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UNITED STATES

SUPREME COURT REPORTS.

Vols. 74, 75, 76, 77.

EMBRACING ALL OPINIONS IN 7, 8, 9 AND 10 WALLACE, WITH OTHERS.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

THE UNITED STATES,

IN THE

DECEMBER TERMS, 1868-69-70.

COMPLETE EDITION,

WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES,
POINTS AND AUTHORITIES OF COUNSEL, FOOT
NOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS,

Counselor at Law.

BOOK XIX.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY,
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JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,
HON. SALMON P. CHASE.

ASSOCIATE JUSTICES,

HON. SAMUEL NELSON,	HON. SAMUEL F. MILLER,
HON. ROBERT C. GRIER,	HON. DAVID DAVIS,
HON. NATHAN CLIFFORD,	HON. STEPHEN J. FIELD,
HON. NOAH H. SWAYNE,	HON. JOSEPH P. BRADLEY.
HON. WILLIAM STRONG.	

ATTORNEYS-GENERAL,

HON. WILLIAM M. EVARTS,
to March 5, 1869; after that
HON. EBENEZER ROCKWELL HOAR,
to June 23, 1870; after that
HON. AMOS T. AKERMAN.

CLERK,
DANIEL WESLEY MIDDLETON, Esq.

REPORTER,
JOHN WILLIAM WALLACE, Esq.

MARSHAL,
RICHARD C. PARSONS, Esq.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1868-69-70, TOGETHER WITH THE DATES OF
THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM AP- POINTED.	CIRCUITS, 1868-1870.	COMMI- SIONED.	SWORN IN.	TERMINA- TION.
ASSOCIATE J.J. NATHAN CLIFFORD, Maine.	President BUCHANAN.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died. 1881. (July 25.)
SAMUEL NELSON, New York.	President TYLER.	SECOND. VERMONT, CONN., NEW YORK.	1845. (Feb. 14.)	1845. (Mar. 8.)	Resigned. 1872. (Dec. 1.)
ROBERT C. GRIER, Pennsylvania.	President POLK.	THIRD. NEW JERSEY, PENN., DEL.	1846. (Aug. 4.)	1846. (Dec. 7.)	Resigned. 1870. (Jan. 31.)
WILLIAM STRONG, Pennsylvania.	President GRANT.		1870. (Feb. 18.)	1870. (Mar. 14.)	Resigned. 1880. (Dec. 14.)
CHIEF JUSTICE. SALMON P. CHASE, Ohio.	President LINCOLN.	FOURTH. MD., VA., N. C., W. VA., S. C.	1864. (Dec. 6.)	1864. (Dec. 15.)	Died. 1878. (May 7.)
*ASSOCIATE J.J. JOSEPH P. BRADLEY, New Jersey.	President GRANT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1870. (Mar. 21.)	1870. (Mar. 23.)	
NOAH H. SWAYNE, Ohio.	President LINCOLN.	SIXTH. KY., TENN., OHIO, MICH.	1862. (Jan. 24.)	1862. (Jan. 27.)	Resigned. 1881. (Jan. 24.)
DAVID DAVIS, Illinois.	President LINCOLN.	SEVENTH. IND., ILL., WIS.	1862. (Dec. 8.)	1862. (Dec. 10.)	Resigned. 1877. (Mar. 4.)
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB.	1862. (July 16.)	1862. (Dec. 1.)	
STEPHEN J. FIELD. California.	President LINCOLN.	NINTH. CALIFORNIA, ORE- GON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)	

*Fifth Circuit vacant to March 21, 1870, when Mr. Justice SWAYNE was assigned this in addition to the Sixth Circuit, holding until April 4, 1870.

PROCEEDINGS

ON THE

DEATH OF MR. JUSTICE WAYNE.

TUESDAY, December 3, 1867.

On the opening of the Court this morning, Mr. Stanbery, Attorney-General of the United States, presented the following

RESOLUTIONS:

The members of the Bar and officers of the Court here assembled, unite in the sincere expression of their respect for the memory of the late Mr. Justice Wayne, and their sorrow that they shall see him no more in the place which, for nearly a third of a century, he filled with uniform dignity and usefulness, and with unblemished honor.

Called to the Bench on the nomination of President Jackson, in the year 1835, in the very noon of life, each succeeding year of his long service only made him more and more sensitively alive to the high duties of the judicial office and, if possible, more resolute and constant in devoting to their fulfillment without fear, favor or affection, all his capacities, acquirements and energies.

To the debt which the whole country owes for this long and faithful judicial life, the Bar must add the acknowledgment of its own peculiar and grateful obligation, for the habitual courtesy and unaffected kindness which distinguished his deportment as a judge, and which everywhere marked him as a true and accomplished gentleman. Therefore,

Resolved, That this public expression of the high esteem, and affectionate regard, in which we held the late Mr. Justice Wayne, and of our sincere sorrow at his death, be laid before the Court, and that Mr. Attorney-General be requested to move that it be ordered to be recorded upon the minutes of the term.

Resolved further, That the chairman communicate a copy of these proceedings, and of such order as the Court may take thereon, to the family of the deceased, with the assurance of our sympathy and respect.

To which the Chief Justice made the following reply:

We all feel most sensibly the loss of our brother Wayne.

The preamble and resolutions which have been adopted by the Bar fitly express their sentiments of honor, veneration, affection and sorrow; and express also, not less fitly, our own. We will direct that the proceedings of the Bar, and the observations just made by the Attorney-

General, in all of which we fully concur, be entered upon the records of the Court.

Mention has been made of the fact that our departed brother was nominated to the Bench by President Jackson. It was the remarkable fortune of that illustrious President to fill a majority of these seats by appointments to vacancies which occurred during his Presidency. Of the judges appointed by him our brother was the last survivor.

He had previously acquired an honorable distinction as a member of the State Judiciary of Georgia, and he well maintained his honors here. With what learning, with what ability, with what courtesy, with what integrity, he performed his various and responsible duties during his protracted services, those who knew him best and longest, whether associates on the Bench or counsel at the Bar, testify most fully and cordially.

Our brother was not only a learned and conscientious judge but a most sincere and earnest patriot. It was with no common devotion that he loved his country and that union which made his country great and honorable among the nations.

Nor were his titles to love and reverence less complete in his private than in his public relations. In sympathetic kindness for the lowly, in the delicate observance of all the proprieties of social intercourse, and in that nice sense of right which permits no deviation from the straightest line of rectitude, he was never wanting. More than all he was a Christian. He acknowledged the incomparable worth of Christian faith, and felt in his own experience the efficacy of its consolations.

My personal acquaintance with him was comparatively recent; but it was sufficient to inspire sincere attachment and heartfelt respect. I can never cease gratefully to remember and acknowledge the kindness with which he welcomed me to this place, or the wisdom of his counsels, or the steadiness of his support.

He has gone from among us full of years and full of honors. Let us tenderly cherish his memory and constantly follow his example.

The Chief Justice then directed that the proceedings of the Bar and of the Court should be entered upon the minutes, and announced that no ordinary business would be transacted this day.

PROCEEDINGS
ON THE
DEATH OF HON. JOHN CATRON,
ASSOCIATE JUSTICE OF THE SUPREME COURT.

TUESDAY, December 5, 1865.

On the opening of the Court this morning, Mr. Speed, Attorney-General of the United States, presented to the Court the following resolutions:

Resolved, That the members of the Bar, and the officers of the Court, sincerely lament the death of the Hon. John Catron, late an Associate Justice of the Supreme Court, and express the high consideration they entertain of the integrity, dignity, impartiality, love of justice and strong common sense, which marked his career as a judge, and as a man.

Resolved, That in manifestation of these sentiments, we will wear the usual badge of mourning during the term.

Resolved, That the Chairman and Secretary of this meeting transmit a copy of these proceedings to the family of the deceased, and assure them of our sympathy and respect.

Resolved, That the Attorney-General be requested to present these proceedings to the Court, and to move that they be entered on its minutes."

To which Mr. Chief Justice Chase made the following reply:

"The Court unites with the Bar in honor to the memory of our departed brother Catron, and in sorrow for his loss.

He was less known to me than to any other member of this tribunal and yet sufficiently

known to be the object of great respect and sincere esteem. His brethren affectionately remember him as an upright man and an excellent judge. It is their testimony that in the learning of the Common Law and of Equity Jurisprudence, and especially in its applications to questions of real property he had few equals, and hardly a superior. He was even more distinguished by strong practical good sense, by firmness of will, and straightforward honesty of purpose. Ever frank and earnest in the expression of his opinions, he was yet void of desire to impose them arbitrarily on others. The candor and patience with which he listened to argument found fitting counterparts in the impartiality and equity of his judgments. These judgments remain and are his best monument. While the records of this Court endure, they will recall the memory of the just and fearless magistrate who pronounced them, and will be esteemed as valuable contributions to the jurisprudence of his country. They will command from the profession the confidence and respect which was felt for their author by his associates in the Court.

As a testimonial of honor, of affection, and of sorrow, the Court will order that the proceedings of the Bar, with this response, be entered on the records, and will adjourn to-day without transacting its ordinary business."

PROCEEDINGS
ON THE
DEATH OF HON. EDWIN M. STANTON.

MONDAY, January 17, 1870.

RESOLUTIONS.

Edwin M. Stanton, for many years a leading and honored member of this Bar, formerly Attorney-General of the United States, and Secretary of War, during the war for the preservation of the Republic, recently nominated and confirmed to fill a prospective vacancy on the Bench of the Supreme Court of the United

States, distinguished by his professional abilities and attainments, and still more distinguished and endeared to the country he contributed so greatly to save, by his energy, patriotism and integrity, having, on the 24th day of December, 1869, laid down a life devoted to the cause of his country, and worn out in her service, the members of the Bar of the Supreme Court of the United States—

assembled to render honor to his memory, as

an expression of their regard and reverence for his public and private virtues, and of his most useful and patriotic career—have

Resolved, That we desire to express our profound and thorough appreciation of the private worth and public merits of Mr. Stanton; of the loss sustained by the national judiciary in his death; and of the measureless debt of gratitude due to him from the citizens of a country saved from destruction in great degree by his untiring labors, large comprehension and unswerving integrity.

Resolved, That the Attorney-General be requested to lay this expression of our feeling before the Court, and to move that the same be entered upon the minutes of the term.

Resolved, That our chairman communicate a copy of these proceedings, and of such action as the Court may take thereon, to the widow and children of our deceased brother, with the assurance of our sympathy and respect.

The Chief Justice said:

The Court unites with the Bar in acknowledgment of the private worth, the professional eminence, and the illustrious public service of Mr. Stanton, and in sorrow that the country has been deprived, by his premature decease, of the great benefits justly expected from his remarkable attainments and abilities in the new sphere of duty to which he had just been

called. We all anticipated from his accession to the Bench, increased strength for the Court, and most efficient aid in its deliberations and decisions. We indulged the hope that his health, impaired by oppressive anxieties and arduous labors, as the head of the Department of War, would be fully restored under the influence, under the calmer and more regular course of this tribunal, and that prolonged life would afford him many opportunities of establishing additional claims upon the gratitude and honor of his country, in the upright performance of judicial duty.

But Providence has ordered otherwise. He was not even permitted to become in fact a member of this Court. He had hardly been nominated and confirmed to fill the vacancy which will occur a few days hence through the prospective resignation of our honored brother, Mr. Justice Grier, when death entered upon the scene and closed his earthly career.

Our deepest sympathies are with his family and friends in their bereavement. We mourn their loss, as our own loss; as the loss of the profession which he adorned, and of the country which he served. The proceedings of the Bar, the address of the Attorney-General, and this response will be entered upon the minutes, and as a further mark of respect, the Court will now adjourn without transacting any business.

PROCEEDINGS

ON THE

DEATH OF JUSTICE GRIER.

Ordered by the Court that the proceedings of the New Jersey Bar in respect to the death of Mr. Justice Grier, be entered on the minutes of this Court as follows:

“In the Circuit Court of the United States for the District of New Jersey.

September Term, 1870.

Upon announcing the death of the Honorable Justice Grier, at the opening of this term of Court, Sep. 27th, the Hon. William McKennan, Circuit Judge, said:

Throughout the Circuit in which Judge Grier so long presided, the announcement of his death will carry with it unusual impressiveness. To speak in this place, at any length, of his eminent judicial qualities, and his marked personal character would be superfluous, for here they were familiarly known and appreciated by all. Endowed by nature with no common intellectual powers, they were invigorated by diligent culture and thorough discipline, and were enriched by attainments which embraced a wide range of legal, classical and scholarly learning. Merit such as his could not long fail of recognition, and so he was

selected to preside over a state tribunal, invested with an extended and varied jurisdiction. His transfer to the higher sphere of the Supreme Court of the United States, was a natural sequence of his tried fitness for its more comprehensive and exacting duties. How “clear he was in his great office;” with what faithfulness, uprightness, learning and ability he responded to all its demands; with what absorbing earnestness he was devoted to the distribution of justice; with what unsparing and administrative sternness to the repression of wrong, the Bar of the whole country can bear witness. For nearly a quarter of a century he exercised the functions of his office with unsurpassed ability, and he put off its robes at last, only when advanced age and growing infirmities assured him that he might dutifully seek rest in retirement.

His character and fame are now historical.

The committee appointed on the 27th inst. to draft and report resolutions expressive of the sorrow of the Bar of New Jersey, on the death of Mr. Justice Grier, and their appreciation of his high judicial character and personal worth, reported the following unanimously

adopted, and ordered by the Court to be entered upon its minutes and filed in the office of the Clerk:

Resolved, That the Bar of the District of New Jersey have learned with sincere regret the death of the Hon. Robt. C. Grier, late one of the Justices of the Supreme Court of the United States, and for more than twenty years the presiding Judge of the Circuit Court, in this district. His professional and judicial career cover more than half of our national existence. During that period he bore a distinguished part in molding and building up the system of American jurisprudence, and enjoyed the highest honors and rewards of the lawyer's life. His labors will live on after him in their influence upon the political and legal history of his country.

His rich and varied learning, his clear comprehension of legal principles, his striking power of close reasoning and forcible expression, his uprightness, simplicity, and independence of character, his zeal and faithfulness in the discharge of his judicial duties, his pure and blameless personal life, and his kind and courteous bearing to the members of the bar, will cause him to be held in memory as one of the marked figures in our earlier judicial history—standing in the front rank of distinguished American jurists.

Resolved, That the Circuit Court be requested to cause these resolutions to be entered on the minutes, and that a copy be transmitted to the family of the deceased, and also, to the Chief Justice of the Supreme Court of the United States.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT DECEMBER TERM, 1868.

[Names of Counsel who actually appeared and argued the case, as shown by the "Minute Book," are given in heavy faced type.]

DAVID GORDON, Administrator, AND SUSAN GORDON, Administratrix of GEORGE FISHER, Deceased, Appts.,
v.

THE UNITED STATES.

(See S. C., 7 Wall., 138-195.)

Power of Congress over claims.

Congress may abolish a tribunal which it created for the adjustment of claims, or commit them to some other authority; in either event a claimant's right is not thereby violated.

[No. 125.]

*Argued Mar. 24, 1868. Decided Apr. 6, 1868.
Opinion delivered Dec. 21, 1868.*

A PPEAL from the Court of Claims.

A very full statement of the case appears in the opinion of the court, where the facts as found by the court below are set out.

Mr. Henry Bennett, for appellant:

An award duly made under the Law of 1860 was good and valid. Its repeal afterwards, in 1861, did not invalidate the award.

Puffendorf, 61; Dwar. Stat., 587; Smith, Stat. and Const. Law, secs. 760, 767; 8 How., 421; 10 N. Y., 874; 12 Pet., 611; 7 Cranch, 164.

It has been judicially settled that interest should be paid on this claim, and the debt draws interest until paid. It has been so settled:

1. By the Act of 1848.
2. By the decision of the Auditor, 1848.
3. By the decisions of the Attorneys-General, 1849.
4. By the decisions of the Secretary of War, 1858.

And by Congress, in 1857, 1858, 1860.

These decisions are conclusive upon the United States.

Op. Atty-Gen., 71, 97; House Report, 467, 35th Congress.

contra John J. Weed and **E. P. Norton**, appellees:

The Secretary of War was not an arbitrator, his decision was not an award.

Gov. Law Dic., tit. Arbitrator; Russ. Arb.,

The resolution of June 1, 1860, gave the appellant a tribunal before which his claims might be investigated. Its repeal only deprived him

of that tribunal. His remedy alone, and not his right, was affected.

Butler v. Palmer, 1 Hill, 324; *Thayer v. Seavey*, 11 Me., 284; *Springfield v. Com., etc.*, 6 Pick., 501; *Commonwealth v. Leach*, 24 Pa., 55; *Uwechlan Township Road*, 80 Pa., 156.

Interest is not allowable on claims against the government.

7 Op. Atty-Gen., 528; Vol. 1, 550; Vol. 2, 110; Vol. 3, 638; Vol. 4, 14, 186; Vol. 5, 106; Vol. 9, 57.

Mr. Justice Grier delivered the opinion of the court:

The case of *Ferreira*, 18 How., 40, was the first to bring before us these claims, under the Treaty with Spain in 1819. This was in 1857, more than thirty years after the date of the treaty. In the opinion of the *Chief Justice* in that case, p. 45, will be found a concise history of the previous legislation of Congress on this subject. That case was brought here by way of appeal as from the judgment of the District Court of Florida. And this court was importuned to give some utterance by which the Secretary of the Treasury might be justified in a departure from the rule adopted on the subject, with regard to the allowance of interest. In the argument of the case the Attorney-General stated as a historical fact, that,

"The first of these claims was presented to the Secretary of the Treasury for payment in the year 1825, and others have been constantly and successively presented from that time to the present. The number of claims thus presented was about two hundred, and the amount paid has exceeded \$1,000,000. But from the first, and in every case where interest has been allowed by the Florida judge, the principal only was paid, and the interest disallowed by the Secretary of the Treasury. For the last twenty-five years this has been the unvaried and uniform course of decision and action by every successive Secretary of the Treasury who has acted on the subject, sustained by the official opinions of several Attorneys-General, without the express dissent of any one of them officially declared."

But, notwithstanding the persistent importunity of the parties who brought forward those stale claims, to obtain some *dictum* or hint of

an opinion that interest for more than thirty years should be paid, this court refused to take jurisdiction and pronounce any opinion on the subject.

Since that time it appears that the Treasury has been thought to labor under the very unusual disease of a *plethora*, and the Attorney-General, unwilling to "follow in the footsteps of his predecessors," has discovered a mode of relief for its depletion by allowing forty years' interest to these claimants as a reward for their laches in not pursuing them in proper time.

The case before us is an appeal from the decision of the Court of Claims. The case, as stated by the learned judge who delivered the opinion of the court, is as follows:

"The legal representatives of George Fisher, deceased, by their amended petition, represent that during the lifetime of the said George Fisher and in the year 1818, a large amount of his property in Florida was taken or destroyed by the troops of the United States; that before his decease the said Fisher made application to Congress for compensation for the loss and destruction of the property; that after his decease this application was renewed by his legal representatives; that after a delay of several years, and in the year 1848, Congress passed an Act for the relief of such legal representatives, authorizing and requiring the Second Auditor of the Treasury Department to examine and adjust their claims on principles of equity and justice, having due regard to the proofs for the value of the property taken or destroyed; providing that the said legal representatives should be paid for the same out of any money in the Treasury not otherwise appropriated. This law also enacted, that if it should be found impracticable for the claimants to furnish distinct proof as to the specific quantity of property taken or destroyed by the troops and by the Indians respectively, it should be lawful for the said accounting officer to apportion the losses caused by said troops and Indians, respectively, in such manner as the proofs should show to be just and equitable, so as to afford a full and fair indemnity for all losses occasioned by the troops; but nothing was to be allowed for property destroyed by the Indians." See 9 Stat. at L., 712. "That this Act of Congress was accepted by the claimants, and that the Auditor proceeded to examine and adjust the claims under it; that the Auditor refused to receive and consider certain depositions and proofs presented by the claimants, because he did not consider them properly authenticated; that the Auditor made what the petition states to be 'an award' on the 22d April, 1848, allowing one half of the value of such property as he considered that the proof established, had been lost or destroyed; assuming, as is alleged, that one half of the loss and destruction was occasioned by the Indians and not by the troops. This award amounted to \$8,878, and did not, as is alleged, include interest or compensation for the losses and injuries sustained; that, in December, 1848, the Auditor (at whose instance does not appear), reconsidered the case, corrected an error in calculation, of \$100 in favor of the claimants, in his former report, and allowed interest on the amount as corrected by him, being \$8,978 from 1832, the date of the first application for relief to the date of the

allowance in 1848, which interest amounted to \$8,997.94. Not yet satisfied, the claimants demand interest from the time of the loss until the award, at the rate of interest allowed in Florida. What that rate was does not appear. This renewed controversy was submitted by the Auditor and the claimants to the Attorney-General, who gave an opinion that interest at the rate of six per centum should be allowed from the date of the loss to the time of the allowance. Upon this a further allowance of interest was made by the Auditor, amounting to \$10,004.80, all of which allowances were granted under the original Act of April 12, 1848, and were paid to the claimants as fast as the auditor furnished his statements.

The claimants, still feeling aggrieved, renewed their application to Congress, and asked relief from the ruling of the Auditor, complaining that he had excluded certain depositions which he deemed not properly authenticated.

Thereupon, on December 23, 1854, Congress passed a supplemental Act, directing the Auditor to re-examine the case and to allow the claimants the benefit of the depositions theretofore marked 'rejected for want of authentication,' provided they were then legally authenticated; the adjustment, under the supplemental Act, to be made in strict accordance with the previous Act.

What steps, if any, were taken under this supplemental Act, by the Auditor, are not stated.

On the 8d of June, 1858, a Joint Resolution was passed, devolving upon the Secretary of War, the execution of the supplemental Act above referred to, directing him to proceed *de novo* to execute the Act and its supplement, according to their plain and obvious meaning, but to deduct from any amount which might be found justly and equitably due to the claimants, all sums which had been previously paid.

The Secretary of War proceeded to examine the case, and estimated the value of the property destroyed and taken, at a sum higher by \$158 than the Auditor had done; but he also found that all the property had been destroyed by the troops, and none of it by the Indians. Thereupon he allowed for the entire value of the property, instead of half its value, and added interest from the date of the destruction, making a further sum of \$39,217.50. This sum was also paid to the claimants.

Still dissatisfied, another petition was presented by these claimants to Congress, and on the 1st of June, 1860, another Joint Resolution was passed, authorizing and requiring the Secretary of War to revise his execution of the supplemental Act aforesaid, and on said revision to give effect to all the testimony filed, including the depositions formerly rejected by the Auditor, and to restate and resettle the account, and to make such corrections in his former statement and settlement and such further allowances, if any, as, in his opinion, justice to the claimants should require.

The Secretary of War did revise his statement and resettle the account; and on the 23d November, 1860, stated his conclusions in favor of the claimants, making a further allowance of \$66,519.85.

The object of this petition is to obtain from this court a judgment for the further allowance of \$66,519.85.

It also appears that, on the 2d March, 1861, Congress passed a Joint Resolution, declaring the Resolution of the 1st of June, 1860, under which the Secretary of War had made the last allowance, rescinded, and pronounced the same, and all the proceedings under it, null and void.

This repealing Resolution, the petitioners aver, was passed without their knowledge or consent, or without notice to them, and that by reason of it they have not been paid; also insist that it is inoperative, unauthorized and void, without power to affect the second allowance of the Secretary of War, which they insist had invested in them a right beyond the reach of Congress.

This petition was demurred to by the solicitor, upon the ground that it does not show a valid subsisting claim against the United States."

The language of the court in its decision of this question is as follows:

"There not being any cause of action or claim set up in the petition, save that founded upon the finding of the Secretary of War under the Resolution approved June 1, 1860, claimed to be an award and holding, as a majority of the court does, that that Resolution and all action under it, was declared to be and became null and void by the force and effect of the repeal of March 2, 1861. The demurrer is sustained and the petition dismissed."

The only question, therefore, presented by the record in this case is, whether the court below gave a proper construction to the repealing Resolution of March 2, 1861.

The whole argument urged on behalf of the appellants is founded on a false assumption. It is asserted that it is a case of arbitrament and award, and was binding as such on the government, and that the repeal of the Resolution of Congress could not affect or invalidate rights vested by the award previously made under it. But the Secretary of War was not an arbitrator. An arbitrator is defined, Bouv. Law Dic. Tit. Arbitrator, as "a private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same."

The Secretary of War acted ministerially. The resolution conferred no judicial power upon him. *De Groot v. U. S.* 5 Wall., 482 [72 U. S., XVIII., 702]. In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy. The resolution under which the Secretary assumed to act did not authorize him to make a final adjustment of the matter embraced in it. It did not bind the appellant to an acceptance of the amount reported by the Secretary, or that he would cease to clamor for more, after being a fifth time paid the amount of damages awarded to and accepted by him.

The Joint Resolution of June 1, 1860, was the fourth resolution which had been passed for the adjustment of the claim of the legal representatives of George Fisher against the United States, for injuries done to his property by the United States troops in 1818. In pursuance of the first three of these resolutions, five different allowances were made in favor of, and paid to the appellant, amounting in all to \$66,803.33. If the finding of the Secretary of War, under the Joint Resolution of June 1, 1860, was final and conclusive, so also must have been the finding

See 7 WALL.

and allowance of the Second Auditor of the Treasury, under the Joint Resolution of April 12th, 1838. Yet the appellant insisted that he was not concluded by the finding of the Second Auditor. He claimed and received after this allowance four additional allowances.

An arbitrament and award which concludes one party only is certainly an anomaly in the law. The various Acts and resolutions of Congress in this case emanated from a desire to do justice, and to obtain the proper information as a basis of action, and were not intended to be submissions to the arbitrament of the accounting officer. They were designed as instruction to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject or rescind, or to otherwise act in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial, not a judicial capacity.

The Joint Resolution of June 1st, 1860, gave the appellant a tribunal before which his claims might be investigated. The repeal of that resolution only deprived him of that tribunal. It was competent for Congress to abolish the tribunal it created for the adjustment of the appellant's claims, or it might have committed them to some other authority. In either event the claimant's right would not have been violated, only his remedy for the enforcement of those rights would have been taken away or changed. The power that created this tribunal might rightfully destroy it, unless some rights had accrued which were the result of the creation of such tribunal, and inseparable from it. Here no such rights had resulted from the passage of this resolution. The appellant was left where that resolution found him. His right to importune Congress for more was not at all impaired by its repeal.

The judgment of the Court of Claims is, therefore, affirmed.

Cited—94 U. S., 400.

LEWIS MOORE, *Plff. in Err.*,
v.

JAMES MARSH, P. BEAVER, CHARLES
C. SHORKLEY AND ELISHA SHORK-
LEY.

(See S. C., 7 Wall., 515-523.)

*Assignment of part of patent, when no bar to
patentee's suit for infringement—effect of.*

The assignment of an undivided half of letters patent, subsequent to an infringement but before the commencement of the suit, is no bar to patentee's claim to recover damages for such infringement.

The assignment of a patent does not carry with it a transfer of the right to damages for an infringement committed before such assignment.

[No. 289.]

Argued Dec. 14, 1868. Decided Jan. 4, 1869.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

This action was brought in the court below by the plaintiff in error, to recover damages

for infringement of a certain patent. Issue having been joined by a demurrer to the defendant's plea and judgment thereon given for defendants, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. Samuel S. Fisher, for plaintiff in error:

Joint patentees or assignees of a patent are tenants in common.

Pitts v. Hall, 3 Blatchf., 201; *Vose v. Singer*, 4 Allen, 226; *Mathers v. Green*, 1 Ch. App. Cas., 29.

Tenants in common cannot join to recover damages for injury to an estate which, at the time of the injury was the sole property of one of them. 1 Chit. Pl., 64.

In the Act of July 4, 1836, sec. 14, the words "name of the person interested," do not mean persons interested in the patent at the time of bringing the suit; but persons interested in the patent at the time when the cause of action accrued. See *Dean v. Mason*, 20 How., 198 (61 U. S., XV., 876).

An assignment of a patent or of an interest therein does not carry with it a right to unliquidated damages, previously accrued for the infringement thereof.

Messrs. H. Baldwin, Jr., and W. Bakewell, for defendants:

That the words "the person or persons interested, whether as patentees, assignees or grantees of the exclusive right within and throughout a specified part of the United States," in the 14th section, which specifies in whose name the suit should be brought, mean interested in the patent, and not interested in the damages, is manifest:

1. By comparing this with the 11th section, Act, July 4, 1836.

2. By the fact that licensees are excluded, and yet they are frequently the only parties interested in the damages, while the plaintiff, as patentee, assignee or grantee of an exclusive right, has no interest in the damages.

3. From the decisions of this court and of circuit courts.

Gayler v. Wilder, 10 How., 498; *Washburn v. Gould*, 8 Story, 131; *Suydam v. Day*, 2 Blatchf., 23; *Goodyear v. McBurney*, 8 Blatchf., 32; *Blanchard v. Eldridge*, 1 Wall., Jr., 340.

A patent is assignable only by statute.

See *Blanchard v. Eldridge*, 1 Wall., Jr., 337; *Brooks v. Byam*, 2 Story, 525.

Claims growing out of and adhering to property may pass by assignment of the property.

Comegys v. Vasse, 1 Pet., 213; *Randal v. Cockran*, 1 Ves., 98.

Mr. Justice Clifford delivered the opinion of the court:

Viewed in the light of the admitted facts, the only question in the case is: whether the assignment by the plaintiff to a third person of an undivided half of the right, title and interest secured to him by his letters patent, subsequent to the alleged infringement, but before the commencement of his suit, is a bar to his claim to recover damages for such infringement.

Letters patent were granted to the plaintiff on the 18th of April, 1848, for a certain new and useful improvement in grain drills, in which it

is alleged that he is the original and first inventor of the improvement. Original patent was for the term of fourteen years, but it was subsequently extended by the Commissioner of Patents for the term of seven years from and after the expiration of the original term. Alleged defects existed in the original specification and, in consequence thereof, the plaintiff on the 3d of February, 1863, surrendered the letters patent, and the same were re-issued to him in three new patents for separate and distinct parts of the invention for the unexpired portion of the original and extended terms of the patent.

Damages are claimed of the defendants for infringing the re-issued letters patent from the day of the re-issue to the 24th of February, 1865, as more fully set forth in the declaration.

Pleas to the declaration were subsequently filed by the defendants, and the record shows that they gave due notice of certain special defenses which they proposed to offer in evidence under the general issue, in pursuance of the Act of Congress in such case made and provided. Before the day for the trial came, however, the parties filed an agreement waiving a jury and submitting the cause to the court, stipulating that the decision of the court should have the same effect as the verdict of a jury. Leave to amend was subsequently granted by the court to both parties.

Purport of the amendment to the declaration was, that the plaintiff was the sole owner of the letters patent for the County of Union, in the State of Pennsylvania, from the date of the re-issued letters patent to the 24th of February, 1865, and that the defendants had infringed the same throughout that period, by making and using the invention, and vending the same to others to be used without his license or consent.

Defendants filed another special plea, in which they alleged that the plaintiff, when he commenced his suit, was not the owner of the exclusive right secured in the re-issued letters patent within any part of the United States; that in certain States and districts he had parted with all his interest in the patent; and that, on the said 24th of February, he assigned and transferred an undivided half of all the residue of his right, title and interest in the same, and, therefore, that the plaintiff had no right to bring this action in his own name against the defendants. Plaintiff demurred to the plea, and the defendants joined in demurrer. Parties were heard, and the court rendered judgment for the defendants, and the plaintiff sued out this writ of error.

Conceded fact is, that the plaintiff was the exclusive owner of the patent in the territorial district where the alleged infringement was committed, throughout the entire period of the infringement, as alleged in the declaration. Express allegation of the declaration is to that effect, and as the plea is in avoidance and contains no denial of the matters alleged in the declaration, they must be considered as admitted, unless the matters alleged in the special plea are a sufficient answer to the action.

Briefly stated, the matter alleged in avoidance of the right of the plaintiff to maintain the suit is, that he, before he commenced the

suit but subsequent to the infringement, sold and assigned an undivided half of his patent for the territorial district where the infringement was committed, to a third person.

Patentees have secured to them, by virtue of the letters patent granted to them, the full and exclusive right and liberty, for a prescribed term, "of making and using, and vending to others to be used," their respective inventions or discoveries; and whenever their rights, as thus defined, are invaded by others, they are entitled to an action on the case to recover actual damages as compensation for the injury. 5 Stat. at L., 123, sec. 14.

Such damages may be recovered by action on the case in any circuit court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or as grantees of the exclusive right, as already defined, within and throughout a specified part of the United States. 5 Stat. at L., 123, sec. 14.

Assignees and grantees, as well as the patentee, may, under some circumstances, maintain an action on the case for an infringement, in their own name, as appears by the express words of the Act of Congress. An assignee is one who holds, by a valid assignment in writing, the whole interest of a patent, or any undivided part of such whole interest, throughout the United States. 5 Stat. at L., 121, sec. 11.

Where the patentee has assigned his whole interest, either before or after the patent is issued, the action must be brought in the name of the assignee, because he alone was interested in the patent at the time the infringement took place; but where the assignment is of an undivided part of the patent, the action should be brought for every infringement committed subsequent to the assignment, in the joint names of the patentee and assignee, as representing the entire interest. *Herbert v. Adams*, 4 Mas. 15; *Curtis, Pat.* (8d ed.), sec. 847; *Gayler v. Wilder*, 10 How., 477; *Whittemore v. Cutter*, 1 Gall., 480; *Woodworth v. Wilson*, 4 How., 712.

Settled view at one time was, that the grantee of a territorial right, for a particular district, could not bring an action on the patent in his own name; but the Act of Congress having made him a party interested in the patent, it is now equally well settled that he may sue in his own name for invasion of the patent in that territorial district, as no one else is injured by any such infringement. *Tyler v. Tuel*, 6 Cranch, 324; *Gayler v. Wilder*, 10 How., 477; *Curtis, Pat.*, sec. 848.

Both assignees and grantees have an interest in the patent, but the terms are not synonymous, as used in the patent law. *Potter v. Holland*, 4 Blatchf., 157.

Grants, as well as assignments, must be in writing, and they must convey the exclusive right, under the patent, to make and use, and vend to others to be used, the thing patented, within and throughout some specified district or portion of the United States, and such right must be exclusive of the patentee, as well as of all others except the grantee. Suits for infringement in such districts, if committed subsequent to the grant, can only be brought in the name of the grantee, as it is clear that no one can maintain such an action until his rights have

been invaded, nor until he is interested in the damages to be recovered.

Alleged infringement in this case was committed in the County of Union, in the State of Pennsylvania, and the admitted fact is, that the plaintiff, throughout the entire period of the infringement, was the sole owner of the exclusive right to make and use, and grant to others to make and use, the thing patented in that territorial district, by virtue of his original title as patentee, having never assigned or granted any right, title or interest, within that county. 5 Stat. at L., 121, sec. 11.

Grant that these views are correct, and it is clear that unless the plaintiff can maintain the action there can be no redress, as it is too plain for argument, that a subsequent assignee or grantee can neither maintain an action in his own name, nor be joined with the patentee in maintaining it for any infringement of the exclusive right committed before he became interested in the patent. Undoubtedly the assignee thereafter stands in the place of the patentee, both as to right under the patent and future responsibility; but it is a great mistake to suppose that the assignment of a patent carries with it a transfer of the right to damages for an infringement committed before such assignment.

Comment upon the cases cited, as supporting this proposition, is unnecessary, as it is clear to a demonstration that they give it no countenance whatever. Such a proposition finds no support in any decided case, nor in the Act of Congress upon the subject.

True meaning of the word "interested," as employed in the last clause of the 14th section of the Patent Act, when properly understood and applied, is, that the right of action is given to the person or persons owning the exclusive right at the time the infringement is committed. Subsequent sale and transfer of the exclusive right are no bar to an action to recover damages for an infringement committed before such sale and transfer.

The reason for the rule is, that the assignee or grantee is not interested in the damages for any infringement committed before the sale and transfer of the patent. Correct interpretation of the words "person or persons interested" is, that the words mean the person or persons interested in the patent at the time when the infringement was committed, which is the cause of action for which the damages may be recovered. *Dean v. Mason*, 20 How., 198 [61 U. S., XV., 876].

Assignment was made in that case after suit was brought, but before the final decree. Proof of the fact was offered, and a motion filed to dismiss the case, but the court overruled the motion, because the assignees could have no interest in a suit for an infringement committed before their right accrued. *Kiborn v. Rowe*, 8 Gray, 415; 1 Hilliard, Tr., 521; *Kades v. Harris*, 1 Younge & C., 230.

Attempt is made to distinguish the case at bar from the rule established in those cases, but, in the view of this court, without success.

Judgment reversed. New venire ordered.

Cited—7 Blatchf., 91; 13 Blatchf., 112; 16 Blatchf., 249.

See 7 WALL.

G. P. DRURY AND W. PAGE, Assignees, of
THE BOSTON LOCOMOTIVE WORKS,
v.
THE MILWAUKEE AND SUPERIOR
RAILROAD COMPANY, JAMES B.
CROSS, JAMES LUDDINGTON AND
SAMUEL B. SCOTT.

(See S. C., 7 Wall., 290-306.)

Fraudulent foreclosure, purchaser held as trustee—chargeable with interest.

Where directors procured a mortgage to be foreclosed on a railroad for a much larger sum than was actually due, by fraudulent combination with the purchaser; held, that the latter must be held liable as trustee, to creditors, for the value of the property he purchased on the sale of the road, after deducting the amount due him at the day of sale.

He must also be charged with interest on the balance found due the creditor complainants, from the day of the sale to the day of the final decree in this suit.

[No. 2.]

Argued Dec. 17, 1868. Decided Jan. 11, 1869.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The bill in this case was filed in the court below by the appellants, to subject the property of the Milwaukee and Superior Railroad Company to the payment of a certain judgment. The court below entered a decree in favor of the complainants, against the said Railroad Company for \$26,145.18, being the debt, interest and costs of the judgment set forth in the bill.

The decree dismissed the bill, with costs as to the defendants, the City of Milwaukee, James Cross, James Luddington and Samuel P. Scott, whereupon the complainants took an appeal to this court.

A further statement appears in the opinion of the court.

Meers. A. A. Jackson and M. H. Carpenter, for appellants:

The facts in this case are substantially the same as attended the foreclosure of the Barnes mortgage on the La Crosse and Milwaukee Railroad, in regard to which this court said:

"It needs no authorities to show that such a sale cannot be upheld without sanctioning the grossest fraud and injustice to the La Crosse and Milwaukee Company, the mortgagor, and its creditors. This deceptive notice was calculated to destroy all competition among the bidders, and indeed to exclude from the purchase everyone except those engaged in the perpetration of the fraud."

James v. R. R. Co., 6 Wall., 752 (73 U. S., XVIII., 885).

The conduct of these directors is not distinguished from that which was commented on so severely by this court in *Koehler v. Black River Co.*, 2 Black, 715 (67 U. S., XVII., 339).

The directors agreed to and did sacrifice the entire property of the Company, which it was their duty as trustees to protect, to secure the personal advantage of discharge from their endorsements.

These circumstances combining; a foreclosure suit conducted by collusion; the attorney, the secretary and a director of the Company, commencing the suit and receiving service of his own subpoenas; making default for the Com-

pany; then drawing the final decree against the Company, and receiving his fees for such valuable and *bona fide* service, from the conspirators who were preparing to swallow the entire property of the Company, and thus defraud all stockholders and creditors, resulted, as might have been expected, in a complete consummation of the meditated fraud.

Cross, Luddington and Scott, pretending to have a decree for \$375,595.55, which had cost them \$13,880.20, prevented all competition at the sale, and purchased the entire railroad, locomotives, cars and franchises of the Company for \$20,000.

Mr. H. L. Palmer, for appellee:

The transactions between the Railroad Company and J. Boorman Johnson & Co., were for the simple tendency and lawful object of security of a just debt. They did indeed give to these creditors a preference.

That such a preference was lawful, has been repeatedly determined by this court.

Marbury v. Brooks, 7 Wheat., 556; *Brooks v. Marbury*, 11 Wheat., 78; *Tompkins v. Wheeler*, 16 Pet., 106.

By making the transfer of the 280 bonds which had been deposited with M. K. Jessup & Co. to Johnson & Co., the directors of the Railroad Company only exercised their undoubted right to give a preference to meritorious creditors.

Neither the complainants nor their assignor had acquired any lien, legal or equitable upon the property of the Railroad Company, or upon the bonds deposited with M. K. Jessup & Co.

The complainants relied upon the securities for which they stipulated, and had no claim down to the date of their judgment upon any other property of the Company. They did not rely upon the mortgage bonds, did not stipulate for and did not have any of them; they had no claim upon nor interest in the Jessup bonds, and therefore have no right to question the disposition made of them by the Company.

Mr. Justice Davis delivered the opinion of the court:

Drury and Page, assignees of the Boston Locomotive Works, having failed at law to obtain satisfaction of a judgment recovered by them against the Milwaukee and Superior Railroad Company, brought suit in chancery, to subject the property of the road to the payment of their debt.

The court below dismissed the bill as to Cross, Luddington and Scott, of which the appellants complain. The object of the suit is, to reach the sale of the franchises and property of the Milwaukee and Superior Railroad Company to Cross, Luddington, and Scott, by virtue of a decree of foreclosure. It is charged that the sale was fraudulent. The history of the case is substantially this: Bailey & Co., of Liverpool, England, held notes against the Milwaukee and Superior Railroad Company, indorsed by four of its directors, for about \$21,000, and as collateral security for their payment, \$42,000 in mortgage bonds of the road. \$280,000 in similar bonds, but which have never been issued, were sealed up and deposited with M. K. Jessup & Co., not to be issued until the indebtedness to Bailey & Co. was paid, and twenty-seven miles of the road were built.

The Company became thoroughly insolvent, and Bailey & Co. being unpaid, brought actions against the directors, on their indorsement, who procured (but at their own expense and risk) a suit to be commenced to foreclose the mortgage, so that they could make their debts out of the collaterals in their hands. In this suit, certain bonds issued to the City of Milwaukee, and the \$42,000 bondsheld by Bailey & Co. were spoken of; but no mention was made of the \$280,000 in bonds deposited with Jessup & Co., and no relief asked in relation to them. On the 19th of March, 1859, the bill was taken as confessed, decree rendered, and the case referred to the master to compute and report the amount that was due.

Prior to the decree, in consequence of negotiations between the directors and Cross, Ludington and Scott, a scheme was formed by the terms of which these persons were to purchase the Bailey claim and protect the directors from their indorsement, who, on their part, were to aid them to acquire the entire property of the road.

In furtherance of this plan, the 280,000 bonds in the hands of Jessup & Co. (by resolution of the Board of Directors), were delivered to Bailey & Co., as additional security for their claim.

They did not ask for further security and refused at first to receive these bonds and, in fact, did not receive them until they had sold their claim with their collaterals to Cross & Co., which was after the decree in the foreclosure suit. Cross and his associates having thus got possession of \$322,000 in bonds transferred by Bailey & Co. as collaterals, in order, as they said, to become the absolute owners of them, sold them, with consent of the Railroad Corporation, at the Exchange in Milwaukee, on five days' notice; bought them for a large sum of money; produced them before the master, who allowed them as a lien on the road, and the final decree in the foreclosure suit was rendered upon said \$322,000 bonds and no others.

The transaction which this short recital of facts discloses cannot be sustained by a court of equity. The conduct of the directors of this Railroad Corporation was very discreditable, and without authority of law. It was their duty to administer the important matters committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust. To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management, with absolute fidelity to both creditors and stockholders, they, nevertheless, acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed. If Bailey & Co. had sold iron to build the road, so had the Boston Association sold locomotives to run it. It is not easy to see why the Corporation should exhaust its effects to pay one, and leave the other unpaid. But, it is said, the directors, being unable to pay both, had the right to choose between them. We do not deny that a debtor has a legal right to prefer one creditor over another, when the transaction is *bona fide*; but this is, in no just sense, a case of preference between

creditors. If the law permits the debtor, in failing circumstances, to make choice of the persons he will pay, it denies him the right, in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result.

That the plan adopted by the directors of this railroad to dispose of its property to Cross & Co. was a fraudulent contrivance, and necessarily, if executed, accomplished a fraudulent result, is too plain for controversy. At the time this scheme was initiated, there were only five miles of track laid, the Company hopelessly insolvent and the enterprise abandoned. In this condition of things, the directors were sued on their indorsement and, as was natural, manifested an anxiety to have the property of the Company pay the debt for which they were liable. But Bailey & Co. preferred not to enforce their mortgage lien, and only consented to allow it to be done, on being indemnified against the risk and expense of the suit. The directors, in furnishing them this indemnity, in order to procure the enforcement of the mortgage lien to the extent of \$42,000, which in their hands was a just debt against the Company, were guilty of no wrong. But the departure from right conduct, on their part, commenced at this point. Notwithstanding they had the control of the foreclosure suit, they were not content to let it proceed to decree and sale without they were, in advance, relieved of personal responsibility. Bailey & Co. would not release them, and they endeavored to find some person who would purchase the Bailey claim, with its collaterals, and discharge them from liability on their notes. This would have been well enough, if the scheme had embraced only the \$42,000 bonds held as collaterals, which the Company justly owed, and which the foreclosure suit was brought to enforce. But the scheme went much further, for these directors, who controlled the Corporation, in their selfish desire to save themselves at the expense of their own reputation and the rights of creditors, were willing to use the means at their command to swell the indebtedness of the road beyond its true amount, in order to aid more effectually Cross and his associates to acquire the property of the Company.

If Cross & Co. had been satisfied with the transfer of the \$42,000 bonds, which constituted the true indebtedness against the road, in the hands of Bailey & Co., the transaction on their part would have been free from censure; but the certain attainment of the object they had in view required more bonds. It was very clear that bidders might appear, if the road was to be sold for no more than the face of these bonds, while they would be deterred from attending a sale where the sum to be made was over \$300,000. To bring the decree, therefore, up to a point at which competition would be silenced, it became necessary to use the bonds in the hands of Jessup & Co. \$280,000 in the bonds of an insolvent corporation—constituting no indebtedness against it—are thrust, unasked, into the hands of creditors, for the ostensible purpose of furnishing them additional security, when, at the time, they were negotiating a sale of the debt to be secured for \$7,000 less than

its face. But the transfer to Bailey & Co. was a mere pretense. To preserve a semblance of fairness in the business, the bonds had to come through Bailey & Co. but the real purpose was not to help them, but to aid Cross and his associates to absorb the whole road—and this these directors were willing to do—when the debt they were struggling to escape could be paid for \$18,880.20, and the very iron in the road bed, for which the debt was incurred, was worth over \$20,000.

It is claimed that the sale at the Milwaukee Exchange, assented to by the Corporation, conferred rights on the purchasers of the bonds which cannot be successfully attacked; but this claim is based on the idea that the sale was for an honest purpose, when, in fact, it was only part of a previously concerted plan to accomplish a fraudulent purpose. The ceremony of this sale was a cheap way of showing honesty and fairness, for it was very evident that an advertisement to sell a large amount of the bonds (having no market value) of an insolvent and abandoned railroad corporation would never attract the attention of capitalists.

The scheme to acquire the property of this Corporation was, in its inception, fraudulent, and every step in the progress of its execution was necessarily stamped with the same character. There is nothing in this record to mitigate the conduct of the defendants, who purchased the Milwaukee and Superior Railroad. They knew the road was abandoned; the Company insolvent; the complainants unpaid for property then in the possession of the Corporation; and yet they combine with timid and unfaithful trustees to get not only this, but all the property of the Corporation, and adopted a plan to carry out their project, which resulted in raising the decree to an extent that would necessarily prevent all fair competition. The fruits of such an adventure cannot be enjoyed by the parties concerned in it.

There are other features in this case which provoke comments, but we forbear to make them.

Cross, Luddington and Scott purchased the entire railroad, locomotives, cars and franchises of the Company, for about \$20,000. Subsequent to the sale, they stripped the road bed of iron, ties, spikes and chairs, which, with the locomotives, cars and fencing, they sold to various parties, and realized from the sales a large sum of money; but how much, the evidence is so singularly loose that we are unable to tell. On account of the want of certainty on this point, the case will have to be sent back, and referred to a master to take proofs, who will also ascertain and report the value (if there be any) of the franchises of the Company which Cross & Co. still retain.

Cross, Luddington and Scott must be held liable as trustees to the complainants for the full value of the property they purchased on the sale of the road, after deducting the amount due at the day of sale on the Bailey judgments against the directors, which amount they will be allowed to retain.

They must also be charged with interest on the balance found due the complainants, from the day of the sale to the day of the final decree in this suit.

The decree of the Circuit Court is reversed, and

the cause remanded, with directions to proceed in conformity with this opinion.

Cited—91 U. S., 589; 103 U. S., 658; 1 Holmes, 448; 5 Sawy., 417.

THE CITY OF AURORA, *Plf. in Err.*,

v.

CHARLES W. WEST AND JOSEPH TORRENCE.

(See S. C., 7 Wall., 82-107.)

Proceedings in suit not a bar unless judgment was rendered—on demurrer judgment will be given against party whose first pleading was defective—estoppel, how pleaded—former judgment as to title, when a bar—effect of demurrer and judgment upon—when conclusive—judgment on coupons—interest on.

Unless a final judgment or decree is rendered in a suit, the proceedings in the same are not a bar to a subsequent action.

Although the pleadings demurred to may be bad, yet the court will give judgment against the party whose pleading was first defective in substance.

Technical estoppels must be pleaded with great strictness. When a former judgment is set up in bar of an action, it is not required to be pleaded with any greater strictness than any other plea in bar.

Where the parties are the same, the legal effect of a former judgment as a bar is not impaired because the subject-matter of the second suit is different, provided the second suit involves the same title and depends upon the same question.

A demurrer to a pleading admits all such matters of fact as are sufficiently pleaded.

On the overruling of a demurrer, judgment for the plaintiff is final if the merits are involved; it is a judgment on the merits, although rendered on demurrer.

And it is as a plea, a bar, and conclusive between the same parties upon the same matter directly in question in a subsequent action.

The rule applied to judgment on coupons of bonds, issued in aid of a railroad company.

A judgment rendered on demurrer, settles every matter which was well alleged in the pleadings of the opposite party.

Interest should be allowed on coupons, from the time they are due until the date of the judgment.

[No. 14.]

Argued Dec. 22, 1868. Decided Jan. 11, 1869.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of *assumpsit* brought in the court below by the defendants in error, to recover the interest alleged to be due on certain bonds issued by the City of Aurora, in payment of a subscription of \$150,000 to the capital stock of the Ohio and Mississippi Railroad Company.

The complicated pleadings in the case need not be here set out, as they sufficiently appear in the opinion of the court.

The court below sustained certain demurrers of the plaintiffs, and gave judgment in their favor for \$10,584.50, with costs. To reverse this judgment, the defendant prosecutes this writ of error.

A further statement appears in the opinion of the court.

Messrs. T. D. Lincoln and William S. Holman, for plaintiff in error:

1. The two cases pleaded as *res judicata* went off upon demurrer, and the whole is upon

NOTE.—*Res judicata*; conclusiveness of judgments. See note to B'k of U. S. v. Beverly, 42 U. S. (1 How.), 124.

the record; and a careful examination of the records and a comparison thereof with the record in this suit, will show that the questions put in issue, both of law and fact, are wholly different; and that the records pleaded cannot, therefore, estop the defendant from proving the truth or its pleas.

The maxim *nemo debet bis vexari pro una et eadem causa*, requires that the very point in question should have been in issue and determined in the former suit.

Carter v. James, 18 Mees. & W., 145; *W. v. Alex. & G. S. P. Co. v. Sickles*, 24 How., 844 (65 U. S., XVI., 654); *Merriam v. Whittemore*, 5 Gray, 817; *Tucker v. Haughton*, 9 Cush., 350; *Outram v. Morewood*, 8 East, 354; *Hitchin v. Campbell*, 2 W. Bl., 881; *Wales v. Lyon*, 2 Mich., 276; *Gardner v. Buckbee*, 3 Cow., 126; *Bouchaud v. Dias*, 3 Den., 243; *Campbell v. Butts*, 8 N. Y., 174; *Doty v. Brown*, 4 N. Y., 73, 74; *Campbell v. Consalus*, 25 N. Y., 616; *Guest v. Warren*, 9 Ex. Ch., 379; *Hughes v. Alexander*, 5 Duer, 491; *Davis v. Talcott*, 14 Barb., 620; *Perkins v. Moore*, 16 Ala., 19; *Dovaston v. Payne*, 2 H. Bl., 531; *Bradshaw v. Heath*, 18 Wend., 419; *Kilheffer v. Herr*, 17 Serg. & R., 819.

An examination of the cases will show how exceedingly guarded the courts have been in speaking of this maxim, and in confining it to the very point which was drawn in issue and adjudicated in the former court.

Gilbert v. Thompson, 9 Cush., 350; *Hyatt v. Bates*, 35 Barb., 816; *Wales v. Lyon*, 2 Mich., 282; *Goodale v. Tuttle*, 29 N. Y., 467; *Outram v. Morewood*, 8 East, 355; *Commissioners of the Leith Harbor and Docks v. The Inspector of the Poor*, 1 McQueen's Scotch App., pt. 1, p. 22; *Packet Co. v. Sickles*, 5 Wall., 592 (73 U. S., XVIII., 553).

We have not been able to find any case where, in the second suit, a party was estopped by such an admission by demurrer, from putting these facts in issue in another suit, for the reason that in such a case it could not be said that the point had been adjudicated.

An admission made in the suit can be taken as estoppel only in that suit.

Carradine v. Carradine, 33 Miss., 783; *Carter v. James*, 18 Mees. & W., 147; *Gresly, Eq. Ev.*, 9.

These admissions are often made in ignorance of the facts, and still oftener in the confidence which counsel have in certain legal questions, and only to raise these questions when the facts admitted might be contested; and much vexatious litigation is thereby avoided.

If they pass into judgment they are conclusive in that case, but no further; much less are the inferences and presumptions of law arising from these facts to be used either as evidence or estoppel in another suit.

See *Bradshaw Heath*, 18 Wend., 419; *Perkins v. Moore*, 16 Ala., 19; *Carter v. James*, 18 Mees. & W., 145; *Gilbert v. Thompson*, 9 Cush., 350.

I do not wish to misrepresent the court below, but I understood it to decide that the party was not only estopped to dispute the facts as made by the demurrer, but that it was also estopped from mending the facts put in issue in the suit, if it had an opportunity to plead and put them in issue in the former suit.

This maxim cannot be aided by intendment, inference or argument.

Perkins v. Moore, 16 Ala., 19; *Carter v. James*,

See 7 WALL.

18 Mees. & W., 147; *Dovaston v. Payne*, 2 H. Bl., 531; 1 Chit. Pl., 224.

The demurrer to the petition in the case tried, could not be held to put in issue the want of consideration of the bond as between the City of Aurora and the Ohio and Mississippi Railroad Company; much less the notice of this fact to West and Torrence, when they receive the bonds. Hence, under the above rules, the maxim does not apply.

2. An estoppel against an estoppel opens up the whole matter and sets it at large. The Supreme Court of Indiana in the case pleaded in the defendant's rejoinder (22 Ind., 96), having substantially reversed its decision in the case pleaded (9 Ind., 86) and sustained the defenses in this suit between these parties, the plaintiffs below cannot insist upon the case as an estoppel. If the case pleaded in the rejoinder be not a technical estoppel, it is, nevertheless, an authoritative determination of the law arising upon the local laws of Indiana and binding upon this court.

3. The 8th replication is to the fourth plea. The plea avers that the City was, at the time of said subscription and the issuing of said bonds, a municipal corporation, with no power to take such stock or issue such bonds until they were required so to do by a majority of the qualified voters of the City, at an annual election, expressing that they were in favor of such subscription; that a majority of the voters had not, at an annual election, so expressed themselves; and that the plaintiffs, when they obtained possession of the said bonds, had notice of these facts.

It is enough that the plea charges them with notice.

If they had notice of the want of the vote, this declaration could be no estoppel.

To constitute an estoppel, the party pleading it must not only be ignorant of the truth, but be without the means of obtaining it.

No matter what he believes, he must not be put on inquiry by any suspicious circumstances.

Boggs v. Merced Mining Co., 14 Cal., 367; *Commonwealth v. Moltz*, 10 Pa., 531; *Treadwell v. Com.*, 11 Ohio, St. 191; *Veeder v. Lima*, 19 Wis., 280; *Montgomery v. M. & W. P. R. Co.*, 31 Ala., 89; *Pa. Del. & Md. St. Nav. Co. v. Dandridge*, 6 Gill & J., 819.

4. There is no promise of interest in these coupons, and no proof that, by the law of New York, interest upon such paper is allowed. There was no allegation upon the subject. These coupons are incidental to the principal contract. They follow it. Being for interest themselves, if interest be allowed upon them, then it is compound interest which would be illegal.

Comparet v. Ewing, 8 Blackf., 328; *Niles v. Comrs.*, 8 Blackf., 160; *Tillotson v. Preston*, 8 Johns., 229; *Williams v. Houghtaling*, 3 Cow., 87; *Dixon v. Parkes*, 1 Esp., 110; *Ex parte Beavan*, 9 Ves., 224; *Grimes v. Blake*, 16 Ind., 162; *Boyer v. Pack*, 2 Den., 108; *Toll v. Hiller*, 11 Paige, 231; *Forman v. Forman*, 17 How. Pr., 257; *Ex parte Beavan*, 9 Ves., 223.

Interest upon such coupons, or upon the annual interest falling due, cannot be contracted for, even at the time the original contract was made. It is against the policy of the law to permit it.

Niles v. Contra., 8 Blackf., 160; *Mowry v. Bishop*, 5 Paige, 102; *Van Benschooten v. Lawson*, 6 Johns. Ch., 818; *Toll v. Hiller*, 11 Paige, 231; *Forman v. Forman*, 17 How. Pr., 257; *Grimes v. Blake*, 16 Ind., 162.

Messrs. Henry Stanbery and Thomas G. Mitchell, for defendants in error:

The whole case can be disposed of by a single proposition, viz.: that there is nothing to show that the judgment of the court below was not rendered upon the second count of the declaration. After the demurrer was overruled, there was only one plea, the general issue filed, as to this court; which plea was, before the submission of the cause or trial, withdrawn.

If the demurrer to this second count had been improperly ruled, which it was not, that error would have been waived by the subsequent filing of a plea; and the withdrawal of a plea would not affect the result.

Wheeler v. Curtis, 11 Wend., 658; *Dearborn v. Kent*, 14 Wend., 188; *Jones v. Thompson*, 6 Hill, 621; *Keen v. Younkman*, 8 Ind., 254; *Rogers v. Smiley*, 2 Port., 249; *Brahan v. Collins*, 1 Minor, 169; *Cameron v. Armstrong*, 8 Clarke, (Ia.), 212; *U. S. v. Boyd*, 5 How., 29; *McFadden v. Fortier*, 20 Ill., 509; *Sheppard v. Shelton*, 34 Ala., 652; *Burditt v. Burditt*, 2 A. K. Marsh., 143.

2. The first, second, fifth and sixth replications set up former recoveries upon other coupons of the same bonds, in actions between the same parties, as estopping the City of Aurora from denying the validity of the bonds.

The judgment of the court of competent authority, upon a point directly put in issue, is conclusive between the same parties whenever the same matter is sought to be litigated in a subsequent action.

Ferrari's case, 6 Co., 7; *Hitchin v. Campbell*, 2 W. Bl., 827, 831; *Grant v. Ramsey*, 7 Ohio St., 157; *Broom, Leg. Max.*, 243; 7 T. R., 456; *Doty v. Brown*, 4 N. Y., 71; *Babcock v. Camp*, 12 Ohio St., 11; *Gardner v. Buckbee*, 3 Cow., 120; *Burt v. Sternburgh*, 4 Cow., 559; *Outram v. Morewood*, 3 East, 346; *Bouchaud v. Dias*, 3 Den., 238; *Breckhead v. Brown*, 5 Sandf., 135; *Le Guen v. Gouverneur*, 1 Johns. Cas., 502; *Duchess of Kingston's case*, 11 St. Tr., 261; 20 How. St. Tr., 642.

The cases which were cited in the court below as modifying or calling in question the decisions which have been just cited, do not tend to disturb the weight of their authority.

In some of these instances it is decided, very properly, that a former judgment based upon the insufficiency of the pleadings is not conclusive.

Lampen v. Kedgewin, 1 Mod., 207; *Kendal v. Talbot*, 1 A. K. Marsh., 237; *Cole v. Driskell*, 1 Blackf., 16; *Wright v. Deklyne*, 1 Pet. (C. C.), 109.

In others of this class of cases it is also properly decided, that a former judgment is not an estoppel as to matters proved by way of aggravation or otherwise collaterally, and not directly and necessarily put in issue.

Gilbert v. Thompson, 9 Cush., 848; *Davis v. Talcott*, 14 Barb., 611; *Müller v. Manice*, 6 Hill, 114; *Kirkpatrick v. Stingley*, 2 Cart., 269; *King v. Chase*, 15 N. H., 9; *Hidabman v. Dulleban*, 4 Watts, 188; *Bennett v. Holmes*, 1 Dev. & B., 486.

In others again of these cases, the decisions are based upon the peculiar facts of the partic-

ular suits under examination; and if the courts had erred in any of these instances in applying the law, the result would not have been to throw doubt upon the general principle.

Carter v. Bloodgood, 3 Sandf. Ch., 298; *Haight v. Keokuk*, 4 Clarke, (Ia.), 199; *Hughes v. Alexander*, 5 Duer, 488; *W. A. & G. S. P. Co. v. Sickles*, 24 How., 833 (65 U. S., XVI., 650); *Guest v. Warren*, 9 Exch., 378; *Campbell v. Butts*, 8 N. Y., 178; *Loomis v. Green*, 7 Me., 386.

Others still of these cases are excellent authorities in behalf of the validity of the replications.

Martin v. Kennedy, 2 Bos. & P., 71; *Bigelow v. Windsor*, 1 Gray, 299; *Merriam v. Whittemore*, 5 Gray, 816; *Wales v. Lyon*, 2 Mich., 276; *Wood v. Jackson*, 8 Wend., 9; *French v. Neal*, 24 Pick., 55; *Housemire v. Moulton*, 15 Ind., 367; *George v. Gillespie*, 1 Greene, (Ia.), 421; *Agnew v. McElroy*, 10 Sm. & M., 552; *Young v. Black*, 7 Cranch, 585; *Livermore v. Herschell*, 8 Pick., 38; *Pinney v. Barnes*, 17 Conn., 420; *Arnold v. Arnold*, 17 Pick., 4; *Parkhurst v. Sumner*, 23 Vt., 538.

4. The demurrer to the rejoinder does not open any question as to the sufficiency of the earlier pleadings. It does not open, for consideration, any question to which a previous demurrer has been overruled.

Rogers v. Smiley, 2 Port., 249.

And under no circumstances does it bring up for examination any errors that are not substantial defects.

Tubbs v. Caswell, 8 Wend., 129; *Stoddard v. Onondaga Ann. Conf.*, 12 Barb., 578; *Haynes v. Corington*, 9 Sm. & M., 470.

Mr. Justice Clifford delivered the opinion of the court:

Fifty bonds, of \$1,000 each, were issued by the Corporation defendants on the first day of January, 1852, in payment of a subscription of \$50,000, previously made by the order of the Common Council of the City, to the capital stock of the Ohio & Mississippi Railroad Company. Authority to subscribe for such stock, and to issue such bonds, under the conditions therein specified, is conferred upon the Corporation by the 18th section of their charter. Said bonds were negotiable, and were made payable in twenty-five years from date, with interest at six per cent. per annum. Interest warrants or coupons were attached to the several bonds, for the payment of each year's interest, till the principal of the bonds should fall due.

Plaintiffs became the holders for value of all of the bonds, together with the coupons thereto attached, and the defendants having neglected and refused to pay the interest for the three years specified in the record, the plaintiffs brought an action of *assumpsit*, to recover the amount of the unpaid interest, as represented in the respective coupons for those years. Their claim was set forth in the declaration in a special count, alleging the substance of the facts as above stated; and the declaration also contained a second count for goods sold and delivered, which also embraced the common counts. Separate demurrers were filed to the respective counts, but they were overruled by the court, and were afterwards withdrawn by the defendants. They also pleaded the general issue, called,

in the record, the first plea, which was subsequently withdrawn.

Seven special pleas, numbered from two to eight, inclusive, were also filed by the defendants to the special count, but the withdrawal of the general issue left the second count without any answer.

Second plea alleged that the bonds and coupons described in the special count were issued without any good or valuable consideration.

Third plea alleged that the Corporation was not authorized to issue the bonds to the Railroad Company, because the company was not chartered to construct a railroad to the City.

Fourth plea alleged that a majority of the qualified voters of the City did not, at an annual election, signify their assent to the making of the subscription to the stock, as required by law.

Fifth plea alleged that the bonds and coupons were null and void, because the Railroad Company was not a company chartered to make a road to said City.

Sixth plea alleged that the bonds and coupons were null and void, because the subscription to the stock was made, and the bonds and coupons were issued, before the road was located to the City, and before the railroad company had determined to make the location.

Seventh plea alleged that the bonds and coupons were null and void, because the stock of the Company, before it was issued to the defendants, became of no value through the mismanagement of the directors, and was wholly worthless.

Eighth plea alleged that the bonds and coupons were null and void, because the proper officers of the City never sold and delivered them, as required by law, but that the company obtained the possession of the same without such sale, and without authority.

Notice to the plaintiffs of the respective defenses, so pleaded, is alleged in each of the several pleas. Six only of the eighteen replications filed by the plaintiffs, remain to be examined, as all the rest of the series were subsequently withdrawn without objection, or were held to be bad on demurrer.

Those not withdrawn, are the first, second, fifth, sixth, eighth and tenth of the series, as appears by a careful inspection of the transcript. Of these, the first was to the second plea, and set up a former judgment rendered in favor of the plaintiffs, May Term, 1856, of the Circuit Court for the County of Dearborn, in the State of Indiana, in a certain action brought by the plaintiffs against the defendants, to recover the amount of the coupons attached to the same fifty bonds, which fell due the first day of January next preceding the rendition of the judgment, and the plaintiffs prayed judgment, if the defendants ought to be admitted to aver against that record, that the bonds and coupons were issued without any good or valuable consideration.

Second replication was to all the pleas, except the first, and set up a former judgment recovered by the plaintiffs, May Term, 1857, in the Circuit Court of the United States for the District of Indiana, in an action of *assumpsit*, against the defendants, for the amount of another set of the coupons attached to the same fifty bonds.

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Fifth replication was to the third, fourth, fifth, sixth, seventh and eighth pleas, and also set up the judgment recovered in the Circuit Court of Dearborn County, as described in the first replication, and substantially in the same form.

Sixth replication was to the fourth plea only, and set up the same judgment, and in the same form as pleaded in the fifth replication.

Eighth replication was also to the fourth plea, and alleged that the defendants were estopped, by the recital in the bonds, from denying that a majority of the qualified voters of the City, at an annual election, signified their assent to the subscription.

Tenth replication was to the third, fifth and sixth pleas, and set up the proceedings of the City Council therein recited, as an answer to the said several pleas.

Defendants demurred specially to each of the several replications, but the court overruled the respective demurrers, and held that the several replications were sufficient.

Leave was granted to the defendants, at the same time, to rejoin, and on a subsequent day they appeared and filed a rejoinder to the second replication.

Parties also filed an agreement, at the same time, to the effect that the rejoinder should be regarded as pleaded to all the replications adjudged good except the tenth, which was the second replication to the third, fifth and sixth pleas.

Substance and effect of the matters alleged in the rejoinder were, that the plaintiffs recovered another judgment against the defendants in the Circuit Court for said Dearborn County, in a suit founded on another and different set of the coupons attached to the same fifty bonds, and that the Supreme Court of the State, on appeal, reversed the judgment for error, and remanded the cause for further proceedings.

Plaintiffs demurred to the rejoinder, and the court sustained the demurrer, and held that the rejoinder was bad. Thereupon the parties waived a jury, and submitted the cause to the court for the assessment of damages, and the court, having heard all the evidence introduced by the parties, rendered judgment for the plaintiffs in the sum of \$10,534.50 damages, and costs of suit.

1. Judgment having been rendered for the plaintiffs, the defendants tendered a bill of exceptions, which was allowed by the presiding justice, and signed and sealed. Statement in the bill of exceptions is, that the parties submitted the cause to the court upon the record and the evidence therein set forth; but it is obvious that, when it was submitted, there was nothing left to be done except to compute the damages.

None of the pleadings terminated in issues of fact, except such as had been withdrawn or waived by one side or the other, and all the issues of law had been determined against the defendants. When the defendants withdrew the general issue, and left the second count in the declaration without any answer, the plaintiffs, as upon *nul dicit*, might have moved for judgment for the want of a plea, but they did not submit any such motion, and both parties proceeded thereafter throughout the trial as if there was but one count in the declaration.

Hogan v. Ross, 18 How., 178; 1 Chit. Arch. Pr. (11th ed.), 288; 1 Tidd, Pr., ed. 1856, 568; Steph. Pl., 108; *Bisbing v. Alberson*, 6 Watts & S., 450; *Cross v. Watson*, 6 Blackf., 130.

Viewed in the light of the proceedings in the suit, subsequent to the withdrawal of the general issue, it must be understood that the second count was waived, as there is not a word in the record to support the proposition assumed by the plaintiffs, that the judgment was rendered on that count.

2. Every issue of fact having been withdrawn, and every issue of law in which the other pleadings terminated having been decided in favor of the plaintiffs, they were clearly entitled to judgment on the first count. Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below, in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs.

Such being the state of the case the decisions of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends. *Suydam v. Williamson*, 20 How., 486 [61 U. S., XV., 981]; *Gorman v. Leno*, 15 Pet., 115.

3. Examination of the questions growing out of the decision of the court below in sustaining the demurrer to the defendants' rejoinder will first be made, because if the objections taken to that decision are overruled, the questions involved in the other decision will be of no importance, as the plaintiffs in any event must prevail, and the judgment of the circuit court must be affirmed. They must prevail in that event, because the several replications to which that rejoinder was filed, as extended and applied by the agreement of the parties, furnish a complete answer to all the special pleas of the defendants.

Before proceeding to consider the questions growing out of that decision of the court below, it should be remembered that the defendants, in filing the rejoinder, waived their demurrers to all the replications to which it was filed. Applied, as it was by the agreement, to all the replications not abandoned, except the tenth, it follows that all the demurrers except that filed to the tenth replication were waived.

Pleading over to a declaration adjudged good on demurrer is a waiver of the demurrer; and when a defendant files a rejoinder to a replication, previously adjudged good on demurrer, his act in pleading over must for the same reason be held to have the same effect. *U. S. v. Boyd*, 5 How., 29; *Jones v. Thompson*, 6 Hill, 621; *Clearwater v. Meredith*, 1 Wall., 42 [68 U. S., XVII., 609].

4. Extended argument, to show that the matters alleged in the rejoinder are not of a character to constitute a sufficient answer to the several replications to which it was filed, is unnecessary, as it is scarcely so contended by the defendants. Undoubtedly, the view of the pleader was to set up an estoppel against the matters pleaded by the plaintiffs in their first, second, fifth, sixth and eighth replications, and

to claim the benefit of the rule that an estoppel against an estoppel opens up the whole matter and sets it at large; but the insuperable difficulty in the way of the attempt to apply that rule, even supposing that the former judgments are pleaded as technical estoppels, is, that the matters pleaded in the rejoinder do not amount to an estoppel, as they merely show that the judgment for the plaintiff, as recovered in that case in the court of original jurisdiction, was reversed in the appellate tribunal, and that the cause was remanded to the subordinate court for further proceedings. Second trials often result in the same way as the first, and certainly the reversal of the judgment, under the circumstances shown in the allegations of the rejoinder, is not conclusive evidence that the plaintiffs may not ultimately recover. Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action. Consequently, where the action was discontinued, or the plaintiff became nonsuit, or where from any other cause, except, perhaps, in the case of a *retraxit*, no judgment or decree was rendered in the case, the proceedings are not conclusive.

Wood v. Jackson, 8 Wend., 9; *Reed v. Locks & Canals*, 8 How., 274; *Regina v. St. Anne*, 9 Q. B., 884; *Greeley v. Smith*, 1 W. & M., 181; *Knox v. Walldorrough*, 5 Me., 185; *Hull v. Blake*, 18 Mass., 155; *Sveigart v. Berk*, 8 S. & R., 305; *Bridge v. Sumner*, 1 Pick., 371; 2 Taylor, Ev. sec. 1528; *Harvey v. Richards*, 2 Gall., 281; *Ridgely v. Spencer*, 2 Blinn., 70.

5. Suppose the rejoinder is bad, still the defendants contend that the replications to which it was filed are also bad, and that they are entitled to judgment, as the first fault in pleading was committed by the plaintiffs. Doubts were entertained at first whether, inasmuch as the demurrers were abandoned after the replications had been adjudged good, the point was open to the defendants; but the better opinion is, that the waiver of the demurrers left the rights of the parties in the same condition as they would have been if the demurrers had never been filed. Conceding that to be the rule, then it is clear that the defendants may go back and attack the sufficiency of the replications, as it is the settled rule of law in this court in respect to demurrers that, although the pleadings demurred to may be bad, the court will, nevertheless, give judgment against the party whose pleading was first defective in substance. *Cooke v. Graham*, 8 Cranch, 229; *Sprigg v. Bank of Mt. P.*, 10 Pet., 264; *U. S. v. Arthur*, 5 Cranch, 261; *Clearwater v. Meredith* [supra]; 1 Chit. Plead., 668; *Gorman v. Leno*, 15 Pet., 115.

Statement of the rule by Stephen is, that on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the plea, they will give judgment, not for the defendant but for the plaintiff, provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant. Steph. Pl., 143; *Mercin v. Smith*, 2 Hill, 210; *Matthewson v. Weller*, 3 Den., 52; *Townsend v. Jamison*, 7 How., 706.

Apart, therefore, from their own demurrers, and solely by virtue of the plaintiff's demurrer to their rejoinder, the defendants may go back

and attack the plaintiff's replications, but they can do so only as to defects of substance, as it is well settled that the rule applies only where the antecedent pleading is bad in substance, and that it does not extend to mere matters of form. *Tubbs v. Canwell*, 8 Wend., 129; *Bushell v. Lechmore*, 1 Ld. Raym., 869. Mere formal objections, therefore, to the replications, will not be noticed, as such objections are not open under the pleadings in this record.

6. Four of the replications set up the two former judgments, and as they involve the same questions, they will all be considered together. Duly exemplified copies of those judgments are exhibited in the transcript, and they are well described in the replications. When the record of a former judgment is set up as establishing some collateral fact involved in a subsequent controversy, it must be pleaded strictly as an estoppel, and the rule is, that such a pleading must be framed with great certainty, as it cannot be aided by any intendment. Technical estoppels, as contended by the defendants, must be pleaded with great strictness, but when a former judgment is set up, in bar of an action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading of the opposite party. *Gray v. Pingry*, 17 Vt., 419; *Perkins v. Walker*, 19 Vt., 144; 1 Greenl. Ev. (12th ed.), 566; *Shelley v. Wright*, Willes, 9.

Same rule applies to a replication as to a plea, as the plaintiff cannot anticipate what the defense will be when he frames his declaration. Cases arise, also, where the record of the former does not show the precise point which was decided in the former suit or does not show it with sufficient precision, and also where the party, relying on the former recovery, had no opportunity to plead it; but it is not necessary to consider those topics, as no such questions are directly presented in this case for decision.

Aside from all these questions, and independent of the form of the replications, the defendants make two objections to the theory, that the former judgments, set up in this case, are a conclusive answer to the respective defenses pleaded in their several special pleas.

First. They contend that a judgment on demurrer is not a bar to a subsequent action between the same parties for the same cause of action, unless the record of the former action shows that the demurrer extended to all the disputed facts involved in the second suit, nor unless the subsequent suit presents substantially the same questions as those determined in the former suit. Where the second suit presents no new question, they concede that the judgment in the former suit, though rendered on demurrer, may be a bar to the second suit, but they maintain that it can never be so regarded, unless all those conditions concur.

Second. They also deny that a former judgment is, in any case, conclusive of any matter or thing involved in a subsequent controversy, even between the same parties for the same cause of action, except as to the precise point or points actually litigated and determined in the antecedent trial; and they insist that none of the defenses set up in their several special pleas were directly presented and de-

termined in either of the former suits, as supposed by the plaintiffs.

7. Identity of the parties, in the former suits, with the parties in the suit at bar, is beyond question, and it cannot be successfully denied that the cause of action, in the former suits, was the same as that in the pending action, within the meaning of that requirement, as defined by decided cases of the highest authority. Where the parties are the same, the legal effect of the former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title, and depends upon the same questions. *Doty v. Brown*, 4 N. Y., 71. Second suit for trespass was held, in the case of *Outram v. Morewood*, 8 East, 346, to be barred by the record of a former judgment, between the same parties, recovered long before the second trespass was committed, as it appeared that the same title was involved in both cases. Precisely the same rule was also laid down in the case of *Burt v. Sternburgh*, 4 Cow., 559, and the reason assigned in its support was, that the plaintiff's right of recovery, and the defense set up in the second action, depended on the same title as that involved in the former suit. So, where an importer and two sureties executed two bonds for duties, and the principal being insolvent, one of the sureties paid the whole amount and brought a suit against the other surety for contribution on the bond which first fell due, and was defeated, on a plea of release, by the obligee, with his own consent, the judgment was held in a subsequent suit for contribution for the amount paid on the other bond, to be a conclusive bar to the second claim, it appearing that both bonds were given at the same time, upon the same consideration, and as parts of one and the same transaction. *Bouchaud v. Dias*, 8 Den., 243.

Different bonds, it will be noticed, were described in the two declarations, but the decision of the court was placed upon the ground that the cases were precisely alike, as to the right of the plaintiff to demand, and the duty of the defendant, as a co-surety, to make contribution. Nothing is better settled, say the court, than that the judgment of a court of concurrent jurisdiction, directly upon the point made in the suit, is conclusive between the same parties, upon the same subject-matter, and they referred to the case of *Gardner v. Buckbee*, 8 Cow., 120, as directly in point, and there can be no doubt that it is entirely analogous.

Substance of the material facts in that case was, that two notes had previously been given by the defendant for the purchase money of a vessel, which he refused to pay; and in the suit on the first note the defense was, that it had been obtained by fraud, and the judgment was for the defendant; and in a subsequent suit on the other note, that judgment was held to be conclusive as to the question of fraud.

Weighed in the light of those decisions, it is quite clear that the cause of action, in the legal sense, is the same in the case at bar as that in the respective former judgments set up in the four replications under consideration.

In the suit determined in the state court, the declaration alleged to the effect that the defendants, under the authority conferred on the Corporation by virtue of their charter, subscribed

for \$50,000 of the stock of the Railroad Company; that the company was chartered to construct, and was then constructing a railroad to said City; that a majority of the qualified voters of the City signified their assent to the subscription by expressing on their tickets, at an annual election in said City, that they were in favor of the same; that the defendants issued and sold the bonds to raise the funds to pay for the stock, and that the plaintiffs purchased the bonds and became the holders of the same and of the coupons thereto attached.

Defendants demurred to the declaration, but the court overruled the demurrer, and they subsequently filed an answer, setting up two defenses: (1) That the location of the railroad was not established through the City till after the subscription. (2) That the company was not chartered to construct, and was not, at the date of the subscription, constructing a railroad to the City.

Plaintiffs demurred to the first answer, and the demurrer was sustained by the court; and to the second defense they replied that the Company located their railroad through the City before the bonds were delivered, and the defendants demurred to the replication, but the court overruled the demurrer.

Concluding statement of the record is, that "The said City, not desiring to controvert the facts stated in said reply, but admitting the same," judgment is rendered for the plaintiffs.

Second judgment set up in the replication, was rendered in the Circuit Court of the United States, in a suit on another set of the coupons attached to the same fifty bonds, and the declaration alleged that the defendants, by virtue of the power conferred in their charter, did lawfully and in due form execute and issue the bonds under the seal of the Corporation, and that the plaintiffs, for a valuable consideration, became the legal holders and bearers of the same, and of the coupons thereto attached.

Special demurrer to the declaration was filed by the defendants, and they showed for cause, among other things, that it did not allege that the bonds were issued in pursuance of such a note of the inhabitants of the City as the charter required. Both parties were heard, and the court overruled the demurrer and gave judgment against the defendants for the amount of the coupons, with interest. Inspection of those records, therefore, shows that the several questions involved in the presentsuit, as to the validity of the bonds, the time and place of the location of the railroad, and the alleged failure to secure the antecedent assent of a majority of the qualified voters of the City, were all put in issue in those cases. They were not only put in issue but they were determined, unless it be denied that the effect of a demurrer to the declaration or other pleadings, is that it admits all such matters of fact as are sufficiently pleaded. Such a denial, if made, would be entitled to no weight, as it is a rule universally acknowledged. 1 Williams Saund., 387, n. 3; Steph. Pl., 155; 1 Saund., Pl. and Ev., 952; 1 Chit. Pl., 662.

Foundation of the rule is that the party demurring, having had his option to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse. *Manchester Bk. v. Buckner*, 20 How., 108 [61 U. S., XV., 862].

On the overruling of a demurrer, the general rule is that judgment for the plaintiff is final if the merits are involved, but a judgment that a declaration is bad, cannot be pleaded as a bar to a good declaration for the same cause of action, because such a judgment is in no just sense a judgment upon the merits. *Gilman v. Rice*, 10 Pet., 298. Other exceptional cases might be named, but it is unnecessary, as none of them can have any bearing on this case. *Richardson v. Boston*, 24 How., 188 [65 U. S., XVI., 625].

Taken as a whole, the pleadings of the defendants in the respective cases amounted to a demurrer to the respective declarations, and the substantial import of the decision of the court in each case was, that the declaration was sufficient to entitle the plaintiffs to judgment. Beyond question they were judgments on the merits, although rendered on demurrer; and in such case the well settled rule is that every material matter of fact sufficiently pleaded is admitted.

Since the resolution in *Ferrer's* case, 6 Rep., 7, the general principle has always been conceded, that when one is barred in any action, real or personal, by judgment on demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing, forever.

Objection was taken in the case of *Bouchaud v. Dias*, 8 Den., 244, that the former judgment between the parties could not be a bar to the subsequent action, because it was rendered on demurrer to the defendant's plea, but the court held that it made no difference in principle whether the facts upon which the court proceeded were proved by competent evidence, or whether they were admitted by the parties; and they also held that an admission, by way of demurrer to a pleading, in which the facts are alleged, must be just as available to the opposite party as though the admission had been made *ore tenus* before a jury. *Perkins v. Moore*, 16 Ala., 17; *Robinson v. Howard*, 5 Cal., 427.

Reference to cases decided in other jurisdictions, however, is unnecessary, as this court decided in the case of *Clearwater v. Meredith*, 1 Wall., 48 [68 U. S., XVII., 609], that on demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue of fact joined upon the same pleading, and found in favor of the same party. *Christmas v. Russell*, 5 Wall., 303 [72 U. S., XVIII., 479]; *Nowlan v. Geddes*, 1 East, 634.

Defense of a former judgment rendered upon general demurrer to the declaration was also set up in the case of *Goodrich v. The City*, 5 Wall., 573 [72 U. S., XVIII., 512], and this court held that it was a good answer to the suit, although the appellant insisted that it was not, because the judgment was rendered on demurrer.

8. Unsupported as the second proposition of the defendants is, as to the theory of fact on which it is based, it will not require any extended consideration. Much doubt and perhaps uncertainty exist in judicial decisions as to the limits, in certain cases, within which the conclusive effect of a judgment is confined by law as expressed in the maxim, *Nemo debet bis occuri pro una et eadem causa*, and also as to the manner in which the former judgment in that class of cases should be taken advantage of by

the party. Broom, Max. (4th ed.), 321; *Sparry's case*, 5 Rep., 61.

But it is believed that the case at bar may be decided without encountering any of those conflicting opinions, as they occur chiefly where the party claiming the benefit of the former judgment failed to plead it at the first opportunity, or where no such opportunity was presented, and it was introduced under the general issue. Decisions made in such cases were cited at the argument, but they afford very little aid in the solution of any question arising in this record. Remark should also be made, that the several replications set up the former judgments, not merely as settling some collateral fact involved in the case, but as having determined the entire merits of the controversy involved in the pleadings. *Stafford v. Clark*, 2 Bing., 377.

Such a case falls directly within the rule that the judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is, as a plea, a bar, and conclusive between the same parties upon the same matter directly in question in a subsequent action. *Rees v. Duchess of Kingston*, 20 St. Tr., 588.

When not pleaded, but introduced as evidence under the general issue, the judgment, it was said in that case, was equally conclusive between the parties; but that point will not be considered in this case, as it is in no manner involved in the pleadings. Express determination of the court, also, in the case of *Outram v. Morewood*, 8 East, 857, was, that the rule that a recovery in one action is a bar to another, is not confined to personal actions alone, but that it extends to all actions, real as well as personal.

Repeated decisions established the rule, in the early history of the common law, that where a judgment was rendered on the merits it barred all other personal suits, except such as were of a higher nature, for the same cause of action. *Hitchin v. Campbell*, 2 W. Bl., 831.

Judgment in a writ of entry is not a bar to a writ of right; but the meaning of the rule is, that each species of judgment is equally conclusive upon its own subject-matters by way of bar to future litigation for the thing thereby decided. Hence, the verdict of a jury, followed by a judgment or a decree in chancery, as held by this court, puts an end to all further controversy between the parties to such suit, and it has already appeared that a judgment for either party on demurrer to a pleading involving the merits, is the same as it would have been on an issue of fact, joined upon the same pleading, and found in favor of the same party. *Hopkins v. Lee*, 6 Wheat., 118; *Lawrence v. Hunt*, 10 Wend., 83; *Wood v. Jackson*, 8 Wend., 9; *Young v. Black*, 7 Cranch, 565.

Determination of this court, in the case of *Aspenden v. Nizon*, 4 How., 467, was, that a judgment or decree, in order that it may be set up as a bar, must have been rendered by a court of competent jurisdiction upon the same subject-matter, between the same parties, and for the same purpose; and in the case of *Packet Co. v. Sickles*, 24 How., 841 [65 U. S., XVI., 658], the decision was, that "the essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause

of the demand, and of the parties in the character in which they are litigants." Attempt was made in that case, as in this, to maintain that the judgment in the first suit could not be held to be an estoppel, unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise, and distinctly overruled that proposition, although the defense of estoppel failed for other reasons.

Courts of justice, in stating the rule, do not always employ the same language; but where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatum*, and the former judgment in such a case is conclusive between the parties. *Greathead v. Bromley*, 7 T. R., 455; Broom, Max. (4th ed.), 324.

Except in special cases, the plea of *res judicata*, says Taylor, applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. 2 Taylor, Ev., sec. 1513; *Henderson v. Henderson*, 3 Hare, 115.

Substantially the same rule was laid down in the case of *Outram v. Morewood*, 8 East, 846, in which the court said that "a recovery in one suit upon issue joined on a matter of title, is equally conclusive upon the subject-matter of such title" in any subsequent action, as an estoppel.

Better opinion is, that the estoppel, where the judgment was rendered upon the merits, whether on demurrer, agreed statement or verdict, extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined in the course of the proceedings. 2 Sm. Lead. Cas., 6th ed., 787.

The allegation in the case of *Ricardo v. Garcias*, 12 Cl. & Fin., 400, was, that the matters in issue on the second suit were the same, and not in any respect different from the matters in issue in the former suit, and the House of Lords held that the plea was sufficient—evidently deciding that nothing was open in the second suit which was within the scope of the issue in the former trial. *Stevens v. Hughes*, 7 Casey, 381. Properly construed, the opinion of this court on this point in the case of *The Packet Co. v. Sickles*, 5 Wall., 692 [72 U. S. XVIII., 558], is to the same effect, as plainly appears in that part of it in which the court say that if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter in question, it will be considered as having settled that matter as to all future actions between the parties. Applying that rule to the case at bar, it is clear that a judgment rendered on demurrer settles every matter which was well alleged in the pleadings of the opposite party.

9. Separate examination of the authorities cited by the defendants, in view of their number, is impracticable, but it will appear, if they are carefully read and rightly applied, that they do not support the proposition under con-

sideration. On the contrary, the decision of the court in the case of *Gilbert v. Thompson*, 9 Cush., 848, is, that a judgment in a former action is conclusive where the same cause of action was adjudicated between the same parties, or the same point was put in issue on the record and directly found by the verdict of a jury; and the case of *Merriam v. Whittemore*, 5 Gray, 816, is precisely to the same effect. Unguarded expressions are found in the opinions in the case of *Carter v. James*, 18 Mees. & Wels., 187, but the decision turned upon the point that the cause of action was not the same in the pending suit as that litigated in the former action. For these reasons our conclusion is that the decision of the circuit court in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants was correct, and that the plaintiffs were thereupon entitled to judgment.

10. In such cases, where the sum for which judgment should be rendered is uncertain, the rule in the Federal Courts is that the damages shall, if either of the parties request it, be assessed by a jury. 1 Stat. at L., 87, sec. 26; *Renner v. Marshall*, 1 Wheat., 218; *Mayhew v. Thatcher*, 6 Wheat., 129.

But if the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the court, or what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain if neither party request the court to call a jury for that purpose. Common law rules were substantially the same, except that "the court themselves might, in a large class of cases, if they pleased, assess the damages and thereupon give final judgment." 2 Saund., Pl. and Ev., 218; 2 Arch. Pr., 709.

Evidently a jury in this case was not necessary, but it was not error to hear proofs under the submission, as both parties assented to the course pursued.

Exceptions were taken to the ruling of the court in allowing interest upon the coupons, and the bill of exceptions states that the exception of the defendants was allowed, but it does not state what amount of interest was included in the judgment, nor give the basis on which it was computed. Judging from the amount of the sum found due, it is, perhaps, a necessary inference that interest was allowed on each coupon from the time it fell due to the date of the judgment, and if so, the finding was correct.

Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper. *Mercer Co. v. Hackett*, 1 Wall., 83 [68 U. S., XVII., 548]; *Meyer v. Muscatine*, 1 Wall., 384 [68 U. S., XVII., 564]. Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached. *Knox Co. v. Aspinwall*, 21 How., 544 [62 U. S., XVI., 210]; *White v. Railroad*, 21 How., 575 [62 U. S., XVI., 221]; *McCoy v. Co. of Wash.*, 7 Am. Law Reg., 193; Pars. Bills & N., 115.

Interest, as a general rule, is due on a debt from the time that payment is unjustly refused, but a demand is not necessary on a bill or note payable on a given day. *Voss v. Philbrook*, 8 Story, 836; *Hollingsworth v. Detroit*, 8 McLean, 472. Being written contracts for the payment of money, and negotiable because payable to bearer and passing from hand to hand, as other negotiable instruments, it is quite apparent on general principles that they should draw interest after payment of the principal is unjustly neglected or refused. *Delafeld v. Stephens*, 2 Hill, 177; *Williams v. Sherman*, 7 Wend., 112. Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time 2 Pars., Bills & N., 893. Governed by that rule this court, in the case of *Gelpeke v. Dubuque*, 1 Wall., 206 [68 U. S., XVII., 525], held that the plaintiff, in a case entirely analogous, was entitled to recover interest. *Thompson v. Lee Co.*, 3 Wall., 882 [70 U. S., XVIII., 178].

Necessity for remark upon the other exceptions is superseded by what has already been said in respect to the plaintiff's demurrer.

Judgment affirmed, with costs.

Mr. Justice Miller, dissenting:

The doctrine of estoppel by a former judgment between the same parties, is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other. But its effect is to prevent any further inquiry into the merits of the controversy. Hence, with all the salutary influence which it exerts in giving permanence to established rights, in putting an end to angry contests, and preserving tranquillity in society, it can only be justified on the ground that the precise point, either of law or of fact, which is presented in the suit where the estoppel is pleaded, had been previously decided between the same parties or their privies, by a court of competent jurisdiction. The principle is equally available and potent whether it is set up by a defendant as an answer to a cause of action, or by a plaintiff to prevent the same defense being used in the second suit that was decided against in the first. In the former case, it must appear that the cause of action in the second suit was the same that it was in the first suit, or depended on precisely the same facts. In the latter case it must appear that the defense set up in the second suit was the same defense, or in other words, consisted of the same facts or points of law as that which was passed upon in the first suit.

It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered concluded by that suit. But this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is, that when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decided in the former suit, or be made to appear by extrinsic proof that it was in fact decided. This is expressly ruled no less than three times within the last eight years by this court, to wit: in *Steam Packet Co. v. Sickles*,

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24 How., 383 [65 U. S., XVI., 650]; S. C., 5 Wall., 580 [72 U. S., XVIII., 550]; *Miles v. Caldwell*, 2 Wall., 85 [89 U. S., XVII., 755]. The principle asserted in these decisions is supported by an array of authority which I will not stop to insert here, but which may be found well digested and arranged in the *notes of Hare and Wallace to the Duchess of Kingston's case*, 2 Sm. Lead. Cas., 791, *et seq.*

The opinion just read asserts a different rule, and insists that whatever might have been fairly within the scope of the pleadings in the former suit, must be held as concluded by the judgment.

In the case before us, the second plea clearly and distinctly avers that the bonds, which are the foundation of plaintiff's action, were issued without any good or valuable consideration, and that this fact was known to the plaintiffs when they received them. I have examined in vain all the pleas filed by defendants in the former suit to discover any plea which set up this defense, or which raised such an issue that the want of consideration must have been passed upon in deciding the case. Nor can I discover any plea under which it might have been decided. Here, then, is a distinct, substantial defense to the bonds sued on, sufficient to defeat the action, which was never presented to the court in the former action and, therefore, never decided; and I am of opinion that the former suit did not conclude defendants' right to have this matter inquired into in this action.

Cited—7 Wall., 622; 8 Wall., 287, 288, 357; 9 Wall., 414, 422; 10 Wall., 423; 12 Wall., 84; 20 Wall., 143, 589; 21 U. S., 533; 22 U. S., 553; 24 U. S., 362, 364, 370, 441; 25 U. S., 62; 103 U. S., 696; 104 U. S., 677; 13 Blatchf., 250; 16 Blatchf., 54; 4 Cliff., 129; 4 Hughes, 348; 3 Sawyer, 653; 21 Minn., 201; 25 Minn., 324; 63 Pa., 271; 18 Am. Rep., 258 (64 Me., 254); 40 Am. Rep., 612 (101 Ill., 599); 28 O. St., 601; 58 Mo., 329.

EDWARD W. BURBANK, *Plff. in Err.*,
v.
EDMOND B. BIGELOW.

Objection to want of parties, when too late—objection must first be made in court below, or it will not be available here.

It is too late, on the day set for trial, to move that the suit be dismissed, because a partner of plaintiff, in the transaction which is the foundation of the suit, was not made a plaintiff in the case.

Defendant cannot go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict, and then raise the question for the first time in this court, that the action is one of equitable cognizance.

[No. 86.]

Argued Mar. 26, 1868. Decided Jan. 11, 1869.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

Bigelow, the plaintiff below, one of the partners of the firm of Bigelow & Burbank (T. S. Burbank), filed his petition in the Circuit Court of the United States for the State of Louisiana, against Edward W. Burbank, the brother of his partner; and also against his partner, T. S. Burbank, charging fraud between the two Burbanks to defeat his rights, and claiming that Edward W. Burbank owed the firm of Bigelow & Burbank a certain sum of money, one half of

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which he asks that the court compel Edward W. Burbank to pay to him.

T. S. Burbank, before answering, filed a peremptory exception, and the suit was dismissed as to him.

Edward W. Burbank, after a general answer of denial, also filed a peremptory exception. The court overruled this peremptory exception on the ground that it "came too late."

The case went to the jury, and a verdict was rendered for \$13,864.84 in favor of the plaintiff, Bigelow; whereupon the defendant sued out his writ of error.

Messrs. C. Cushing and W. W. Boyce,
for appellant:

The action in this case is brought by one partner against a debtor of the partnership, the other partner not being joined in the action. It is submitted that no such action can be maintained. This is so clearly the case in courts of common law, that it is not deemed necessary to cite authorities. Nor can such action be maintained by the Louisiana practice.

Cutler v. Cochran, 13 La., 482; *Hyde v. Brashear*, 19 La., 402; *Babcock v. Same*, 19 La., 404; *Crozier v. Hodge*, 3 La., 358; *Dick v. Dunlap*, 1 Rob. La., 54; *Shipman v. Hickman*, 9 Rob. La., 149; *Halliman v. Clark*, 4 La. Ann., 180; *Robb v. Bailey*, 13 La. Ann., 457; *Rugely v. Gull*, 15 La. Ann., 509.

The omission to join the proper partners as defendants is not a matter of form, but law; and the partner sued may have the case dismissed. *Dougart v. Desangle*, 10 Rob., 480.

If it appear on the pleading that another should have been joined, who had been omitted, the defendant may demur, arrest the judgment or bring a writ of error.

Breedlove v. Nicolet, 7 Pet., 418; *Wilson v. Leno*, 1 Cranch, 194; *U. S. Bank v. Smith*, 11 Wheat., 171; *Suydam v. Williamson*, 20 How., 483 (61 U. S., XV., 980); *Farni v. Tesson*, 1 Black, 309 (66 U. S., XVII., 67); *Rogers v. Burlington*, 3 Wall., 661 (70 U. S., XVIII., 82); *Bennett v. Butlerworth*, 11 How., 669; *Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How., 131; *Cohens v. Virginia*, 6 Wheat., 410.

It is submitted, therefore, that the judgment in this case should be arrested, without reference to the peremptory exception filed by the defendant below.

But it is clear that exception was in time, and should have been admitted by the judge on the trial. See *Tutrix v. Porte*, 18 La. Ann., 456, in which case the court says: "An exception that plaintiff is absolutely without right to stand in judgment may be impleaded at any stage of the proceedings." See article 346, Code of Practice of Louisiana, which declares that "Peremptory exceptions founded in law may be pleaded in every stage of the action previous to the definitive judgment, but they must be pleaded specially, and sufficient time allowed to adverse party to bring his evidence." The peremptory exception in this case was founded in law, and sufficient time allowed the adverse party to bring his evidence, because the facts set forth in the peremptory exception were set forth in plaintiff's petition.

Mr. Thomas J. Durant, for defendant in error:

The exception of the plaintiff in error, defendant below, E. W. Burbank, was nothing

of this sort; it came, therefore, too late, and the judge properly overruled it.

Tanner v. King, 10 La. Ann., 485; *Brewer v. Cook*, 11 La. Ann., 687; La. Code, 832, 838, 843, 844.

Mr. Justice Miller delivered the opinion of the court:

The case of *Breedlove v. Nicolet*, 7 Pet., 418, disposes of the only question raised by the record in the present case.

That was an action in the Circuit Court of the United States for the District of Louisiana, brought by Nicolet & Siggs as partners; in which, after issue taken on pleas in bar of the action, the defendants, on the day set for trial, filed a plea averring that Musson and others were also partners with plaintiffs, and citizens of Louisiana. The plea was stricken out by order of the court, on the ground that it came too late. This court held that such action was within the discretion of the circuit court, and would not be revised.

In the case before us, the defendant below, plaintiff in error, filed his peremptory exception after the case was at issue, and on the day that it was set for trial before a jury, prayed that the suit should be dismissed, because T. S. Burbank, a partner with plaintiff in the transaction which is the foundation of this suit, was not made a plaintiff in the case. The court overruled this exception on the ground that it came too late. We were at first inclined to distinguish the two cases under the idea that the plea in the first case rested on the citizenship of the partners not joined in the suit, who, if joined, would have defeated the jurisdiction of the court. But it is expressly said in the opinion, that "the plea is to be considered as if the averment, that Musson and others were citizens of Louisiana, had not been contained in it."

The point ruled in that case is identical with the one presented here, and that decision must govern this.

The objection, that the matter of plaintiff's demand is one of equitable cognizance in the Federal Courts, cannot prevail. No such objection was raised in the court below, at any stage of the proceedings; and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict, without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court.

As the record raises no other question for our consideration, the judgment of the Circuit Court is affirmed.

WILLIAM F. DAVIDSON, *Pff. in Err.*,

v.

JACOB L. STARCHER;

SAME v. JOHN KING,

AND

SAME v. THOMAS McMAHON.

Jurisdiction over state judgment—case dismissed.
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This court has no jurisdiction to review a judgment of a state court, in an action to recover damages resulting from the explosion of a steamboat boiler.

Where the record shows that no question under the 25th section of the Judiciary Act was passed upon by the state court, no ground appears of jurisdiction in this court over the judgment, and the writ of error must be dismissed for want of jurisdiction.

[Nos. 320, 330, 331.]

Argued Jan. 8, 1869. Decided Jan. 11, 1869.

IN ERROR to the Supreme Court of the State of Minnesota.

These actions were brought in one of the district courts of the State of Minnesota, by the defendants in error, to recover damages resulting from the explosion of a steamboat boiler on the Mississippi River near St. Paul, and judgments were obtained by the plaintiffs. The Supreme Court of Minnesota, on appeal, affirmed the judgments; whereupon the defendants sued out this writ of error.

On motion to dismiss.

Meers. Smith and Gilman and R. P. Spalding, for defendants in error:

This court can take jurisdiction over the causes, only by virtue of section 25 of the Judiciary Act of 1789, 1 Stat. at L., 85, and it has been repeatedly decided, that to give this court jurisdiction under said section 25, it must appear on the record itself to be one of the cases enumerated in that section. *Mills v. Brown*, 16 Pet., 525; *Bank v. Buckingham*, 5 How., 817; *Smith v. Hunter*, 7 How., 788.

It is true that the Supreme Court of the State decides that the fact of the explosion of the boiler is *prima facie* evidence that it was caused by negligence and refers to 5 Stat. at L., page 386, sec. 18, which they treat as but an affirmation of the common law. The court also decides that it was negligence to permit the water in the boiler to fall below three inches above the flue; also that carriers of passengers by steamboat are required to employ licensed engineers; and refers to 10 Stat. at L., 69, sec. 12, and p. 67, sec. 8, sub. 10. But there is nothing in this which brings the cases within the provisions of said section 25 of the Judiciary Act.

In the first place, the opinion of the court is no part of the record.

Ocean Ins. Co. v. Polleys, 13 Pet., 157; *Mobile v. Estava*, 16 Pet., 354.

Furthermore, the decision of the state court must be against the claim set up under the law, etc., of the United States, to confer appellate jurisdiction to the court.

McClung v. Stillman, 6 Wheat., 598; *Fulton v. McAfee*, 16 Pet., 149; *Walker v. Taylor*, 5 How., 64; *Scott v. Jones*, 5 How., 348; *Reddall v. Bryan*, 24 How., 420 (65 U. S., XVI., 740); *Gordon v. Caldwell*, 8 Cranch, 238.

Mr. L. Allis, for plaintiff in error.

[No brief is on file.]

Mr. Chief Justice Chase delivered the opinion of the court:

In these cases it appears, on looking into the record, that no question under the 25th section of the Judiciary Act was passed upon by the court. No ground appears, therefore, of jurisdiction in this court over the judgments of the state court, and the several writs of error must be dismissed for want of jurisdiction.

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MADELINE HENRIETTE GIRARD, MARGUERITE P. LARDY, ANNE STEPHANIE de LENTILHAC, AND ALFRED de LENTILHAC, HER HUSBAND, FABRICIUS DEVARS DUMAINE, a minor, AND MARGUERITE PALMIRE, a minor, by their next friend, JOHN DEVARS DUMAINE, all aliens and subjects of the FRENCH,
Appls.,
v.

THE CITY OF PHILADELPHIA.

(See S. C., 7 Wall., 1-16.)

Chancellor, or Legislature, may substitute one trustee for another—Girard estate vested in Philadelphia—change of its limits or charter does not affect its title.

When a trustee is unable longer to administer, the charities or trusts do not fail, but the Chancellor will substitute another trustee.

The sovereign, by legislation (if needed) may have the charities properly administered.

The residue of the estate of Stephen Girard, at the time of his death, was, by his will, vested in the Corporation of Philadelphia on valid legal trusts, which it was fully competent to execute.

By the supplement to the Act incorporating the City, commonly called the "Consolidation Act," the identity of the Corporation is not destroyed.

The change in its name, the enlargement of its area, or increase in the number of its corporators, cannot affect its title to property held at the time of such change.

The Corporation, under its amended charter, has every capacity to hold, and every power and authority necessary to execute, the trusts of the will.

[No. 24.]

Argued Jan. 7, 1869. Decided Jan. 18, 1869.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Mr. C. Ingersoll, for the appellants:

Mr. Girard's devise of the remainder of the residue of his estate was not an absolute, but a strictly limited, devise.

To the questions before the court, it matters not whether the devise is properly or improperly called by the testator in his will, a trust. His meaning is clear enough. The estate was limited, not absolute. The devisees took in trust for certain limited specified objects, and for none other. It was an office to be performed by the devisees.

3 Jarm. Wills, 198; Lewin, Trusts, 171, Vol. 24, Law. Lib.

Any expression in a will showing the testator's intention, limits the devised estate accordingly. The word "trust" in a will means only what is required to effect the intentions of the testator.

1 Jarm., 796; 2 Jarm., 198, 278; 1 Pow. Dev., 223; *Doe v. Norton*, 11 Mees. & W., 928; *Ingis v. Sailor's Snug Harbor*, 3 Pet., 119; 2 Co. Litt., 7, 8; 3 Com. Dig., 80, Condition, a, 4; 4 *Ibid.*, 178, 4; Estate by Devise, n. 9.

A corporation, being trustee of a charity, is looked upon in equity as an individual. Grant, Corp., 118. The college trustees and beneficiaries were different parties. The trustee was the City, but the beneficiaries were not the City. They were certain orphans to be educated by the City, at the expense of the trust. Should the City abuse the college trust, they might be

removed by the courts, as an individual might be, and another trustee appointed. That was done in the case of *The City of Coventry*, who were trustees of a charity.

See *The Mayor of Coventry v. The Atty-Gen.*, 7 Bro. P. C., 235, a case cited and approved by this court in the *Dartmouth College* case, 4 Wheat., 676, 7; *Dummer v. Corp. of Chippenham*, 14 Ves., 245.

The defendant, avoiding *Soohan's* case, makes its claim, not for the present City, but for the territory and population of the late City.

It could plausibly claim in no other way.

Beardsworth v. Torkington, 1 Q. B. (N. S.), 782; *Atty-Gen. v. Vician*, 1 Russ., 226; *Atty-Gen. v. Grant*, 1 P. Wms., 669; *Plymouth v. Jackson*, 15 Pa., 44; *Soohan v. Philadelphia*, 38 Pa., 9.

It is a principle of law that the Legislature, in altering the franchises, cannot affect individual rights in the case of public more than private corporations.

Terret v. Taylor, 9 Cranch, 52; *Stormfelle v. Manor, etc.*, 18 Pa., 560; *St. Louis v. Russell*, 9 Mo., 503; *Bailey v. Mayor of N. Y.*, 3 Hill, 581; 2 Kent, Com., 275; Story, Const., sec. 1387.

The effect of consolidating the City with the county municipalities is to render impossible the performance of the municipal uses devised.

Grant arithmetical possibility, since consolidation, to perform these municipal uses for the benefit of the territory and population of the late City: the devise was to a municipal discretion of the late City, and cannot be transferred to the municipal discretion of the county. It comes within the rule in cases of grants or devises to personal discretion.

Fontain v. Racenel, 17 How., 386 (58 U. S. XV., 87); *Hibbard v. Lamb*, Ambl., 309; *Mercer Co. v. P. & E. R. R. Co.*, 27 Pa., 402; *Ommanney v. Butcher*, 1 Turn. & R., 260; *Lee v. Young*, 2 You. & Col., 532; *Cole v. Wade*, 16 Ves., 46; *Bradford v. Belfield*, 2 Sim., 264; Hill, Trusts., 485; *Hillyard v. Miller*, 10 Pa., 385.

There is a class of English cases which bears strongly against the pretension to hold for territory and population and not for the City.

Atty-Gen. v. Whitchurch, 3 Ves., 141; *Atty-Gen. v. Davies*, 9 Ves., 585; *Chapman v. Brown*, 6 Ves., 404; *Blandford v. Thackerell*, 2 Ves., Jr., 239; *Clark v. Taylor*, 21 Eng. L. & E., 308; *Grieces v. Case*, 1 Ves., Jr., 548.

The defendants say the consolidated charter was imposed on them by a legislative Act, and that they cannot be held to conditions which have been made impossible by act of law.

Let it be admitted that estates on condition, originally, become absolute if afterwards the fulfillment of the condition be made impossible by the grantor, or by the act of God or of the law. This is not such a case. Though the devisee took an estate limited or conditioned to certain uses, the condition was not in abatement of the gift: it was the gift itself.

But is it true in fact or law that the charter was "imposed" on the defendants? The evidence taken in the court below shows the petition, for consolidation of the corporators to the Legislature was accompanied by a draft of the Consolidation Act as afterwards passed; it shows the approval of this proceeding of the corporators by the authorities of the Corporation; it shows the unanimous vote of the Phila-

See 7 WALL.

delphia representatives in both branches of the Legislature, for the Consolidation Act, in the form in which it was petitioned for. A comparison of the draft accompanying the petition with the Act, shows them to be substantially the same; but if they were substantially different, it would be incumbent on the defendants to make the difference avail them, to show the difference it is which renders them impossible, since the consolidation, the performance of these municipal uses. No other difference could avail them. The corporations and Corporation and their representatives in the State Legislature are united to procure the Act. If it is not to be regarded as the devisees' own Act, it is because there is a fiction of law (*fictio juris semper subsistit equitas*) which prevails over the fact.

See *The King v. Pasmore*, 3 T. R., 246; *Rez v. Amery*, 1 T. R., 584; *Rez v. Burrey*, 4 M. & S., 253; *Bagge's case* (Rolle, 324), 2 Brownl., 100; *Rez v. Askeu*, 4 Burr., 2200, 1; *Rutter v. Chapman*, 8 Mees. & W., 1; *Patterson v. Society, etc.*, 4 Zab., 397.

In Pennsylvania the very case has occurred of an attempt, which was overruled by the Supreme Court, to impose a municipal charter upon unwilling citizens. It will be found in the case of *The Borough of West Phila.*, 5 Watts & S., 281.

See *Bank of U. S. v. Dandridge*, 12 Wheat., 64.

There is no ground for the defendants' position, that this devise being to a charitable use, violation of the will does not affect the title of the devisees; nor would the English rule of *cy pres* afford the least aid to such a position.

The books show that the case never happened where either chancery or the *parens patrie* interfered to aid the charity, which was likely to fail by the act of the devisee. To let the devisee imperil or make uncertain or impossible the performance of the testator's purposes, and then substitute his own, would be a novelty.

Atty-Gen. v. Whitchurch, 3 Ves., 144; *Atty-Gen. v. Sir John Platt*, Finch, 222; *Man v. Ballet*, 1 Vern., 43; *Atty-Gen. v. Margaret, etc.*, 1 Vern., 55, and 1 Cas. Eq. Abr., 99; *Atty-Gen. v. Mansfield*, 2 Russ., 501; *Atty-Gen. v. Whiteley*, 11 Ves., 241; *Ex parte Bolton School*, 2 Bro. Ch., 662; *Crofts v. Eoetis*, Toth., 61, 62; *Magill v. Brown*, Bright, 347; *Atty-Gen. v. Sherborne Gram. Sch.*, 18 Beav., 290; *Atty-Gen. v. Calvert*, 23 Beav., 254; *Atty-Gen. v. Rochester*, 5 De Gex, M. & G., 797; *Atty-Gen. v. Dean, etc.*, of W., 8 H. of L. Cas., 869; *Atty-Gen. v. Painter's Co.*, 2 Cox, 51; Eq. Jur., Story, 1175.

Upon these citations the plaintiffs rely to show that the defendants are held to the substantial performance of these uses, being a charity, as closely as if they were not a charity; and that the defendants cannot, if they themselves have caused the trust to fail, or the condition to become impossible, expect the aid of equity in their new position. The question is: would equity have countenanced, before the Consolidation Act, the transfer of the protection of these uses from the old City to the county? If not, equity will give no countenance to their transfer afterwards.

If there be, with the aid of *cy pres*, the English rule, as alleged by the defendants, that gifts of charity do not fail, the books show that

in carrying it out they make strange distinctions.

The following is part of a note of the reporter to the case of *Loscomb v. Wintringham*, 13 Beav., 89: "The following, amongst other bequests, have been held void as charitable gifts: Benevolent purposes, *James v. Allen*, 3 Mer., 17; Objects of benevolence and liberality, *Morice v. Bishop of D.*, 9 Ves., 399, affirmed, 10 Ves., 521; Charitable or other purposes, *Ellis v. Selby*, 7 Sim., 352, and 1 Myl. & C., 286; Benevolent, charitable and religious purposes, *Williams v. Kershaw*, 5 L. J. (N. S.), ch. 84, cited 1 Keen, 232, and 1 Myl. & C., 293-298; Private charity, *Ommanney v. Butcher*, 1 Turn. & Russ., 260; For charitable or public purposes, or to any person or persons, as his executors should think fit, *Veezy v. Jamson*, 1 Sim. & St., 69; For such uses as trustees should think fit, *Fowler v. Garlike*, 1 Russ. & Myl., 232; To such persons as trustees should think proper, *Gibby v. Rumsey*, 2 Ves. & B., 295; To buying such books as might have a tendency to promote the interests of virtue and religion, and the happiness of mankind, and distributing such books, *Brown v. Yeale*, 7 Ves., 50, note 76, p. 52, referred to in J. Ves., 406, 10 Ves., 27, Hargrave on the Thellesson Act, 22, and 2 Jurist. Aug., 70, 162, 163; £6,000 for a hospital, to increase until it amounted to —, for supporting — boys, *Ewen v. Bannerman*, 2 Dow. & Cl., 74; To Roman Catholic priests, for prayers for the repose of the testatrix's soul, *West v. Shuttleworth*, 2 Myl. & K., 684; For the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, *Kendall v. Granger*, 5 Beav., 301."

See, also, *Russell v. Kellett*, 3 Smale & Giff., 268; *Cherry v. Mott*, 1 Myl. & C., 123; *Atty-Gen. v. Minshull*, 4 Ves., 14; *Shelft*, Mort., 648.

What are the rights here of the representatives of the testator?

See *Wheeler v. Smith*, 9 How., 55; *Fontain v. Ravenel*, 17 How., 369 (58 U. S., XV., 80); *James v. Allen*, 3 Mer., 17; *Ommanney v. Butcher*, 1 Tur. & R., 280; *Atty-Gen. v. Skithorp*, 2 Russ. & Myl., 107; *Ellis v. Selby*, 7 Sim., 352.

If any object shall "appear to have become extinct, the portion bequeathed to such object must fall into the residue as a lapsed legacy."

Magill v. Brown, Bright, 396, as cited by the court in *Fontain v. Ravenel*, 17 How., 369 (58 U. S., XV., 89); 2 Story, Eq. Jur., sec. 1156; *Morice v. Bishop of Durham*, 10 Ves., 535; *Atty-Gen. v. Mayor of Galway*, 1 Moll., 110; *Atty-Gen. v. Shrewsbury*, 6 Beav., 230.

Messrs. James Lynde, Edward Olmstead and W. M. Meredith, for defendant in error:

The validity of the trust for the college has not been disputed by the plaintiffs in their bill, nor do they deny that the present defendant is incapable to execute them. But they allege that the Consolidation Act has made it impossible to execute the trusts for municipal purposes.

If the defendant cannot execute the trusts for municipal purposes, then the whole trust estate must be applied for public purposes of the college, even without the express direction to that effect.

Case of *Thetford School*, 8 Co., 181; *Magill v. Brown*, Bright., 396; 4 Bro. Ch., 103; *Pickering v. Shothell*, 10 Pa., 23; *Witman v. Lee*, 17 Serg. & R., 93; *Beaver v. Filson*, 8 Pa., 327; *McLain v. School Directors*, 51 Pa., 196; *Philadelphia v. Girard's Heirs*, 45 Pa., 28; Story, Eq., p. 524, sec. 1177.

Public trusts and charitable uses may be considered as synonymous expressions.

Attorney v. Hecks, 2 Sim. & Stu., 67, cited in note; Amb., 651; *Atty-Gen. v. Corporation of Shrewsbury*, 6 Beav., 230; *Cresson's Appeal*, 30 Pa., 450.

The trust for municipal purposes was to have effect only if there was a surplus beyond the wants of the college. The whole of the residue was given—1, to the maintenance of the college; 2 and 3, to certain municipal purposes. The first was the primary trust; the others were secondary.

The answer shows that the whole of the net income of the residuary estate since the year 1847, has been appropriated to the maintenance and endowment of the college, and used for that purpose. And further, that the applicants for admission to the college, have far exceeded the ability of the City to maintain them.

At the time of the death of Mr. Girard, the City of Philadelphia was bounded by Vine and South Streets, and the Delaware and Schuylkill rivers. The legislative power of the Corporation was vested in two bodies, called the Select and Common Councils. The Legislature of the State had, from time to time, enlarged, modified and curtailed the powers of these bodies. The City of Philadelphia formed a part of the County of Philadelphia. The other parts of the county contained a number of municipal corporations, all of which were for the purposes independent of each other. There were some corporations, or quasi corporations, which exercised authority and jurisdiction over the whole county. The poor, the health, the public education, and business of streets, was managed and regulated by these last named bodies; and the care of providing for the support of the administration of justice was devolved upon a separate and independent body.

The evils following from such a system of government were found to be productive of such inconveniences, that in the year 1854, the Legislature of the Commonwealth incorporated all these independent municipalities into the City of Philadelphia.

Surely nothing was further from the intention of the Legislature than an interference with the trusts of Mr. Girard's will.

If the conduct of trustees can forfeit their *cestuis que trust's* estate, it must be shown that the trustee, by forbearing or acting, could save the estate. The councils of the City, or the people of the City, had neither nor both of them, the power to prevent the Legislature from enlarging the boundaries of this public corporation. 2 Kent, 275, 305; Ang. & Ames Corp., 5th ed., p. 27, sec. 81; *North Yarmouth v. Stallings*, 45 Me., 133; *Brown v. Hummel*, 6 Pa., 92; *Kirby v. Shaw*, 19 Pa., 258; 2 P. F. Smith, 52 Pa. St., 374; Grant, Corp., 62; *Haddock's case*, Sir T. Raym., 439; S. C., 1 Vent, 355; *Luttrell's case*, 4 Co. Rep., 88.

The answer denies that the defendant sought to promote the enactment of the Consolidation See 7 WALL.

Act, and there was no evidence to prove such fact.

This trust for municipal purposes is not a trust in the sense that all gifts to municipal corporations are in trust to devote them to municipal purposes; but an active one, whereof the Corporation is the trustee, and the inhabitants of the City are the beneficiaries. This is shown conclusively by the circumstance that the trust only is available if the funds are not needed for the college. *Atty-Gen. v. Vivian*, 1 Russ., 226, 234; *Atty-Gen. v. Mayor, etc., of Rochester*, Finch, 193.

Mr. Justice Grier delivered the opinion of the court:

The case of *Vidal v. The Executors of Girard*, 2 How., 127, has put an end to any further controversy as to the validity of the trusts and the power of the City to execute them. Nor do the heirs, who are complainants in this bill, pretend to call in question the matters finally and conclusively settled by that case.

The facts which are supposed to rehabilitate their claim have occurred since its decision. Admitting that the will of Stephen Girard entirely excluded them from any claim of right to the property in question, they now contend that the Consolidation Act has made it impossible for anyone to execute the trusts for municipal purposes, and as a consequence the heirs are entitled to that portion of the estate appropriated by the testator for such uses. If it shall appear that the effect of the Consolidation Act is not that which the bill alleges, it may be unnecessary to discuss the question whether if it were, the consequence assumed from it, be legitimate.

The will of Stephen Girard, after sundry bequests to his relatives and friends, and to certain specified charities, announces (sec. XX.) his great and favorite charity to be the establishment of a college for the education of poor orphans. It then proceeds: "Now, I give, devise and bequeath all the residue and remainder of my real and personal estate, etc., unto the mayor, aldermen, and citizens of Philadelphia in trust for the several uses, intents and purposes hereinafter declared."

The attempt to restrain the alienation being inoperative cannot effect the validity of this devise. After many and very special directions as to the college, its construction and government, it further directs that two millions of the personal estate be appropriated to the building; and if this sum should not be sufficient, the remainder should be taken "from the final residuary fund hereinafter expressly referred to." "And, as it regards the remainder of said residue of my personal estate to invest the same in good securities, and in like manner to invest the interest and income thereof, from time to time, so that the whole shall form a permanent fund, and to apply the income of the said fund—" first, to the further improvement and maintenance of the aforesaid college, as directed in the last paragraph of the 21st clause of this, my will.

"Second, to enable the Corporation of the City of Philadelphia to provide more effectually than they now do for the security of the inhabitants of the said City by a competent police, including a sufficient number of watch-

men, really suited to the purpose; and to this end I recommend a division of the City into watch districts, of four parts, each under a proper head.

"Third, to enable the said Corporation to improve the city property, and the general appearance of the City itself, and in effect to diminish the burden of taxation, now most oppressive, especially on those who are the least able to bear it.

"To all which objects the prosperity of the City and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly, and every year forever, after providing for the college as hereinbefore directed, as my primary object."

The bill admits this to be a valid charity, and claims only the residue after that is satisfied. Now, it is admitted (for it has been so decided), that till February, 1854, the Corporation was vested with a complete title to the whole residue of the estate of Stephen Girard, subject to these charitable trusts and, consequently, at that date, his heirs at law had no right, title or interest whatsoever in the same. But the bill alleges that the Act of the Legislature of that date (commonly called the "Consolidation Act"), which purports to be a supplement to the original Act incorporating the City, has either dissolved or destroyed the identity of the original Corporation, and it is consequently unable any longer to administer the trust. Now, if this were true, the only consequence would be, not that the charities or trust should fail, but that the *Chancellor* should substitute another trustee.

It is not insisted that the mere change or abbreviation of the name has destroyed the identity of the Corporation. The bill even seems to admit that a small addition to its territory and jurisdiction might not have that effect, but that the annexation of twenty-nine boroughs and townships has smothered it to death, or rendered it utterly incapable of administering trusts or charities committed to it when its boundaries were Vine and South Streets, and the two rivers. There is nothing to be found in the letter or spirit of this Act which shows any intention in the Legislature to destroy the original corporation, either by changing its name, enlarging its territory, or increasing the number of its corporators. On the contrary, "all its powers, rights, privileges, and immunities, etc., are continued in full vigor and effect." It provides, also, that "all the estates, etc.," held by any of the corporations united by the Act, shall be held "upon and for the same uses, trusts, limitations, charities and conditions, as the same were then held."

By the Act of the 4th of April, 1852, the Corporation was "authorized to exercise all such jurisdiction, to enact all such ordinances, and to do and execute all such acts and things whatsoever, as may be necessary for the full and entire acceptance, execution and prosecution of any and all the devises, bequests, trusts and provisions contained in said will." It may also "provide, by ordinance or otherwise, for the election and appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard."

Now, it cannot be pretended that the Legislature had not the power to appoint another trustee if the Act had dissolved the Corporation, or to continue the rights, duties, trusts, etc., in the enlarged corporation. It has done so, and has given the widest powers to the trustee to administer the trusts and charities, according to the intent of the testator, as declared in his will.

The Legislature may alter, modify or even annul the franchises of a public municipal corporation, although it may not impose burdens on it without its consent. In this case the Corporation has assented to accept the changes, assume the burdens and perform the duties imposed upon it; and it is difficult to conceive how they can have forfeited their right to the charities which the law makes it their duty to administer. The objects of the testator's charity remains the same, while the City, large or small, exists; the trust is an existing and valid one, the trustee is vested by law with the estate, and the fullest power and authority to execute the trust.

Whatever the fears or fancy of the complainants may be, as to the moral ability of this overgrown Corporation, there is no necessary or natural inability which prohibits it from administering this charity as faithfully as it could before its increase. In fact, it is a matter in which the complainants have no concern whatever, or any right to intervene. If the trust be not rightly administered, the *cestui que trust*, or the sovereign, may require the courts to compel a proper execution.

In the case of *Vidal*, 2 How., 191, the Supreme Court say, that "if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator, or any other private person, would have any right to inquire into or contest the right of the Corporation to take the property or execute the trust; this would exclusively belong to the State in its sovereign capacity, and as *parens patrie*, and its sole discretion."

This is not an assertion that the Legislature, as *parens patrie*, may interfere, by retrospective Acts, to exercise the *ex post* power, which has become so odious from its application in England to what were called superstitious uses. *Baxter's* case, and other similar ones, cannot be precedents where there is no established church which treats all dissent as superstition (2 Vernon). But it cannot admit of a doubt that, where there is a valid devise to a corporation, in trust for charitable purposes, unaffected by any question as to its validity because of superstition, the sovereign may interfere to enforce the execution of the trusts, either by changing the administrator, if the Corporation be dissolved, or, if not, by modifying or enlarging its franchises, provided the trust be not perverted, and no wrong done to the beneficiaries.

Where the trustee is a corporation, no modification of its franchises, or change in its name, while its identity remains, can affect its rights to hold property devised to it for any purpose. Nor can a valid vested estate, in trust, lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right, as well as the duty of the sovereign, by its courts and public

officers, as also by legislation (if needed), to have the charities properly administered.

Now, there is no complaint here that the charity, so far as regards the primary and great object of the testator, is not properly administered; and it does not appear that there now is, or ever will be, any residue to apply to the secondary objects. If that time should ever arrive, the question, whether the charity shall be so applied as to have the "effect to diminish the burden of taxation" on all the Corporation, or only those within the former boundaries of the City, will have to be decided. The case of *Sothan v. The City*, 9 Casey, does not decide it; nor is this court bound to decide it. The answer shows how it may be done, and the Corporation has ample power conferred on it to execute the trust according to either hypothesis; and, if further powers were necessary, the Legislature, executing the sovereign power, can certainly grant them. In the meantime the heirs at law of the testator have no concern in the matter, or any right to interfere by a bill *quia timet*. Their anticipations of the future perversion of the charity by the corruption or folly of the enlarged corporation, and the moral impossibility of its just administration, are not sufficient reasons for the interference of this court to seize upon the fund, or any part of it, and to deliver it up to the complainants, who never had, and by the will of Stephen Girard were not intended to have, any right, title or claim whatsoever to the property.

In fine, the bill was rightly dismissed, because:

1. The residue of the estate of Stephen Girard, at the time of his death, was, by his will, vested in the Corporation on valid legal trusts, which it was fully competent to execute.

2. By the supplement to the Act incorporating the City (commonly called the "Consolidation Act"), the identity of the Corporation is not destroyed; nor can the change in its name, the enlargement of its area, or increase in the number of its corporators, affect its title to property held at the time of such change.

3. The Corporation, under its amended charter, has every capacity to hold, and every power and authority necessary to execute the trusts of the will.

4. That the difficulties anticipated by the bill, as to the execution of the secondary trusts, are imaginary. They have not arisen, and most probably never will.

5. And if they should, it is a matter, whether probable or improbable, with which the complainants have no concern, and cannot have on any possible contingency.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

Cited—102 U. S., 532; 64 Pa., 122; 83 Pa., 211.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE BANK OF NEW YORK NATIONAL BANKING ASSOCIATION, *Piffs. in Err.*,

v.

RICHARD B. CONNELLY, Comptroller, AND JOHN T. HOFFMAN, Mayor, Etc.;

AND

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE NATIONAL BROADWAY BANK, *Piffs. in Err.*,

v.

JOHN T. HOFFMAN, Mayor, AND RICHARD B. CONNELLY, Comptroller, Etc.;

AND

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE NATIONAL BANK OF THE REPUBLIC OF THE CITY OF NEW YORK, *Piffs. in Err.*,

v.

JOHN T. HOFFMAN, Mayor, RICHARD B. CONNELLY, Comptroller of the CITY OF NEW YORK, *et al.*

(See S. C., "*The Banks v. The Mayor*," 7 Wall., 16-25.)

Jurisdiction over state decision involving taxation of federal securities—U. S. certificates of indebtedness not taxable.

Where, under a New York Act, the banking associations of that State were entitled to re-imbursement by bonds for taxes illegally collected by the State from them on federal securities, and the New York Court of Appeals denied them the relief, this court has jurisdiction to review that decision under the Act of Feb. 5, 1867.

United States bonds are not liable to taxation under state legislation.

Certificates of indebtedness issued directly to creditors in payment of their demands, are not subject to state taxation.

[Nos. 246, 248, 252.]

Argued Dec. 15, 1868. Decided Jan. 18, 1869.

IN ERROR to the Court of Appeals of the State of New York.

A writ of *mandamus* was sued out in each of these cases in the Supreme Court of New York by the plaintiffs in error, to compel the defendants to sign, seal, and deliver certain bonds. Judgments having been given by that court for the defendants, and having been affirmed on appeal by the Court Appeals of that State, the plaintiffs sued out these writs of error.

A full statement of the case appears in the opinion of the court.

Messrs. Wheeler H. Peckham, John E. Burrill, and Thomas H. Rodman, for plaintiffs in error:

1. The "credit" of the United States is exempt from taxation under state authority.

(a) This credit, which is exempt, is entirely distinct from the forms in which it may be expressed, and from the instruments or evidence which may prove that it has been pledged.

Weston v. Charleston, 2 Pet., 449; *Bank of Commerce* case, 2 Black, 620 (67 U. S., XVII., 451), and *note*; *Bank of Commonwealth* case, 33 Barb., 509; 28 N. Y., 192; *Bank Tax* case, 2 Wall., 200 (69 U. S., XVII., 793); and in *Van Allen v. Assessors*, 3 Wall., 573 (70 U. S., XVIII., 229).

Aside from authority, it is apparent to anyone in the least degree familiar with the truths of political economy, that credit cannot be taxed and can pay no tax. If the credit of the United States is taxed through its bonds or other securities, the only effect is that, on a sale or issue of those bonds, the United States realizes so much less.

A tax upon an instrument employed by the government to carry into execution powers vested in it by the Constitution, is illegal.

McCulloch v. Maryland, 4 Wheat., 310; *Osborn v. Bank of U. S.*, 9 Wheat., 788; *Brown v. Maryland*, 12 Wheat., 419.

2. The certificates are, clearly, within the principle of exemption hereinbefore stated.

(a) The certificates are not mere certificates of a pre-existing indebtedness. (b) The pre-existing indebtedness was itself not taxable.

See *Metropolitan Bank v. Van Dyck*, 27 N. Y., 491; *Dobbins v. Com. of Erie Co.*, 16 Pet., 449.

3. The certificates are exempt by the Statutes of the United States, and those statutes are constitutional.

Act, Feb. 25th, 1862, 12 U. S. Stat. at L., 346, sec. 2; Act, March 3, 1863, 12 Stat., 710, sec. 1; Act, March 3, 1864, 13 Stat., p. 12, sec. 1; Act, June 30, 1864, 13 Stat. at L., p. 222, secs. 1, 13.

The certificates are not property in the hands of its citizens. They are the debts of the United States, and as such represent the credit of the United States.

That the certificates of indebtedness (\$188,000) on which it was attempted to tax the bank in 1863, are exempt from taxation by the State, is *res judicata* as between the City and the relator.

Birckhead v. Brown, 5 Sandf., 134; *Doty v. Brown*, 4 N. Y., 173, and cases cited by *Rugles, J.*; *Bouchaud v. Dias*, 3 Den., 238; *White v. Coatsworth*, 6 N. Y., 137; *Castle v. Noyes*, 14 N. Y., 329; *Oggsbury v. LaFarge*, 3 N. Y., 113; *Morris v. Floyd*, 5 Barb., 180; *Embury v. Conner*, 3 N. Y., 511; *Per Jewett, J.*, and cases cited at p. 522; *Southgate v. Montgomery*, 1 Paige, 41; *People v. Supervisors of Delaware*, 12 How. Pr., 50.

Messrs. Richard O'Gorman and Chas. O'Connor, for defendants in error:

1. The judgment of the state court is not subject to review in this court. The re-imbursement contemplated by the State in its legislative Act of April 3, 1866, was a voluntary grace and favor.

When the plaintiffs in error voluntarily paid the tax in question, they waived any exemption that may have existed. When they appeared as suitors or parties in the state court, they had no title, right or privilege, save such as may have been conferred by the state Act.

2. It cannot be maintained that the claim of a person upon the government is an instrument or agency, or that it is the property of the government. It is simply a property or "chase," belonging to the creditor.

3. Congress has no authority to grant an exemption from the taxing power of the States. It is only where an exemption arises from the nature of the subject, and might be implied from the Constitution itself, that Congress may declare it.

4. Issuing a certificate acknowledging a pre-existing indebtedness arising from the purchase of supplies or procurement of services, is not borrowing money.

5. None of the Acts of Congress exempting federal securities from state taxation, apply to certificates of indebtedness. In the Act of February 25, 1862, and the Act of June 30, 1864, the phrases "other securities," and "other ob-

ligations," are not to be taken so largely as to include every indebtedness of the United States. Securities and obligations issued to secure the repayment of moneys borrowed, were alone understood at these times to be exempt from state taxation by the State Constitution, and nothing more was intended by these statutes than to declare and promulgate that exemption.

Mr. Chief Justice Chase delivered the opinion of the court in these causes:

These three cases present, under somewhat different forms, the same question, namely: Are the obligations of the United States, known as certificates of indebtedness, liable to be taxed by state legislation?

These three cases were argued, and will be considered, together.

In 1863, and in 1864, the proper officers of the State, acting under the laws of New York, assessed certain taxes upon the capital stock of the several banking associations in that State. Some of these banking associations resisted the collection of the tax, on the ground that, though nominally imposed upon their respective capital, it was, in fact, imposed upon the bonds and obligations of the United States, in which a large proportion of these capitals was invested and which, under the Constitution and laws of the United States, were exempt from state taxation.

This question was brought before the Court of Appeals, which sustained the assessments and disallowed the claim of the banking associations.

From this decision an appeal was taken to this court, upon the hearing of which, at the December Term, 1864, it was adjudged that the taxes imposed upon the capitals of the associations were a tax upon the national bonds and obligations in which they were invested and, therefore, so far contrary to the Constitution of the United States. 2 Wall., 210 [69 U. S., XVII., 795].

A mandate in conformity with this decision was sent to the Court of Appeals of New York, which court thereupon reversed its judgment and entered a judgment agreeably to the mandate.

Afterwards, April 30, 1866, the Legislature of New York provided by law for refunding to the banking associations and other corporations in like conditions, the taxes of 1863 and 1864, collected upon that part of their capital invested in securities of the United States, exempt by law from taxation. The Board of Supervisors of the County of New York was charged with the duty of auditing and allowing, with the approval of the Mayor of the City and the Corporation Council, the amount collected from each corporation for taxes on the exempt portion of its capital, together with costs, damages, and interest. Upon such auditing and allowance, the sums awarded were to be paid to the corporations severally entitled, by the issue to each, of New York County seven per cent. bonds of equal amounts. These bonds were to be signed by the Comptroller of the City of New York, countersigned by the mayor, and sealed with the seal of the Board of Supervisors, and attested by the Clerk of the Board.

Under this Act, the Board of Supervisors

audited and allowed to the several institutions represented in the three cases under consideration, their several claims for taxes collected upon the national securities held by them, including in this allowance the taxes paid on certificates of indebtedness which the corporation claimed to be securities of the United States, exempt from taxation.

But the comptroller, mayor, and clerk refused to sign, countersign, seal and attest the requisite amount of bonds for payment, insisting that certificates of indebtedness were not exempt from taxation.

A writ of *mandamus* was thereupon sued out of the Supreme Court of New York, for the purpose of compelling these officials to perform their alleged duty in this respect. An answer was filed, and the court, by its judgment, sustained the refusal. An appeal was taken to the Court of Appeals of New York, by which the judgment of the Supreme Court was affirmed. Writs of error, under the 26th section of the Judiciary Act, bring these judgments here for revision.

The first question to be considered is one of jurisdiction. It is insisted, in behalf of the defendants in error, that the judgment of the New York Court of Appeals is not subject to review in this court.

But is it not plain, that under the Act of the Legislature of New York the banking associations were entitled to re-imbursement by bonds of the taxes illegally collected from them in 1863 and 1864?

No objection was made in the state court to the process by which the associations sought to enforce the issue of the bonds to which they asserted their right. *Mandamus* to the officers charged with the execution of the state law seems to have been regarded on all hands as the appropriate remedy.

But it was objected on the part of those officers, that the particular description of obligations, of the tax on which the associations claimed re-imbursement, were not exempt from taxation. The associations, on the other hand, insisted that these obligations were exempt under the Constitution and laws of the United States. If they were so exempt, the associations were entitled to the relief which they sought. The judgment of the Court of Appeals denied the relief upon the ground that the certificates of indebtedness were not entitled to exemption. Is it not clear that, in the case before the state court, a right, privilege or immunity was claimed under the Constitution or a statute of the United States, and that the decision was against the right, privilege or immunity claimed? And, therefore, that the jurisdiction of this court to review that decision is within the express words of the Amendatory Act of February 5th, 1867? There can be but one answer to this question. We can find no ground for doubt on the point of jurisdiction.

The general question upon the merits is this: Were the obligations of the United States, known as certificates of indebtedness, liable to state taxation?

If this question can be affirmatively answered, the judgments of the Court of Appeals must be affirmed; if not, they must be reversed.

Evidences of the indebtedness of the United States, held by individuals or corporations, and

sometimes called stock or stocks, but recently better known as bonds or obligations, have uniformly been held by this court not to be liable to taxation under state legislation.

The authority to borrow money on the credit of the United States, is, in the enumeration of the powers expressly granted by the Constitution, second in place, and only second in importance to the authority to lay and collect taxes. Both are given as means to the exercise of the functions of government under the Constitution; and both, if neither had been expressly conferred, would be necessarily implied from other powers. For no one will assert that without them the great powers—mentioning no others—to raise and support armies, to provide and maintain a navy, and to carry on war, could be exercised at all; or if at all, with adequate efficiency.

And no one affirms that the power of the government to borrow, or the action of the government in borrowing, is subject to taxation by the States.

There are those, however, who assert that, although the States cannot tax the exercise of the powers of the government—as, for example, in the conveyance of the mails, the transportation of troops, or the borrowing of money—they may tax the indebtedness of the government when it assumes the form of obligations held by individuals, and so becomes in a certain sense private property.

This court, however, has constantly held otherwise.

Forty years ago, in the case *Weston v. Charleston*, 2 Pet., 467, this court, speaking through Chief Justice Marshall, said:

“The American people have conferred the power of borrowing money upon their government, and by making that government supreme have shielded its action in the exercise of that power from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.”

And applying these principles the court proceeded to say:

“The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of the government. It may be carried to an extent which shall arrest them entirely.”

And finally:

“A tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently repugnant to the Constitution.”

Nothing need be added to this, except that in no case decided since have these propositions been retracted or qualified. The last cases in which the power of the States to tax the obligations of the government came directly in question were those of *The Bank of Commerce v. New York*, 2 Black, 628 [67 U. S., XVII., 454], in 1862, and the *Bank Tax* case, 3 Wall., 200 [69 U. S., XVII., 798], in 1865, in both of which the power was denied.

An attempt was made at the bar to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince us that such a distinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money.

The principle of exemption is, that the States cannot control the National Government within the sphere of its constitutional powers—for there it is supreme—and cannot tax its obligations for payment of money issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control.

The certificates of indebtedness, in the case before us, are completely within the protection of this principle. For the public history of the country and the Acts of Congress show that they were issued to creditors for supplies necessary to the government in carrying on the recent war for the integrity of the Union and the preservation of our republican institutions. They were received instead of money at a time when full money payment for supplies was impossible, and according to the principles of the cases to which we have referred, are as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued.

It results that the several judgments of the Court of Appeals must be reversed.

Cited—9 Wall., 589; 11 Wall., 209; 34 N. J. L., 130; 90 N. Y., 66.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THE BANK OF NEW YORK, *Piffs. in Err.*, v.

THE BOARD OF SUPERVISORS OF THE COUNTY OF NEW YORK.

(See S. C., "*Bank v. Supervisors*," 7 Wall., 26-31).

United States notes exempt from taxation.

United States notes issued under the Acts of 1862 and 1863 are exempt from taxation by or under state authority.

[No. 247.]

Argued Dec. 16, 1868. Decided Jan. 16, 1869.

IN ERROR to the Court of Appeals of the State of New York.

A writ of *mandamus* was sued out in this case in the Supreme Court of the State of New York, by the plaintiffs in error, to compel the Board of Supervisors of New York County to audit a claim for the repayment of certain taxes. The

respondents demurred to the petition, and the court sustained the demurrer and entered a judgment in their favor. The Court of Appeals affirmed the judgment, on appeal; whereupon plaintiff sued out a writ of error to this court.

A further statement of the case appears in the opinion of the court. See, also, the preceding case of *People v. Hoffman*.

Mr. Wheeler H. Peckham, for plaintiffs in error:

1. Credit of the United States is in all forms exempt.

Weston v. Charleston, 2 Pet., 456; *Bank of Commerce* case, 2 Black, 620 (67 U. S., XVII., 451); *Bank Tax* case, 2 Wall., 200 (69 U. S., XVII., 798); *Van Allen v. Assessors*, 8 Wall., 573 (70 U. S., XVIII., 229).

Legal tender notes are a form of that credit, issued on the credit of the United States, and are an exercise of the power to borrow money on the credit of the United States, and a tax on them is a tax on the credit of the United States.

Metropolitan Bk. v. Van Dyck, 27 N. Y., 400; *Hague v. Pothers*, 39 Barb., 427.

In every Act of Congress in which their issue is authorized, the language used is, "the Secretary of the Treasury is hereby authorized to issue on the credit of the United States, etc."

Act of Feb. 25, 1862, 12 Stat. at L., 845; Act of July 11, 1862, 12 Stat., 832; Joint Resolutions of Jan. 17, 1863, 12 Stat., 822; Act of March 3, 1863, 12 Stat., 710.

By the Constitution, Congress has the power to punish the counterfeiting of the securities, etc. In all the Acts authorizing the issue of these notes, provision is made for the punishment of those who counterfeit them, and in all such Acts they are called securities. If they are securities, they must represent the credit of the United States.

3. These notes are exempt, as being a contract of the United States.

Bank of Commerce case, 2 Black, 631 (67 U. S., XVII., 454); *Weston v. Charleston*, 2 Pet., 465.

4. The right of exemption is not peculiar to securities given on a direct loan of money.

See Act Aug. 4, 1790, 1 Stat. at L., 139; 1 Stat., 433, sec. 2; see Act authorizing the issue of treasury notes, 2 Stat. at L., 767, sec. 4, par. 802, sec. 5; 3 Stat. at L., p. 101, secs. 5, 6; and see list of Acts authorizing issue of treasury notes prior to 1844, in *note*, p. 766, 2 U. S., Stat.

5. They are declared exempt from state taxation by the United States Statutes.

Acts of Feb. 25, 1862; July 11, 1862; March 3, 1863; 12 U. S. Stat., pp. 345, 532 and 710, respectively.

6. The notes are exempt as a financial means or instrument of the government.

McCulloch v. Maryland, 4 Wheat., 316; *Osborn v. Bk of the U. S.*, 9 Wheat., 738.

7. That these notes are by statute made a legal tender, etc., does not make them the less exempt.

8. The statute declaring these notes exempt is constitutional.

9. The legal tender clause is unconstitutional. The Constitution has nowhere given to Congress the power to make its credit the currency of the country, or to make its credit money and, consequently, these notes cannot be money.

Messrs. Richard O'Gorman and Ch. O'Conor, for defendant in error:

1. The Acts of Congress relating to the financial operations of the government during the civil war, afford evidence that Congress did not intend that the notes in question should be exempt from state taxation.

They are, throughout, distinguishable from all other issues of the government, by a name especially and exclusively appropriated to them. They are called "United States notes."

12 Stat. at L., 345, secs. 1, 2; 12 Stat. at L., 709; 13 Stat. at L., 219, 221 and 222.

2. None of the general clauses of exemption apply to them.

3. If the special exemption expressed in the Act of March 3, 1863, sec. 1, 12 Stat. at L., p. 710, coupled with sec. 8 of the same Act, can be applied to "United States notes issued under the provisions of that Act," it is an anomalous case, probably an inadvertence or slip in legislation, and the plaintiff in error cannot derive any benefit from it on this writ of error.

4. An Act of Congress providing that lawful money paid by the government to its creditors should be forever exempt from taxation by state authority, would be unconstitutional and void. Consequently, if the exemption declared in the Act of March 3, 1863, be applicable to United States notes mentioned in sec. 3 of that Act, and the question is properly presented on the record, that exemption must be disallowed.

See the abstract of the argument of the above counsel in the preceding case.

Mr. Chief Justice Chase delivered the opinion of the court:

This case differs from those just disposed of in two particulars: (1) that the Board of Supervisors, which, in the other cases allowed and audited the claims of the banking associations, refused to allow the claim made in this case; and (2) that the exemption from state taxation claimed in this case was of United States notes, while in other cases it was of certificates of indebtedness.

The *mandamus* in the state court was, therefore, directed in the case now before us to the Board of Supervisors instead of the officers authorized to issue bonds as in the cases already decided.

The judgment of the Court of Appeals sustained the action of the Board, and the case is brought here by a writ of error to that court.

The general question requiring consideration is whether United States notes come under another rule in respect to taxation than that which applies to certificates of indebtedness.

The issues of United States notes were authorized by three successive Acts. The first was the Act of February 25, 1862, 12 Stat. at L., 345; the second, the Act of July 11, 1862, 12 Stat. at L., 582; and the third, that of March 3, 1863, 12 Stat. at L., 709.

Before either of these Acts received the sanction of Congress, the Secretary of the Treasury had been authorized by the Act of July 17, 1861, 12 Stat. at L., 259, sec. 6, to issue treasury notes not bearing interest, but payable on demand by the assistant treasurers at New York, Philadelphia, or Boston; and about three weeks later these notes, by the Act of August 5, 1861, 12 Stat. at L., 813, sec. 5, had been made receiv-

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able generally for public dues. The amount of notes to be issued of this description was originally limited to fifty millions, but was afterwards, by the Act of February 12, 1862, 12 Stat. at L., 388, increased to sixty millions.

These notes, made payable on demand, and receivable for all public dues, including duties on imports always payable in coin, were practically equivalent to coin; and all public disbursements, until after the date of the Act last mentioned, were made in coin or these notes.

In December, 1861, the state banks (and no others then existed) suspended payment in coin; and it became necessary to provide by law for the use of State bank notes, or to authorize the issue of notes for circulation under the authority of the National Government. The latter alternative was preferred, and in the necessity thus recognized originated the legislation providing at first for the emission of United States notes, and at a later period for the issue of the national bank currency.

Under the exigencies of the times it seems to have been thought inexpedient to attempt any provision for the redemption of the United States notes in coin. The law, therefore, directed that they should be made payable to bearer at the Treasury of the United States, but did not provide for payment on demand. The period of payment was left to be determined by the public exigencies. In the meantime the notes were receivable in payment of all loans, and were, until after the close of our civil war, always practically convertible into bonds of the funded debt, bearing not less than five per cent. interest, payable in coin.

The Act of February 25, 1862, provided for the issue of these notes to the amount of one hundred and fifty millions of dollars. The Act of July 11, 1862, added another hundred and fifty millions of dollars to the circulation, reserving, however, fifty millions for the redemption of temporary loan, to be issued and used only when necessary for that purpose. Under the Act of March 3, 1863, another issue of one hundred and fifty millions was authorized, making the whole amount authorized four hundred and fifty millions, and contemplating a permanent circulation, until resumption of payment in coin, of four hundred millions of dollars.

It is unnecessary here to go further into the history of these notes, or to examine their relation to the national bank currency. That history belongs to another place, and the quality of these notes, as legal tenders, belongs to another discussion. It has been thought proper only to advert to the legislation by which these notes were authorized, in order that their true character may be clearly perceived.

That these notes were issued under the authority of the United States, and as a means to ends entirely within the constitutional power of the government, was not seriously questioned upon the argument.

But it was insisted that they were issued as money; that their controlling quality was that of money, and that, therefore, they were subject to taxation in the same manner, and to the same extent, as coin issued under like authority.

And there is certainly much force in the argument. It is clear that these notes were intended to circulate as money and, with the

national bank notes, to constitute the credit currency of the country.

Nor is it easy to see that taxation of these notes, used as money, and held by individual owners, can control or embarrass the power of the government in issuing them for circulation, more than like taxation embarrasses its power in coining and issuing gold and silver money for circulation.

Apart from the quality of legal tender impressed upon them by Acts of Congress, of which we now say nothing, their circulation as currency depends on the extent to which they are received in payment, on the quantity in circulation, and on the credit given to the promises they bear. In these respects they resemble the bank notes formerly issued as currency.

But, on the other hand, it is equally clear that these notes are obligations of the United States. Their name imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver authenticated as such by the stamp of the government. No other dollars had before been recognized by the legislation of the National Government as lawful money.

Would, then, their usefulness and value as means to the exercise of the functions of government, be injuriously affected by state taxation?

It cannot be said, as we have already intimated, that the same inconveniences as would arise from the taxation of bonds and other interest bearing obligations of the government, would attend the taxation of notes issued for circulation as money. But we cannot say that no embarrassment would arise from such taxation. And we think it clearly within the discretion of Congress to determine whether, in view of all the circumstances attending the issue of the notes, their usefulness, as a means of carrying on the government, would be enhanced by exemption from taxation; and within the constitutional power of Congress, having resolved the question of usefulness affirmatively, to provide by law for such exemption.

There remains, then, only this question: has Congress exercised the power of exemption?

A careful examination of the Acts under which they were issued, has left no doubt in our minds upon that point.

The Act of February, 1862, 12 Stat. at L., 846, sec. 2, declares that "all United States bonds, and other securities of the United States, held by individuals, associations, or corporations, within the United States, shall be exempt from taxation by or under state authority."

We have already said that these notes are obligations. They bind the national faith. They are, therefore, strictly securities. They secure the payment stipulated to the holders, by the pledge of the national faith, the only ultimate security of all national obligations, whatever form they may assume.

And this provision is re-enacted in application to the second issue of United States notes by the Act of July 11, 1863, 12 Stat. at L., 546.

And, as if to remove every possible doubt from the intention of Congress, the Act of

March 3, 1863, 12 Stat. at L., 709, which provides for the last issue of these notes, omits, in its exemption clause, the word "stocks," and substitutes for "other securities," the words "Treasury notes or United States notes issued under the provisions of this Act."

It was insisted at the bar, that a measure of exemption in respect to the notes issued under this—different from that provided in the former Acts, in respect to the notes authorized by them—was intended; but we cannot yield our assent to this view. The rule established in the last Act is in no respect inconsistent with that previously established. It must be regarded, therefore, as explanatory. It makes specific what was before expressed in general terms.

Our conclusion is, that United States notes are exempt; and, at the time the New York statutes were enacted, were exempt from taxation by or under state authority.

The judgment of the Court of Appeals must, therefore, be reversed.

Cited—9 Wall., 589; 12 Wall., 584, 624; 59 Ind., 462; 20 Am. Rep., 274 (49 Ala., 219).

WILLIAM H. GAINES ET AL., *Appts.*,
v.

JACOB THOMPSON, Secretary of the Interior, AND JOSEPH S. WILSON, Commissioner of the Land Office.

(See S. C., 7 Wall., 347-357.)

Discretion of officer not subject to the control of the courts—canceling entry of land, when cannot be enjoined.

An officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes to him as a part of his official functions.

This doctrine is as applicable to the writ of injunction as it is to the writ of *mandamus*.

The canceling an entry for lands by the Commissioner of the Land Office, which he has been directed to do by the Secretary of the Interior, is not a ministerial act which can be enjoined by injunction from the courts.

[No. 1.]

Argued Dec. 23, 1863. Decided Jan. 18, 1869.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The bill in this case was filed in the Circuit Court of the District of Columbia, by the appellants, praying that the Secretary of the Interior and the Commissioner of the Land Office should be enjoined from making a cancellation of a certain entry, under which said appellants claim an equitable right to certain lands in Arkansas.

The court below, on hearing, entered a decree dismissing the bill. Thereupon the complainants took an appeal to this court.

A further statement appears in the opinion of the court.

Messrs. H. May, R. J. Brent, and I. L. Brent, for appellants:

In the case of *Hale v. Gaines*, 22 How., 160 (68 U. S., XVI., 269), the superior title of the complainants was vindicated as against the conflicting claims of private parties.

No opinion was expressed touching the claim of the United States, but that question was left

open, because the United States were not parties in that cause.

This bill was filed to obtain an injunction against the Commissioner of the Land Office and the Secretary of the Interior, to restrain the lawless act menaced by the Secretary of the Interior, and we maintain that in such a case an injunction against a public officer is right and proper.

4 Simonds, 13; 6 Simonds, 222; 6 Paige, 88; 2 Johns. Ch., 473; 2 Kent, 339, *note*; *Mississippi v. Johnson*, 4 Wall., 498, 499 (71 U. S., XVIII., 440); 6 Wall., 71-77 (73 U. S., XVIII., 723, 725).

Such a bill is proper to prevent a cloud being cast on a title, or to prevent the injurious act of a public officer.

3 How., 460.

The practice or opinion of the land office cannot control the action or opinion of the court in expounding the rights of parties claiming under the law.

20 How., 567 (61 U. S., XV., 998); 24 How., 361 (65 U. S., XVI., 694); *Lindsey v. Hawes*, 2 Black, 554, 556 (67 U. S., XVII., 263).

A preemption certificate confers an equitable right which courts will protect. It is not a shadowy right.

Lytle v. Arkansas, 9 How., 333; 15 Pet., 407; 3 How., 441.

The executive officers and the Land Department cannot violate law; and it is their duty to respect the decisions of the U. S. courts.

20 How., 567 (61 U. S., XV., 998); 10 Pet., 80. Courts will overrule them. 20 How., 3 (61 U. S., XV., 802).

The entry certificate conferred a legal right—vested a right; 18 How., 45 (59 U. S., XV., 286); 9 How., 333;

And can only be canceled by fraud or some unfairness.

22 How., 193 (63 U. S., XVI., 806); 3 How., 460; *Lytle's case* (2d time), 22 How., 203 (63 U. S., XVI., 809).

A reservation cannot prevail against a preemption right.

Wilcox v. Jackson, 13 Pet., 511; *U. S. v. Fitzgerald*, 15 Pet., 407; *Lytle's case*, 9 How., 334; *Barnard v. Ashley*, 18 How., 45 (59 U. S., XV., 286).

The Supreme Court has decided ours to be the best title against all the world, except the United States.

The settlement established the right to a patent, which gave a perfect legal title and went back by relation to the origin of the claim.

Landes v. Brant, 10 How., 348.

The Commissioner of the Land Office may correct errors; he is clothed with liberal powers, to be exercised for the purposes of justice.

Bell v. Hearne, 19 How., 262 (60 U. S., XV., 617).

William M. Evarts, *Atty. Gen.*, and **J. Hubley Ashton**, *Asst. Atty. Gen.*, for appellants:

The subject-matter is one in which judgment and discretion are to be exercised.

The learned *Chief Justice* in *Mississippi v. Johnson*, 4 Wall., 498 (71 U. S., XVIII., 440). "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It

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is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

Within the entire range of the executive authority, there are no functions less ministerial and more distinctly executive in their character than those which devolve upon the officers of the Land Department, in the administration of matters relating to the disposal of the public domain.

The judgment of registers and receivers on questions or right of preemption and entry, are subject to review by the Commissioner of the Land Office (*Barnard v. Ashley*, 18 How., 45 (59 U. S., XV., 286); and over all the judgments of that officer, a revisory jurisdiction is exercisable by the Secretary of the Interior. *Magwire v. Tyler*, 1 Black, 202 (66 U. S., XVII., 141).

The case is, therefore, within the rule which forbids judicial interference with the exercise of executive discretion.

This principle has been so lately expounded by this court, and so ably vindicated by the *Chief Justice* in the case of *Mississippi v. Johnson*, 4 Wall., 499 (71 U. S., XVIII., 441) that we deem it unnecessary to do more than refer to the other and previous adjudication of this court, and to leading opinions of Attorneys-General of the United States.

Kendall v. U. S., 12 Pet., 609; *Decatur v. Paulding*, 14 Pet., 515; *Kendall v. Stokes*, 8 How., 98; *Brashear v. Mason*, 6 How., 101; *Reeside v. Walker*, 11 How., 289; *U. S. v. Guthrie*, 17 How., 304 (58 U. S., XV., 106); 1 Op. Attys Gen., 681; 3 *Ibid.*, 681.

And there is nothing in this case which brings it at all within the decision of this court in the case *Marbury v. Madison*, 1 Cranch, 137.

All the cases cited by the appellants, in which the courts have undertaken to review ultimately the decisions and actions of the Land Office in the exercise of its statutory authority, where cases between private parties litigated after the legal title had passed by patent or otherwise out of the government.

Lytle v. Arkansas, 9 How., 333; 22 How., 202 (63 U. S., XVI., 309); *Cunningham v. Ashley*, 14 How., 383; *Barnard v. Ashley*, 18 How., 43 (59 U. S., XV., 285); *Garland v. Wynn*, 20 How., 7 (61 U. S., XV., 802); *O'Brien v. Perry*, 1 Black, 139 (66 U. S., XVII., 117); *Harkness v. Underhill*, 1 Black, 316 (66 U. S., XVII., 208); *Lindsey v. Hawes*, 2 Black, 557 (67 U. S., XVII., 267); *Minnesota v. Bachelder*, 1 Wall., 115 (68 U. S., XVII., 552).

Mr. Justice Miller delivered the opinion of the court:

The Secretary of the Interior having directed the Commissioner of the Land Office to cancel an entry under which the appellants claim an equitable right to certain lands in Arkansas, they brought their suit in the Circuit Court of the District of Columbia, praying that the Secretary and Commissioner should be enjoined from making such cancellation. The defendants entered their appearance, and Wilson, the Commissioner, filed a plea. The substance of this plea is that the matters set up in the bill are within the exclusive control of the Executive Department of the Government, the Secretary and Commissioner representing the Presi-

dent, and that the court had no jurisdiction or authority to interfere with the exercise of this power by injunction.

The extent of the jurisdiction which may lawfully be asserted by the Federal Courts over the officers of the Executive Departments of the Government, has been mooted in this court from the case of *Marbury v. Madison*, down to the present time; and while the principle which should govern the action of the courts in that regard have been settled long since, the frequent application of late to this court, and to other Federal Courts, for the exercise of power not belonging to them, shows that the question is one not generally understood.

In the case already referred to, of *Marbury v. Madison*, 1 Cranch, 137, the *Chief Justice* commented at some length upon the power of the courts over the action of the executive officers of the government, in the course of which he arrived at the conclusion that it is a question which must always depend upon the nature of the act. He then argues, that by the Constitution the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and for which he is accountable only to his country and his conscience, and that he has officers to aid him in the exercise of these powers, who are directly accountable to him. The acts of such an officer, he says, can never, as an officer, be examinable in a court of justice. He holds, however, that where an officer is required by law to perform an act, not of this political or executive character, which affects the private rights of individuals, he is to that extent amenable to the courts. The duty which it was held in that case could be enforced in the proper court by *mandamus*, was the delivery of a commission already signed by the President. The point, as there presented, was new and embarrassing, and it is no reflection on the distinguished jurist who delivered the opinion, to say that the rule which governs the court in its action, in this class of cases, has since been laid down with more precision, without conflicting with the principles there stated.

In the case of *McIntire v. Wood*, 7 Cranch, 504, an application was made to the Circuit Court for the District of Ohio for a *mandamus* to the register of the land office, to compel him to issue certificates of purchase to plaintiff for lands to which he supposed himself entitled by law. This court was of opinion that no power had been vested by Congress in the circuit courts to issue the writ in such cases. The reasoning of the court is not extended, but the case bears a strong analogy to the one under consideration.

But in *Kendall v. U. S.*, 12 Pet., 524, the majority of the court held that the courts of the District of Columbia had a larger power than the circuit courts, and could issue writs of *mandamus* to Federal officers in proper cases. As this is the first case in which the writ was actually ordered, it is worth while to examine the ground on which it was placed. "The act required to be done by the Postmaster-General," says the court, "is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the Postmaster-General had no discretion whatever. This was

not an official act in any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise."

In this language there is no ambiguity, and in it we find a clear enunciation of the rule which separates the class of cases in which the court will interfere from those in which it will not. In the subsequent case of *Decatur v. Paulding*, 14 Pet., 497, where the writ was refused, the *Chief Justice*, who had dissented in the former case, accepts both the doctrine of the right to issue the writ by the court of the district, and of the cases in which it may be issued, as settled by the case of *Kendall v. U. S.* "The first question, therefore, to be considered," he says, "is, whether the duty imposed upon the Secretary of the Navy by the resolution in favor of Mrs. Decatur was a mere ministerial act?" The case of *Mrs. Decatur* arose under an Act of Congress, and also a Joint Resolution of that body of the same date, both providing compensation for the services of her deceased husband; but the measure of this compensation (which was to be paid to her by the Secretary of the Navy) was in the Act different from what it was in the resolution. The Secretary held that but one of these was intended by Congress, and gave her the election. She brought suit to compel him to give her both. It is clear she had no other legal remedy. The United States could not be sued. The Secretary could not be sued in any other form of action than *mandamus*. But on the ground that the action of the Secretary involved the exercise of judgment and discretion, the order of the circuit court refusing the writ was sustained.

This case is cited and relied on in the case of *Commissioner of Patents v. Whiteley*, 4 Wall., 522 [71 U. S., XVIII., 335], and some of the observations of *Chief Justice* Taney, in delivering the opinion in the former, are so pertinent to the case before us, and state so well the relations of the judicial branch of the government to the officers engaged in the executive branch, that they may well be reproduced here.

Speaking of the functions of these officers, he says: "In general, such duties, whether imposed by Act of Congress or by resolution, are not mere ministerial duties. The head of an Executive Department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is required to act." "If," he says, "a suit should come before this court, which involved the construction of any of those laws, the court certainly would not be bound to adopt the construction given by the head of the department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But this judgment, upon the construction of the law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the Acts of Congress, in order to ascertain the rights of the parties before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise

his judgment in any case where the law authorized him to exercise judgment or discretion. Nor can it by *mandamus* act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary exercise of his official duties *** The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them."

To the same effect are also the cases, *U. S. v. Seaman*, 17 How., 225 [58 U. S., XV., 226]; *Same v. Guthrie*, 17 How., 284 [58 U. S., XV., 102]; *Same v. Commissioner of Land Office*, 5 Wall., 563 [72 U. S., XVIII., 692].

It may, however, be suggested, that the relief sought in all those cases was through the writ of *mandamus*, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is inapplicable to the writ of injunction as it is to the writ of *mandamus*.

In the one case the officer is required to abandon his right to exercise his personal judgment and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of *mandamus* or injunction.

Accordingly, in the case of *Mississippi v. Johnson*, 4 Wall., 475 [71 U. S. XVIII., 437], which was an application to this court for the writ of injunction, in the exercise of its original jurisdiction, the court says that it is unable to perceive that the fact that the relief asked is by injunction, takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

In the same case the Chief Justice gives us this clear definition of a ministerial duty in the relation in which we have been considering it: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law."

The action of the officers of the Land Department, with which we are asked to interfere in this case, is clearly not of this character. The

validity of plaintiffs' entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one Act of Congress. It has been for a long time before the department, and has received the attention of successive Secretaries of the Interior, and has been found so difficult as to justify those officers in requiring the opinion of the Attorney-General. It is far from being a ministerial act under any definition given by this court.

The numerous cases referred to by counsel, in which this court—after the title had passed from the United States, and the matter had ceased to be under the control of the Executive Department—has sustained the courts of justice in decreeing the equitable title to belong to the person against whom the department had decided, are not in conflict with these views, but furnish an additional reason for refusing to interfere with such cases while they remain under such control.

The decree of the Circuit Court is affirmed.

Cited—9 Wall., 312, 315, 577; 93 U. S., 173; 101 U. S., 475; 1 Hughes, 581, 583, 587; 4 Cliff., 412; 8 McC., 177.

THE LOUISIANA MUTUAL INSURANCE COMPANY, *Plff. in Err.*,

v.

JOHN P. TWEED.

(See S. C., 7 Wall., 44-53.)

Distinction between law and equity in Federal Courts in Louisiana—opinion of court below is not a finding of facts—exception in policy of insurance—cause of fire.

The distinction between law and equity prevails in the Federal Courts sitting in Louisiana, in the modes of proceeding, notwithstanding the State Civil Code.

The opinion of the court below is not a sufficient finding of facts within the Statute of Mar. 2, 1865, and the general rule.

Where an explosion produced or set in operation the fire which burned the plaintiff's cotton, the fact that it was carried to the cotton by first burning another building, will not so take the case out of the exception in a policy, that the insurers will not be liable for a loss which happened by means of an explosion.

Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse, be considered a new cause.

[No. 22.]

Argued Jan. 6, 1868. Decided Jan. 25, 1869.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

Mr. W. M. Evarts, for plaintiff in error:

An examination of the authorities will show that within any accepted interpretation of the rule of "*Causa proxima, non remota, spectatur*," the loss in this case was by "fire which happened or took place by means of explosion."

Gen. Mut. Ins. Co. v. Sherwood, 14 How., 387; *Peters v. Warren Ins. Co.*, 14 Pet., 110; *Magoun v. N. E. Mar. Ins. Co.*, 1 Story, 157; *Montoya v. Lon. Ass. Co.*, 6 Exch., 451; 4 Eng. L. & E., 500; *Tilton v. Hamilton Fire Ins. Co.*, 1 Bosw., 387; *Brady v. N. W. Ins. Co.*, 11 Mich., 425; *Lewis v. Springfield F. & M. Ins. Co.*, 10 Gray, 159; *Strong v. Sun Mut.*

Ins. Co., 81 N. Y., 108; *City Fire Ins. Co. v. Cortice*, 21 Wend., 867.

The leading case, touching directly in its circumstances the question now under judgment, is that of *St. John v. Am. Mut. F. & M. Ins. Co.*, considered in the Superior Court of New York, 1 Duer, 871, and in the Court of Appeals, 11 N. Y., 516.

"When it is provided by the conditions annexed to a policy of insurance against fire, that the company shall not be liable for any loss occasioned by the explosion of a steam boiler, or explosions arising from any other cause, unless specially specified in the policy, although fire may be the proximate cause of the loss that is claimed, the company is not liable when it appears that the fire was directly and wholly occasioned by an explosion."

It is apparent in the light of these authorities, that the insurers undertook, by the careful and full expression of the traits of the loss which they excepted from the stipulated indemnity, to exclude all opportunity of refinement and subtlety.

In terms, they secured for themselves exemption from liability, although fire was the immediate, direct and exclusive agent of destruction operating upon the insured property, and although the relation which explosion bore to this consummating cause, was merely the opening cause, by means of which the destroying fire should happen or take place.

Messrs. P. J. Sullivan, E. C. Billings, T. J. Durant, and Hughes, and Denver & Peck, for the defendants in error:

It is submitted that, upon the facts found, the loss or damage did not happen or take place by means of explosion, as the parties themselves understood the terms of the policy and the exception; and this without invoking the principle that, since the exception is the language of the insurers and for their benefit, it must be construed more strongly against them.

To reconcile the instrument of insurance as a whole, the cause insured against and the cause excepted must have been meant by the parties to be only the direct cause, and with this line of demarcation, the consuming fire was wholly outside of the exception.

But not only the manifest intent of the parties, but the principle of law as settled by harmonious and well-nigh universal adjudication, places the fire which consumed the insured cotton out of the dominion of the exception, and leaves it within the indemnification of the policy. The exception includes only fires which may happen by means of explosion. The policy includes fires which may happen or take place by all other means. The law makes the means excepted and the means reserved to be direct means, the medium. Lord Bacon, *Regula*, l, pp. 85 and 86, has given us a comprehensive maxim, of which all the decisions, so far as they are authority, are but illustrations. *In jure non remota causa sed proxima spectatur.*

Little v. Janson, 13 East, 648; *Green v. Elmslie*, Peake, N. P., 278; *Hodgson v. Malcolm*, 5 Bos. & P., 336; *Jones v. Schmoll*, sitting after Trinity, 1785, case stated in 2 Arn. Ins., Perk. ed., 764, and in 1 D. & E., 180, note; *Redman v. Wilson*, 14 Mees. & W., 476; *Ionides v. Univer. Mar. Ins. Co.*, 8 Law T. (N. S.), 705; *Marsden v. City and Co. Assur. Co.*, 18

L. T. (N. S.), 465; *Thompson v. Hopper*, El., Bl. & E., 1088; S. C., 5 Jur. (N. S.), 93.

The American authorities assert, with equal positiveness and insist with equal strictness, upon the distinction maintained in Lord Bacon's maxim.

Col. Ins. Co. v. Lawrence, 10 Pet., 507; *Waters v. Merch. Louisville Ins. Co.*, 11 Pet., 213.

It is submitted that the doctrine of the cases cited is, that the exception cannot be made to cover fires which were simply preceded by or remotely contributed to by explosion, but that wherever the explosion as a direct agency in kindling or communicating fire ended, just at that point, the force of the exception stops; and it is found as a fact, that not only had the force of the explosion been spent, and more than a half hour elapsed before the insured property was set on fire, but that when ignited it was set on fire by a cause entirely distinct from the explosion.

Mr. Justice Miller delivered the opinion of the court:

The action in the case before us was brought in the Circuit Court for the Eastern District of Louisiana, on a policy of insurance, and was tried by the court without a jury. There is no bill of exceptions. There is no ruling on any proposition of law raised by the pleadings. The evidence seems to be copied into the transcript, but whether it is all the testimony, or how it came to be here, there is nothing to show. There is, in fact, nothing which a writ of error can bring here for review, tested by the rules of the common law.

The distinction between law and equity prevails in the Federal Courts sitting in Louisiana, in the modes of proceeding, notwithstanding the Civil Code, which governs the practice as well as the rights of parties in the state courts. On account of the peculiarity in practice in that State, it has been decided in several cases coming from the state courts of Louisiana to this court by writ of error, that we would regard the statements of fact found in the opinions of the court as part of the record, where they were in themselves sufficient and otherwise unobjectionable. And perhaps this may in practice have been extended to cases from the Federal Courts of that district. But in regard to the latter, we are not now at liberty to do so. The Act of March 3, 1865 (18 Stat. at L., 501), by its fourth section, provides a clear and simple mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed here, and also prescribes what may be reviewed in such cases. This statute, which is but a reproduction of the system in practice in many of the States, is as binding on the Federal Courts sitting in Louisiana as elsewhere, and we cannot disregard it.

We are asked in the present case to accept the opinion of the court below as a sufficient finding of the facts within the statute, and within the general rule on this subject. But with no aid outside the record we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the evidence and not the facts as found from that

evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, "reasons for judgment."

But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made.

Upon an examination of the facts thus stated, and placing upon them that construction most favorable to the judgment of the court, we are of opinion that it cannot be sustained.

The insurance was against fire, and covered certain bales of cotton in the Alabama warehouse in Mobile. The policy contained a proviso that the insurers should not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion, earthquake or hurricane.

During the time covered by the policy, an explosion took place in the Marshall warehouse, situated directly across the street, which threw down the walls in the Alabama warehouse, scattered combustible materials in the street, and resulted in an extensive conflagration, embracing several squares and buildings, among which the Alabama warehouse and the cotton stored in it were wholly destroyed.

The only question to be decided in the case is, whether the fire which destroyed plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract.

That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy.

It must be taken that the fire was not communicated directly from the Marshall warehouse, in which the explosion occurred, to the Alabama warehouse, but that it came more immediately from another building—the Eagle Mill—which was itself fired by the explosion. Some stress is also laid by the plaintiff on the circumstance that the wind was blowing in the direction from the Eagle Mill to the Alabama warehouse. But the whole fire was a continuous affair from the explosion, and under full headway in about half an hour.

Under these circumstances, we have cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.

One of the most valuable of the criteria furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

In the present case we think there is no such

new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building, supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. That may have been the usual course of the breeze in that neighborhood. Its force may have been trifling. Its influence in producing the fire in the Alabama warehouse was too slight to be substituted for the explosion as the cause of the fire.

But there are other causes of fire mentioned in the exempting clause, and they throw light on the intent of the parties in reference to this one. If the fire had taken place by means of invasion, riot, insurrection or civil commotion, earthquake or hurricane, and by either of these means the Marshall warehouse had been first fired, and the fire had extended, as we have shown it did, to the Alabama warehouse, would the Insurance Company have been liable?

Could it be held as necessary to exemption that the persons engaged in riot or invasion must have actually placed the torch to the building insured, and that in such case, if half the town had been burned down, the Company would have been liable for all the buildings insured, except the one first fired? Or if a hurricane or earthquake had started the fire, is the exemption limited in the same manner?

These propositions cannot be sustained, and in establishing a principle applicable to fire originating by explosion, we must find one which is equally applicable under like circumstances to the other causes embraced in the same clause.

Without commenting further, we are clearly of opinion that the explosion was the cause of the fire in this case, within the meaning of the policy, and that the judgment of the Circuit Court must be reversed, and a new trial granted.

Cited—9 Wall., 128, 431; 18 Wall., 262; 19 Wall., 542; 95 U. S., 131; 105 U. S., 251; 2 Flipp., 669; 3 Dill., 108, 109; 12 Blatchf., 29, 30; 62 Pa., 368; 14 Am. Rep., 15 (59 Ill., 349); 23 Am. Rep., 222 (10 Vroom., 390); 24 Am. Rep., 755 (4 Iowa, 402); 25 Am. Rep., 450 (34 Ill., 200); 34 Am. Rep., 386 (127 Mass., 348).

THE STEAMSHIP CHINA, Her Tackle,
etc., THE BRITISH AND NORTH AMERICAN
ROYAL MAIL STEAM PACKET COMPANY,
Claimant, App.,

v.

LOUIS WALSH and BENJAMIN CARVER.

(See S. C., "The China," 7 Wall., 58-71.)

*New York pilot law—vessel liable for collision
which occurred through fault of pilot.*

The Statute of New York, of April 3, 1857, compels the master of a vessel to take a pilot. The fact that the law compels the master to take the pilot does not exonerate the vessel from liability for damages for a collision which was entirely the result of his gross mismanagement.

[No. 21.]

Argued Jan. 5, 1869. Decided Jan. 25, 1869.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The respondents, as owners of the brig Kentucky, filed their libel in the District Court of the United States for the Southern District of New York, against the steamship China, one of the Cunard packets, alleging that July 17, 1868, the said steamship China negligently collided with the said brig, Kentucky, and caused the loss of the vessel and the destruction of her cargo.

The British and North American Royal Mail Steam Packet Company intervened as claimants of The China, and in their answer admit the collision, but deny that said collision was in consequence of any negligence of the officers or crew of the said steamer.

The answer further alleges that, "at the time of said collision, the said steamer China was in charge of a pilot duly licensed by virtue of certain Acts of the Legislature of the State of New York; that said pilot was taken in conformity with the requirements of the laws of the State of New York; that the said pilot directed all the maneuvers of the steamer, which preceded the collision; and the respondents claim and insist that by reason thereof, they are not responsible for any loss or damage caused thereby."

The proofs fully sustained the allegation of the libel, that the steamer China was in fault in the collision, and the brig Kentucky was wholly free from blame.

The allegation of the answer, that the collision occurred while the steamer China was in charge of a pilot licensed under the laws of New York, and that he directed the maneuvers which preceded the collision, was also proved.

A decree was made by His Honor, Judge Betts, for the libelants, and a reference to a commissioner ordered to compute their damages.

The commissioner reported the damages at \$19,898.84, and, upon exceptions, his report was confirmed and a decree entered for the amount.

Upon an appeal by the claimants to the circuit court, and a hearing before His Honor, Judge Nelson, this decree was affirmed; whereupon the respondents took an appeal to this court.

MR. D. D. LORD, for appellants:

By Acts of the Legislature of New York, passed April 11, 1864, amended by Act of April 8, 1867, the owners of The China were compelled to submit her to the control of a pilot, licensed in conformity with their provisions.

These laws are more strict than the English Statutes for Liverpool and Newcastle, which have been held compulsory, although they impose no penalty for refusing a pilot, other than the payment of his fees.

The Maria, 1 Wm. Rob., 98; *The Agricola*, 2 Wm. Rob., 10; *Smith v. Condry*, 1 How., 28. The Statute of New York differs from that of Pennsylvania, which has been held not compulsory, in making unlicensed pilotage a misdemeanor, punishable by fine and imprisonment, and in giving full fees instead of half

fees to the pilot rejected. This later provision alone would show a prohibitory intention in the New York Statute, not existing in that of Pennsylvania.

The Statute of New York and the rules established under their authority by the Pilot Commissioners, precluded masters and owners of vessels, not only from an uncontrolled selection of pilots, but even of the right of choosing from amongst those licensed by the commissioners.

The enactments of the Statutes of New York were binding in conscience as well as in law.

They were provisions to insure the public welfare.

It is morally wrong to pilot without a license, or to employ others to do so when a statute declares it to be a misdemeanor; or even when a statute forbids it, although without sanction of a punishment.

The owners of The China could not have refused a New York pilot in the expectation of being able to select a pilot from New Jersey. The pilot laws of New Jersey and rules of their commissioners are similar to those of New York, and give ship-owners no more right of selection.

Nixon, Elmer, Dig., p. 623, secs. 1, 18, 17-87; *Rules of N. J. Commis.*, 19, 9, 18-81.

Even if owners might select between a pilot assigned them by the N. J. Commissioners, and one assigned them by the N. Y. Commissioners such a selection, if made, would not have been so voluntary as to subject them to responsibility,

The Batavier, 2 Wm. Rob., 410.

The pilot thus put in charge of The China by force of the statute was not under the control of her owners or officers; they might displace him if drunk or manifestly incompetent, and they might offer him suggestions; but so long as he remained in charge of the ship they were obliged to submit to his decisions, and execute his orders with promptness, even when contrary to their own opinions of what was expedient or even prudent.

The Argo, Swab., 463; *The Lochibo*, 3 W. Rob., 310, 321.

The owners of The China cannot be justly held responsible for the acts of the pilot whom they had no power either to select or control, but to whom they were, nevertheless, compelled to surrender their ship.

The Argo, Swab., 462; *The Fama*, 2 W. Rob., 184; *The Batavier*, 2 W. Rob., 407; *The Agricola*, 2 W. Rob., 10; *The Maria*, 1 W. Rob., 95; *The Protector*, 1 W. Rob., 45; *The Christiana*, 2 Hagg., 188; *Ritchie v. Boucfield*, 7 Taunt., 309; *Bennet v. Moita*, 7 Taunt., 258; *Carruthers v. Sydebotham*, 4 Maule & S., 77.

These decisions are not controverted by *Atty. Gen. v. Case*, 3 Price, 302, nor by *The Neptune* 2d Dod., 467. In the former case the vessel was anchored and, therefore, not bound to take the pilot who caused the damage; and in the latter case the compulsory statute, then recently passed, was overlooked, as is stated by Dr. Lushington, who was counsel in the case.

1 W. Rob., 405; *Smith v. Condry*, 1 How., 28.

The only English cases in conflict with those above cited are Sir John Nichol's decisions in *The Transit*, 1 Monthly Law Mag., 582; *The Girolamo*, 4 Hagg., 169. These decisions he followed without further opinions, in *The Baron Helberg*,

3 Hagg., 244; *The Gladiator*, 3 Hagg., 340; *The Eskides*, 3 Hagg., 367; but they were all founded on a clear misconception of Lord Stowell's opinion in *The Neptune* 2d, and an erroneous construction of sec. 87 of the British General Pilot Act, which, as Sir J. Nichol supposed, permitted those claims from which owners were expressly exempted, to be enforced in admiralty against their vessels.

These cases, however, have all been expressly overruled by later cases above cited.

The American cases do not conflict with the principles above stated. They all arose from the acts of pilots not taken by compulsion of law.

The Carolus, 3 Curt., 71, acknowledges the injustice of holding vessels responsible for pilots taken by compulsion of law.

In *The Lotty*, Olcott, 329, the pilot was not licensed, but taken when all laws regulating pilotage in the harbor of New York had been repealed.

See *Laws*, 1845, p. 80.

U. S. v. Farnham, 2 Blatchf., 528. This pilot was not a branch pilot, but one of the regular crew of a North River steamboat.

Bussy v. Donaldson, 4 Dall., 206; *Yates v. Brown*, 8 Pick., 23; *Smith v. The Oracle*, 2 Wall. (C.C.), 485, held the vessel responsible for pilots, on the ground that the statutes under which they were taken were not compulsory. This construction, first given to the Statutes of Pennsylvania, in *Bussy v. Donaldson*, 4 Dall., 206, was followed in the other cases. These decisions, however, do not apply to cases where the pilot was taken by compulsion of law.

Messrs. Wm. M. Evarts and Charles E. Whitehead, for respondents:

The theory of this specific responsibility of the offending vessel to make good the injury which her improper navigation has inflicted upon an innocent sufferer, proceeds upon reasons, both of justice and policy, which exclude the protection against such responsibility here asserted.

Accordingly, in practical execution of this theory, the very blow which inflicts the culpable injury upon the innocent vessel, impresses in her favor a lien of indemnity upon the offending vessel. The proceeding *in rem* of the admiralty, is but a judicial consummation of this lien, and requires for its support nothing but proof of such fault of the vessel as, by the rules of maritime law, raises the lien.

To displace this lien and defeat this recourse *in rem*, and thus reduce the sufferer to recourse against the individual in fault, is, in effect, to supplant the admiralty jurisdiction and the admiralty procedure, and overthrow the reasons of justice and policy upon which they are built up.

Such consequences can be assigned only to legislation of paramount authority over the jurisprudence and jurisdiction.

The pilotage regulations found in the legislation of the State of New York do not assume to contravene or modify the recourse in the admiralty, by which, through the proceeding, *in rem*, the offending vessel makes good to the innocent sufferer the injury it has inflicted.

The State has undertaken to impose a duty upon all vessels embraced within its provisions, See 7 WALL.

"bound to or from the Port of New York by way of Sandy Hook," of paying pilotage, whether they employ a pilot or not, and to superadd a payment of \$100 to the Pilot Commissioners in case of the employment of a pilot not licensed within the permission of the Act.

No penal consequences whatever are visited upon the vessel or its owners, from an omission to employ one of the pilots provided by the Act, and a contribution of the pilotage fees of the vessel to the pilot service, provided by the Act, discharges every obligation, moral and legal, imposed by the terms and policy of this legislation.

To import from this limited policy and narrow expression, into the legislation of the State of New York, the purpose and effect of liberating all vessels in charge of these pilots from responsibility for injuries inflicted by culpable navigation, and to oust the admiralty jurisdiction and jurisprudence of the United States in the premises, is extravagant and preposterous. *Atty-Gen. v. Case*, 3 Price (Exch.), 302.

The British Statutes to which, as a paramount authority, the British Court of Admiralty has accorded the consequence of protecting from all responsibility for culpable injuries inflicted during navigation, by and obedient to the directions of pilots in charge, have made determinate and peremptory provisions, both of compulsion upon the vessel to employ the pilot, and an exemption from responsibility while directed by him.

The doctrine of the British Admiralty Court, that the enjoining by statute of the taking of a pilot, and in case of refusal, requiring the payment of pilotage dues, amounts to a compulsion to take a pilot and exempts the ship from responsibility while navigated under his charge, has never been followed in this country.

The doctrine is held in *The Maria*, 1 W. Rob., 102.

It seems never to have found favor with Sir William Scott. *The Neptune* 2d, 1 Dod., 467.

And the whole doctrine seems to be regarded with great distrust, notwithstanding the policy has been adopted in the statutes.

The courts insisted that the pilot must be shown affirmatively to have been wholly to blame, and that the *onus* of this proof rested upon the party setting up the exemption.

The General de Caen, Swab., 10; *The Mobile*, Swab., 69, 128; *The Diana*, 1 W. Rob., 135; *The Protector*, 1 W. Rob., 45; *The Massachusetts*, 1 W. Rob., 378; *The Christiana*, 7 Moore (P. C.), 160; *The Schwalbe*, 14 Moore (P. C.), 241.

And finally, in a very recent case, and upon a full examination, this doctrine of exemption by reason of the compulsory employment of a pilot has been pronounced by Sir Robert Phillimore, a contravention of natural justice and of sound policy.

The Halley, L. R., 2 Adm. & Eccl., 3. See also, *The Minna*, *Ibid.*, 97; *The Lion*, *Ibid.*, 102.

The American cases are of uniform tenor, and the whole subject has been recently reviewed, and the doctrine of continued liberality, notwithstanding the pilot regulations of the statutes, firmly established by Mr. Justice Grier, in an important case in the Pennsylvania District.

Bussy v. Donaldson, 4 Dall., 206; *Williamson v. Price*, 4 Mart. (N. S.), 399; *Yates v. Brown*, 8 Pick., 23; *Denison v. Seymour*, 9 Wend., 1;

Smith v. Condry, 1 How., 28; *The Lotty*, Olcott, 329; *The Croole*, 2 Wall., Jr., 485; opinion of *Mr. Justice Grier*, pp., 511-520.

Mr. Justice Swayne delivered the opinion of the court:

This is a case arising out of a collision between the steamship *China*, a British vessel, then leaving the Port of New York for Liverpool, and the brig *Kentucky*, then on a voyage from Cardenas to New York. The facts are few and undisputed. The collision occurred on the 15th July, 1863, a short distance outside of Sandy Hook. The brig was sunk. The steamship was wholly in fault. It was not alleged, in the argument here for the appellants, that there was either fault or error on the part of the brig. The case turns upon the effect to be given to the Statute of New York of the 8d of April, 1857. At the time of the collision the steamship was within the pilot waters of the Port of New York, and was in charge of a pilot, licensed under this Act, and taken by the master pursuant to its provisions. The pilot's orders were obeyed, and the catastrophe was entirely the result of his gross and culpable mismanagement. No question was made in the argument upon the subject; the evidence is too clear to admit of any. These are all the facts material to be considered.

The questions with which we have to deal are questions of law. No others arise in the case.

It is insisted by the appellants that the statute referred to compelled the master of the steamship to take the pilot, and that they are, therefore, not liable for the results of his misconduct.

British adjudications are relied upon in support of both these propositions. In order to appreciate these authorities, the British Pilot Acts must be understood. They are the 53 George III., ch. 80; the 6 George IV., ch. 125; the Shipping Act of the 17 and 18 Victoria, ch. 104; the Liverpool Pilot Act of 37 George III., ch. 789; and the Newcastle Pilot Act of the 41 George III., ch. 86. The first three mentioned contain equivalent provisions. The same remark applies to the latter two. The former all contain a clause to the effect that the "owner or master of any ship shall not be answerable for any loss or damage occasioned by the neglect, default, incompetency or incapacity of any licensed pilot." The latter contain a system of local pilot regulations, but have no such provision. They require that a pilot shall be taken, and if not taken, the pilotage shall, nevertheless, be paid. In these respects, and in most others, they are substantially the same with the Statute of New York.

1. Was the steamship compelled to take the pilot?

In the case of *The Maria*, 1 W. Rob., 95, in which the Liverpool Pilot Act was largely considered, Dr. Lushington said: "It never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid, was not compulsory. * * * * * Now, the Liverpool Pilot Act provides for three cases: 1. The case of vessels homeward bound; 2. Of vessels outward bound; and lastly, of vessels lying at anchorage; and with reference to homeward bound vessels, it is pro-

vided in the 24th section of the Act, that if the master refuses to take a pilot on board, he is liable to the payment of pilotage. There is, therefore, this distinction in the two cases: that in the case of a vessel at anchor, the taking of the pilot on board is perfectly optional with the master, but in the case of a homeward bound vessel, it is enjoined upon him by the provisions of the Act, and if he refuses so to do, he is rendered liable to the payment of the pilotage dues. This, in my opinion, amounts to compulsion to take such pilot on board, and it was so held by the learned judges by whom the case of *Sidebotham v. Caruthers* was decided. What says *Mr. Justice Le Blanc*? 'It appears that the master was compellable to take the pilot on board, and it was in consequence of his misconduct that the vessel was placed in such a situation, that when the water left her, she fell upon her side, and thus the damage happened.' Without going further into the case, it is sufficient to observe, that Lord Ellenborough and *Mr. Justice Bailey* were of the same opinion, that the master was compellable to take the pilot on board."

1 W. Rob., 95.

Other authorities to the same effect might be referred to, but it is deemed unnecessary. The one we have cited is sufficient.

Suppose the New York Statute, in the event of a refusal to take a pilot on board, instead of full pilotage had given the vessel or cargo to the pilot. Whether the amount to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact, but in the degree of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is, that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed. The alternatives presented are to receive the pilot or to refuse and take the consequences.

In this connection it is proper to consider the particular provisions of the New York Statute. It enacts that the master "shall take a licensed pilot;" that in case of refusal, pilotage shall be paid, and that it shall be paid to the first pilot offering his services. Any person not holding a license under this Act, or the law of New Jersey, who shall pilot or offer to pilot any vessel to or from the Port of New York, by way of Sandy Hook, except such as are exempt by virtue of this Act; or any master on board a steam tug who shall tow such vessel without a licensed pilot on board, shall be punished by a fine not exceeding \$100, or imprisonment not exceeding sixty days; and all persons employing a person not licensed under this Act, or the laws of New Jersey, are subjected to a penalty of \$100.

It was contended by the counsel for the appellee, that if the master had chosen to proceed without a pilot, he would have been liable only to the payment of pilotage; and that none of the other penal provisions of the statute, according to its true meaning, apply in such a case. We have not found it necessary to ex-

amine this subject. Giving to the statute either construction, it seems to us clear, in the light of both reason and authority, that the pilot was taken by the steamship upon compulsion.

2. This brings us to the examination of the second proposition. Does the fact that the law compelled the master to take the pilot, exonerate the vessel from liability?

The immunity of the wrong-doing vessel when the pilot is in charge, and alone in fault, is now well settled in English jurisprudence, both in the Admiralty Court and in the courts of common law. The rule must necessarily be the same in both. In such cases the liability of the ship and of the owner are convertible terms. The ship is not liable if the owners are not; and no responsibility can attach to the owners, if the ship is not liable to be proceeded against. *The Druid*, 1 W. Rob., 399.

Some of the leading English cases will be adverted to, according to the order of time in which they were determined.

The case of *The Neptune*, 1 Dod., 467, was decided two years after the passage of the Statute of 52 George III. In that case Sir William Scott said: "If the mere fact of having a pilot on board and acting in obedience to his directions, would discharge the owner from responsibility, I am of opinion that they would stand excused in the present case. I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this I conceive is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount, as well as they can, against him. It cannot be maintained that the circumstance of having a pilot on board, and acting in conformity to his directions, can operate as a discharge of the responsibility of the owners." The statute is not adverted to in the case.

In *The Atty-Gen. v. Case*, 3 Price, 303, it was held by the Court of Exchequer that the case was to be determined under the Liverpool Pilot Act, and that the statute containing the clause of exemption did not apply; that the vessel being at anchor, it was optional with the master to take a pilot or not, and that the vessel was, therefore, liable. It was strongly intimated that if she had been under way, and the pilot had been taken under the Liverpool Act, there would have been no such compulsion as, upon general principles, would have exonerated the vessel from responsibility.

In *Carruthers v. Sydebotham*, 4 M. & S., 88, the Court of King's Bench held that the pilot was compulsorily taken, and that, independently of the statute giving the exemption, the vessel, upon general principles of municipal law, was not liable. *Atty-Gen. v. Case* was referred to in the argument. The ruling of the court was in direct antagonism to the intimations in that case.

The Girolamo, 8 Hagg., 169, was decided by Sir John Nichol. He held, among other things, that the provision in the 6 George IV., that "the Act should not affect or impair the

jurisdiction of the High Court of Admiralty," limited the operation of the clause of exemption to proceedings in *personam* in the common law courts, and left the admiralty jurisdiction to be exercised in all respects as if the exemption in the statute had not been enacted. The judgment is a very elaborate one. The vessel was held liable, although in charge of a licensed pilot at the time of the collision.

This case was followed by *The Baron Holberg*, 3 Hagg., 244, *The Gladiator*, 3 Hagg., 340, and *The Eolides*, 3 Hagg., 367—decided by the same judge in the same way.

So the English law stood until the decision by Dr. Lushington in the case of *The Protector*, 1 W. Rob., 45. In that case the subject was examined with great care and fullness of research. The learned judge expressed the opinion that Sir William Scott had decided the case of *The Neptune* in entire ignorance of the Statute of 52 George III., ch. 39, and that the case, therefore, was not authority. He overruled the judgment of Sir John Nichol as to the effect of the jurisdiction clause of the statute, and held the true rule to be, that the statute took away the responsibility of the vessel whenever the accident was imputable to the fault of the pilot alone. The court found the fact so to be, and upon that ground dismissed the owner of *The Protector* from the suit.

In *The Maria*, 1 W. Rob., 95, the subject was again ably examined by the same admiralty judge. It was held that under the Newcastle Pilot Act the taking of a pilot by a foreign ship was compulsory, and that if damage occurred to another vessel by his default, the vessel which had taken him was not liable, both upon general principles and by virtue of the Act of 5 George IV., ch. 55. The rule laid down by the Court of King's Bench in *Carruthers v. Sydebotham*, 4 M. & S., 78, was recognized and affirmed.

These judgments have stood unquestioned down to the present time. There have been numerous adjudications settling the construction of the statutory provision that the vessel shall be exonerated where the pilot is in fault.

The following propositions may be deduced from them:

The statute giving the immunity where a licensed pilot is employed, abridges the natural right of the injured party to compensation, and is, therefore, to be construed strictly.

The exemption applies only where the pilot is actually in charge of the vessel, and solely in fault.

If there be anything which concurred with the fault of the pilot, in producing the accident, the exemption does not apply, and the vessel, master and owners are liable.

The colliding vessel is in all cases *prima facie* responsible.

The burden of proof rests upon the party claiming the benefit of the exemption. He must show affirmatively that the pilot was in fault, and that there was no fault on the part of the officers or crew, "which might have been in any degree conducive to the damage." *The Gen. De Caen*, 1 Swab., 10; *The Diana*, 1 W. Rob., 135; *The Protector*, 1 W. Rob., 60; *The Christiana*, 7 Moore, P. C., 171; *The Minna*, Law Rep. (Ad. & Ecc.), pt. 2, Nov., 1868, p. 97; *The Iona*, Law Rep., 1 P. C., 432.

The last in the series of these authorities to be considered, is *The Halley*, Law Rep., 1868, pt. 2 (Ad. & Ecc.), p. 8. The owners of a foreign ship sued the owners of an English ship in the British Court of Admiralty, claiming damages for a collision in Belgian waters. The defendants pleaded that by the Belgian law pilotage was compulsory. The plaintiffs replied, that by the same law the wrong-doing vessel was liable for the damages. The case turned upon the sufficiency of the latter proposition as an answer to the former.

Sir Robert Phillimore, following the case of *Smith v. Condry*, decided by this court (1 How., 28), and other authorities to which he referred, held that the rights of the parties were governed by the law of the place of the tort. In the course of his learned and elaborate opinion, he said:

"The English Legislature has thought it expedient that only certain persons, under certain restrictions, shall be allowed to act as pilots in British waters; and that it shall be compulsory upon all masters of ships to place the navigation of their vessel under the control of one of these licensed pilots. And the common law of England has ruled, that in such cases, the natural responsibility of the owner of the vessel, for injuries done to the property or persons of others, by the unskillful navigation of that vessel, shall cease, and be transferred to the pilot. This law holds, that the responsibility of the owner, for the acts of his servant, is founded upon the presumption that the owner chooses his servant, and gives him orders, which he is bound to obey; and that the acts of the servant, so far as the interests of third parties are concerned, must always be considered the acts of the owner. But no such presumptions, it is said, can exist in the case of compulsory pilotage, in which the State forces its own servant upon the owner, and, indeed, in some respects reverses the usual order of things on board ship, by rendering it incumbent on the master to obey the order of the pilot. But the considerations of domestic policy, which have created this peculiar law, are not founded on principles of universal law or natural justice. They are considerations of British policy, which apply to British waters and territory; but not Flushing waters, in which this collision took place. * * * Lord Stowell's mind, furnished as it was with the principles of jurisprudence, rejected the argument for the immunity of the wrong-doing vessel. * * * I will frankly say, that it appears to me difficult to reconcile the claims of natural justice to the law which exempts the owner who has a licensed pilot on board, from all liabilities for the injuries done, by the bad navigation of the ship, to the property of an innocent owner. * * * No one acquainted with the working of this law, which exempts the wrong-doing vessel from liability in this court, can be ignorant that it is fruitful of injustice."

This survey of the English adjudications warrants several observations.

Lord Stowell, overlooking the statute, refused to recognize the principle of exemption. He held the "true rule of law" to be, that fault created liability, notwithstanding that the pilot was taken upon compulsion.

Sir John Nichol made a persistent effort to get rid of the statute by giving the jurisdiction

clause a construction which annulled the operation of the exemption in the Admiralty Court.

Dr. Lushington and the Privy Council have held that the exemption clause is to be strictly construed, and have given it a construction so narrow as greatly to limit its operation and impair its efficacy; while Sir Robert Phillimore pronounced its working in the Admiralty Court "fruitful of injustice," and more than intimates that it is contrary to the fundamental principles of natural right.

These results furnish little inducements to us to establish the principle in our jurisprudence.

The question is not a new one in this country. It arose as early as the year 1800, in *Bussy v. Donaldson*, 4 Dall., 206. In that case the court said:

"The legislative regulations were not intended to alter or obliterate the principles of law, by which the owner of a vessel was previously responsible for the conduct of the pilot, but to secure in favor of every person—strangers as well as residents—trading to our port, a class of experienced, skillful and honest mariners, to navigate their vessels safely up the bay and the River Delaware. The mere right of choice is, indeed, one, but not the only reason why the law in general makes the master responsible for the acts of his servant—and, in many cases where the responsibility is allowed to exist, the servant may not in fact be the choice of the master."

Williamson v. Price, 4 Mart. N. S., 899; *Yates v. Brown*, 8 Pick., 23; and *Denison v. Seymour*, 9 Wend., 1, involved the same principle, and were decided in the same way.

In the case of *The Creole*, decided by Mr. Justice Grier, on the circuit, in the year 1853, 2: Wall., Jr., 485, the subject underwent a learned and thorough examination, both by counsel and the court. The result was the same as in *Bussy v. Donaldson*. It appears by that case, that Mr. Justice Wayne had ruled the point in the same way in his circuit. No American adjudication to the contrary has been brought to our attention.

The question is now, for the first time, presented in this court.

The New York Statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrong-doing vessel. Such a provision in a state law would present an important question, which, in this case, it is not necessary to consider.

The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent. 15 East, 189; 4 M. & S., 77; 6 B. & C., 657; *Milligan v. Wedge*, 12 Adol. & Ell., 737; *Reedie v. Railway Company*, 4 Exch., 244.

The reasoning by which the application of this principle to the case before us is attempted to be maintained, is specious rather than solid. It is necessary that both outward and inward bound vessels, of the classes designated in the statute, should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed by providing a body of trained and skillful seamen, at all times ready for the service, holding

out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship. The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance. It is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all cases of great necessity. *The Argo*, 1 Swab., 464; *The Christiana*, 7 Moore, P. C., 172. The master has the same power to displace the pilot that he has to remove any subordinate officer of the vessel. He may exercise it or not, according to his discretion.

The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors. *The Phoebe*, 1 Ware, 278; *The Oreole*, 2 Wall., Jr., 519.

The maxim of the civil law—*sic utere tuo ut alienum non laedas*—may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment—especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. According to the admiralty law, the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. Unlike a common law lien, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances. *The Bold Buccleugh*, 7 Moore, P. C., 284; *Edwards v. The Stockton*, Crabbe, 580; *The American*, 16 Law Rep., 264; *The Lion*, Law Rep., Nov. 1868 (Adm. & Eccl.), 102.

The proposition of the appellants would blot out this important feature of the Maritime Code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien.

All port regulations are compulsory. The provisions of the Statute of New York are a part of the series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she

in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation, and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. We think the rule which works this result is a wise and salutary one, and we feel no disposition to disturb it.

The steamship is a foreign vessel. We have, therefore, considered the learned and able argument of the counsel for the appellants with more care than we should otherwise have deemed necessary. Maritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case.

The decree of the Circuit Court is affirmed.

Mr. Justice Clifford, dissenting:

I concur in the proposition that the Pilot Laws of New York afford no defense to the appellants in this case, and that the decree of the circuit court, determining that the colliding steamship was liable, notwithstanding she had a licensed pilot on board, ought to be affirmed. Many English cases decide otherwise, but I am not satisfied with the reasons given in their support, and have no hesitation in concurring in the conclusion to which the majority of the court has come; but I do not concur in the proposition that the state laws which require inward or outward bound vessels to pay pilot fees or half pilot fees, whether they employ a pilot or not, would afford any such defense in a case of collision, even if it be admitted that a law imposing penalties, in case of a refusal to employ a licensed pilot, would have that effect. Whether the party charged is liable or not, aside from the merits, depends in all cases upon his relation to the wrong-doer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable, and he is equally so if the act constituting the fault was done by one towards whom he bore the relation of principal; but the liability ceases where the relation of principal entirely ceases to exist, as in case of inevitable accident. Unless the relation of principal entirely ceases to exist, the party owning the vessel remains liable in a suit *in personam*.

When the vessel is chartered, the liability of the owner, in respect to a collision happening in consequence of the faulty navigation of the ship, depends upon the inquiry whether or not the master and crew can be considered to be his servants. Settled rule is that where the ship-owner provides the vessel only, and the master and crew are selected by the charterer, the latter and not the ship-owner is responsible for their acts. But if the ship-owner provides not merely the vessel, but also selects the master and crew, he is still liable, in case of collision, to the owners of the injured vessel, because the vessel, in the sense of the maritime law, is under his control, though the wages of the master and crew may be paid by the charterer. Such liability in the former case is shifted from the real owner to the owner for the voyage; but the ship is as much liable in the one case as in the other to a suit *in rem* for the injury committed, because she sailed on the voyage as

the property of the real owner and by his consent.

Port regulations are supposed to be known to the ship-owner before he sends his vessel on the voyage, and the rule of the maritime law is, that in sending her to any particular port he elects to submit to the lawful regulations established at that port, and that his vessel shall be responsible in case she unlawfully collides with another vessel engaged in lawful navigation. Contrary to the rule adopted in the English admiralty, the American courts have so held without an exception which has fallen under my observation. *The Carolus*, 2 Curt., 69; *The Hallock*, 1 Sprague, 589; *Bussy v. Donaldson*, 4 Dall., 206; *Yates v. Brown*, 8 Pick., 23; *Willamson v. Price*, 4 Mart. (N. S.), 399; *Denison v. Seymour*, 9 Wend., 1; *Smith v. Condrey*, 1 How., 28; *The Lotty*, Olcott, 329; *The Creole*, 2 Wall., Jr., 511; *The Rescue*, 2 Sprague, 16.

All of these cases decide that the state statutes requiring the master to take a licensed pilot and making provision for the payment of pilot fees, do not amount to a compulsion to take a pilot, and I am satisfied they are correct, and that such a statute cannot be set up as exempting a ship from responsibility while navigated by a licensed pilot.

Believing those decisions to be correct, I cannot consent to pronounce them incorrect, especially as no such conclusion is necessary to the right disposition of the present case. Neither the common law courts nor the courts of admiralty, in this country, have adopted the rule established by Dr. Lushington. On the contrary, they all have held that the state laws requiring the master to pay pilot fees, whether he employed a pilot or not, did not compel him to surrender the navigation of his ship to the licensed pilot, or prevent him from continuing in the command of his ship. Dissenting as I do from the rule laid down in the English courts, I concur with the majority of the court in overruling those decisions as applied to our jurisprudence, but I cannot concur in overruling the American decisions which assert the opposite doctrine, because I believe they are correct.

I am requested to say that *Mr. Justice Field* concurs in this opinion.

Cited—14 Wall., 202; 91 U. S., 546; 98 U. S., 107; 1 Ben., 489; 5 Ben., 66; 1 Bro., 179; 19 Am. Rep., 400 (117 Mass., 109); 43 Am. Rep., 737 (88 N. C., 123).

THE ST. PAUL AND PACIFIC R. R. CO.,
WILLIAM B. LITCHFIELD AND B. H.
FITZ, *Plffs. in Err.*,

CASPER H. SCHURMEIER;

AND

ST. PAUL AND PACIFIC R. R. CO., *Appt.*,

GEORGE D. HUMPHREYS, LUCIUS H.
FERRY AND MOSES M. BROADWELL.

(See S. C., 7 Wall., 272-290).

River as a boundary—navigable streams highways—right to erect wharves—rights of municipalities in streets—railroad in streets.

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The river and not the meander line run by the U. S. surveyors is the boundary of a lot on a river.

Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways.

Riparian proprietors on such streams have the right to construct suitable landings and wharves, for the convenience of commerce and navigation.

A municipal corporation takes the title to streets in trust, impliedly if not expressly, designated by the acts of the party in making the dedication.

It cannot, nor can the State, appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant, such as the laying of a railroad track.

[Nos. 37, 38.]

Argued Jan. 12, 1869. Decided Jan. 25, 1869.

IN ERROR to the Supreme Court of the State of Minnesota, and,

Appeal from the Circuit Court of the United States for the District of Minnesota.

The case is stated by the court (the opinion and argument refer especially to first of the above causes).

Messrs. Thomas A. Hendricks, H. R. Bigelow, and George L. Becker, for plaintiffs in error:

If under his patent Lewis Roberts acquired and held beyond the meander boundary of lot 1, so as to include Island No. 11 (eleven), and the intervening space, then by his dedication of a part thereof to the City of St. Paul in 1849, for a public landing, levee and highway, his property in such part passed from him and vested in the city, and he cannot restrain any public use thereof which is agreeable to the city.

Stat. Wis., 159; see, also, Organic Act of Minnesota Territory, 9 Stat. at L., 407, sec. 12.

By the dedication, the control passed from the proprietor to the city, and if there be any remedy for a disregard of the purpose of the dedication, it must be against the city.

The improvements made upon these grounds and the use made of them, are consistent with the duties and obligations of the city under the donation thereof. It received the donation for a public landing, levee and highway; a place where the mingling trade and commerce of the country and the river might be conveniently carried on. The locality should be so improved, if possible, as to accommodate all the wants of commerce at that point; and if trains of cars bringing passengers and freight from a vast region of country, as well as drays and wagons, are allowed to load and unload upon it, it will be a proper and judicial use of the property, and a faithful discharge of the trust.

People v. Kerr, 27 N. Y., 188; 1 Redf. Railw., 260, 262, sec. 13; *Phila. & R. R. R. v. Philadelphia*, 47 Pa., 325.

The appellant claimed the lawful right to construct, maintain and use its railroad upon the premises in question, upon two grounds: first, that it owned the land under the Congressional grant of 1857, and the territorial and state transfers thereof, and possessed the authority to use the same in the prosecution of its enterprise; and second, if such claim were not good, then its structure was authorized by the territorial and state laws, upon the premises dedicated to the public as a landing, street and highway. Until the validity of these claims of lawful right had been tested at law, and adjudged against the appellant, the owner of ad-

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joining private property could not maintain proceedings for injunction, even though he sustained special loss and inconvenience.

Irwin v. Dixion, 9 How., 10.

In this cause the appellant claims that at the date of the Congressional land grant, the lands in front of lot 1, section 5, including 1st and 11, were undisposed of by the United States and, therefore, have come to and vested in appellant under that grant. If this claim be well made, then the right to locate the railroads thereon is not questionable.

The meander posts were upon the left bank of the river, and their location is fixed by the described bearing trees. The river is not a call in the survey; the survey does not extend to the river, but only to the post and described trees upon the bank. Lot 1 in its boundaries does not extend to the river, but only so near as the points where the township and section lines intersect the left bank as fixed by the posts.

Dunlap v. Stetson, 4 Mas., 349; *Bates v. Ill. Cent. R. R. Co.*, 1 Black, 204 (66 U. S. XVII., 158); *Leaven v. Smith*, 7 Port., 428.

The bank of a stream is defined to be "the continuous margin where vegetation ceases, and the shore is the pebbly, sandy or rocky space between that and the lower water mark."

3 Sumn., 170; *Walker v. Smith*, 2 Pa. St. 48; *Yountkin v. Cowan*, 34 Pa., 198; *Hall v. Tanner*, 4 Pa., 244.

Mr. Lorenzo Allis, for defendant in error:

The patent to Roberts calls for lots numbered (1) one, and two (2) of section 5, in township 28, north of range 22 west, in the district of lands subject to sale at the Falls of St. Croix, Wisconsin, containing 10 $\frac{1}{4}$ acres, according to the official plat of the survey of said lands, returned to the General Land Office by the Surveyor General.

This description as to lot No. 1, clearly calls for a parcel of land bounded on the north by the east and west fractional line, and on the west by the north and south fractional line, and on the only other remaining side by the water-course, that is, the Mississippi River; for with these boundaries it was duly surveyed, platted and mapped; and such survey, plat and map were duly approved and returned to the General Land Office; and according to such survey, plat and map, it was duly patented as aforesaid.

The plaintiffs in error claim that the southerly boundary of this parcel of land is not the water-course or Mississippi River, but the meander line which a surveyor can run along the course of the river for the purpose of determining the quantity of land.

In the United States Government surveys, the boundaries are the north and south and east and west lines of the sections and townships, and in the case of fractions also, the natural or exterior object which causes the fraction, as a water-course, Indian territory, etc. The monuments are the section posts and quarter-section posts.

The meander lines are not boundaries. They are not even known to the laws or Acts of Congress. The term "meander" is simply used to designate certain lines run by the surveyors along the windings of water-courses bounding

fractions, for the purpose of ascertaining and returning the quantity of land in such fractions.

The Acts of Congress explicitly define monuments, and provide where they shall be placed.

They are to be set down at the township, section and quarter-section corners.

And these Acts provide that from these monuments all lines shall be run north or south or east or west, until other like monuments or their places shall be reached, or until some water-course or other exterior object intervenes.

There is no provision whatever for meandering a water-course, or running any line along its bank or the thread of the stream. But the quantity of land in a fraction must be returned; hence the surveyor runs lines along the bank of a water-course, to determine the quantity of land in the fraction.

Bright. Dig., 466, sec. 41; 493, sec. 208; Lester, Land Laws, 709.

If the surveyor make an error in his return as to the quantity of the land, or if the quantity is erroneously stated in the patent, this will not affect the grant. The grantees will take according to the boundaries of the land described.

Lindsey v. Hawes, 2 Black, 554 (67 U. S., XVII., 265.)

The survey, including the maps, plats, field notes and certificates returned into the Land Office, and pursuant to which the grant is made by the patent, is a matter of record, and of equal dignity with and a part of the patent.

See case last above cited; also 2 Bouv. Dic., 566, term "Survey," and authorities cited.

The government is concluded by the survey according to which the grant is made. Any subsequent survey of the land by the government made after the grant, is void and without effect as to the grantees.

Lindsey v. Hawes (*supra*); *Bates v. Ill. Cent. R. R. Co.*, 1 Black, 204. (66 U. S. XVII., 158).

So any survey not made in pursuance of the Acts of Congress, is void. *Brown v. Clements*, 3 How., 650.

It is clear, therefore, that Roberts' patent "calls" for the Mississippi River as one of the boundaries of his grant.

Now, it is happily beyond question, that a call for a river or water-course as a boundary is a call for the thread of the stream or center of the channel. Ang., Water-courses, ch. 1, 13; *Middleton v. Pritchard*, 3 Scam., 510; *Ex parte Jennings*, 6 Cow., 518, and note on p. 536; *Gavit v. Chambers*, 8 Ohio, 496; *Mewson v. Fryor*, 7 Wheat., 7; *Jones v. Soular*, 24 How., 63 (65 U. S., XVII., 608); *Bates v. Ill. Cent. R. R. Co.* (*supra*); 3 Kent, 427, Lect., 52, subd. 2, Riparian Rights; *Schurmeier v. St. Paul & P. R. R. Co.*, 10 Minn., 82.

It is conceived that the decision of the Supreme Court of Minnesota in the case at bar (see last case above cited) on this question, settles the law for that State, and is also conclusive on this point in this court.

This court has determined and settled this rule of property in precisely the same way. *Jones v. Soular* (*supra*).

The Supreme Court of Minnesota, in its decision of this case, call attention to the fact that even if the other rule of property were to be adopted, and the riparian proprietor was only to be allowed to take to the low water mark; yet, even under this rule Robert's patent would

include the land claimed by the plaintiffs in error. See *Schurmeier v. St. Paul & P. R. R. Co.*, 10 Minn., 99.

But let us assume, for the purposes of this case, that the fee to the premises in question passed to the plaintiffs in error under the Congressional Land Grant, precisely as claimed by them.

The land, clearly, would be held by them as it would be by any other grantee from the United States, subject to the easement of a public landing.

Their occupation, therefore, is, in no sense nor aspect, a legalized obstruction, and hence it is a public nuisance.

The decision of the Supreme Court of Minnesota, therefore, upon the question of boundary in this case, does not, necessarily, affect the final judgment which they reached and rendered in the case.

And since it appears that its decision of this question does not, necessarily, affect the final conclusions reached and judgments rendered by that court, this court will not disturb such judgment.

It is nevertheless not in the power of the Legislature of Minnesota, even if it were so disposed, to authorize these obstructions upon the public landing of a great national highway of commerce like the Mississippi River. Const. U. S., art. IV., sec. 2; Ordinance of 1787, art. IV., last clause; Act, Cong., May 18, 1796, sec. 9; 1 Stat. at L., 468; Bright. Dig., 500, sec. 282.

Mr. Justice Clifford delivered the opinion of the court:

Complainant alleged that he was the owner in fee, and in the actual possession of the real estate described in the bill of complaint, together with the stone warehouse thereon erected. As described, the premises are situated in the City of St. Paul, County of Ramsey, and State of Minnesota; and the allegation is, that the lot extends to and adjoins the public street and levee which run along the left bank of the Mississippi River in front of that city; that the said street and levee constitute the public landing for all steamboats and other vessels bound to that port, and the place where all such vessels receive and discharge their freight and passengers; that the street, levee and public landing, occupy the whole space between this lot and the bank of the river, in front of the same, and that he is the owner in fee of that whole space, subject to the public right to use and occupy the same as such street, levee and public landing.

Based upon these preliminary allegations, the charge is, that the Corporation respondents were then engaged, without his license or consent, in extending and constructing their railroad over and along the said public street, levee and landing, in front of his premises, with the design and purpose of running their cars on the same for the transportation of freight and passengers; and the complainant alleged that the effect would be, if the design and purpose of the respondents should be carried out, that the said public street, levee and landing, could not be occupied and used for the purposes for which they were constructed, and to which they were dedicated, and that his premises would be rendered useless and valueless.

Two defenses were set up by the respondents in their answer.

First. They denied that the fee of the land described in the bill of complaint, as a public street and levee, or public landing, was ever in the complainant, or that he ever had any right, title or interest in the land between his premises and the main channel of the river.

Second. They alleged that all the land between the premises of the complainant and the river in front, were part and parcel of the land surveyed by the United States, and granted by the Act of Congress of the 8d of March, 1857, to the Territory of Minnesota, and that they were the owners of the same in fee, as the grantees of the Territory and State, to aid in the construction of their railroad.

Defense of the other respondents is, that all the acts charged against them were performed by the direction and under the authority of the respondent Corporation.

Prayer of the bill of complaint was, that the respondent might be restrained from extending and constructing their railroad over and along said public street, levee or landing, and from obstructing and impeding the free use of the same by the public.

By consent of parties, it was subsequently ordered by the court that the cause be referred to a sole referee, to hear and determine all the issues in the pleadings, and that he should report his determination to the court. Such a report was subsequently made by the referee, and the record shows that the court, in pursuance of the same, enjoined the respondents, as prayed in the bill of complaint, and ordered, adjudged and decreed that the respondents should remove from the street, levee and landing in front of the complainant's premises, all tracks, trestleworks, embankments, buildings and obstructions of every kind erected or constructed thereon by them for railroad purposes.

Appeal was taken by the respondents from the decree, as rendered in the District Court for that county, to the Supreme Court of the State, where the decree was in all things affirmed, and the respondents removed the cause into this court, by a writ of error, sued out under the 25th section of the Judiciary Act.

1. Express finding of the referee was, that the premises in question were included in that part of section five, township twenty-eight north, in range twenty-two west of the fourth principal meridian, which is situated on the north side of the center line of the Mississippi River. He also found that the survey of that part of section five was made by the deputy-surveyor, October 27, 1847; that the field notes of the survey were duly communicated to the Surveyor-General, and that the latter officer, on the 15th of March following, duly approved the survey as made by the deputy-surveyor. Same report also shows that a plat of that part of section five was duly prepared and certified by the Surveyor-General, on the same day, and that it was duly transmitted to the land office of the district where the land was situated. By that plat it appears that the land, as surveyed, consisted of two separate parcels called lots one and two, in the report of the referee, exhibited in the record. Lot one, the tract in question, is situated in the northwest corner of the section, and contains the quantity of land described

in the official survey and plat. Particular description of lot two is unnecessary, as it is not in controversy in this case.

Both of those lots were purchased by Lewis Roberts, and on the 24th of March, 1849, a patent, in due form of law, was issued to him, for the same, by the proper officers of the United States. Possessed of a full title to all the land described in the patent, the purchaser caused lot one to be surveyed and laid out into town blocks, lots, streets, etc., as a part of the Town of St. Paul, and the finding of the referee is, that the plat, as recorded, describes the land as extending to the main channel of the river. Block twenty-nine, as exhibited on that plat, includes lots eleven and twelve, described in the bill of complaint, and the report of the referee shows that they are a part of the triangular fraction of land situated in the northwest corner of section five, as delineated on the official plat.

Claim of the complainant is to lots eleven and twelve, in block twenty-nine, and the finding of the referee is, that he holds the same through certain *meane* conveyances, from the original grantee under the patent.

Congress granted to the Territory of Minnesota, by the Act of the 3d of March, 1857, for the purpose of aiding in the construction of certain railroads, every alternate section, designated by odd numbers, for six sections in width, on each side of the respective railroads therein mentioned, and their branches, and the respondents claim title to the premises described in the pleadings under that Act of Congress, as the grantees of the State. 11 Stat. at L., 195; State Sess. Laws (1857), p. 70; Gen. Laws (1858), 9; Sess. Laws (1862), 226.

Title claimed by the complainant, being of prior date to that set up by the respondents, will be first examined, because, if it be sustained as including the premises in controversy, an examination of the title of the respondents will not be necessary.

Since the Town of St. Paul was organized under her city charter, passed March 4, 1854, the city government has exercised municipal authority and control over the entire parcel of land lying between the main channel of the river and block twenty-nine, where the complainant's warehouse is situated. Claiming entire control over the premises, as a street, levee or landing, the city authorities have established a grade for the same and, long before any attempt was made by the respondents to controvert the title of the complainant, they had made large progress in the work of reducing the surface of the land to the established grade.

Appellants contend that the river is not a boundary in the official survey; that the tract, as surveyed, did not extend to the river, but that the survey stopped at the meander posts and the described trees on the bank of the river. Accordingly, they insist that lot one did not extend to the river, but only to the points where the township and section lines intersect the left bank of the river, as shown by the meander posts.

The finding of the referee also shows that the meander line of lot one was run, in the official survey, along the left or north bank of a channel which then existed between that

bank and a certain parcel of land in front of the same, afterwards designated as Island Eleven, but which was not mentioned in the field notes of the official survey, nor delineated on the official plat.

Conceded fact is, that those field notes constituted the foundation of the official plat, and that that plat was the only one in the local land office at the time the patent was issued under which the appellee claims. When the water in the river was at a medium height, there was a current in the channel, between what is called the island and the bank, where the meander posts were located, but when the water was low, there was no current in that channel and, when the water was very high in the river, the entire parcel of land, designated as the island, was completely inundated.

No mention is made of any such channel in the official survey, under which the patent was issued; but the deputy-surveyor, under the instructions of the land office, on the 18th of March, 1856, made a new survey of the parcel of land lying between that channel and the main channel of the river, and the field notes of the same were subsequently approved by the Surveyor-General. Duplicates of that survey were communicated to the General Land Office, and the finding of the referee shows that the plat exhibits the true relation which that tract bears to lot one in that section. Prior to that survey, however, the City of St. Paul had filled the channel, and reclaimed the land at the west end of the same, and extended the grade of the street and levee or landing entirely across the island to the main channel of the river. Besides, the uncontradicted fact is, that the landing for boats and vessels, touching at that port, was always on the river side of the island, and the finding of the referee shows that the front wall of the complainant's warehouse is not more than four feet north of the southerly line of the lot on which it is erected.

Surveyors were directed by the Act of Congress of the 20th of May, 1785, to divide the territory, ceded by individual States, into townships of six miles square, by lines running due north and south, and others crossing these at right angles, * * * "unless where the boundaries of the tracts purchased from the Indians rendered the same impracticable." 1 Land Laws, 11.

Congress preserved the same system also in the Act of the 17th of May, 1796, in respect to the survey and sale of the lands northwest of the Ohio River, but the latter Act recognizes two other necessary exceptions to the general rule. 1 Stat. at L., 464. Public lands therein described were required to be divided by north and south lines running according to the true meridian, and others crossing them by right angles, so as to form townships of six miles square, "unless where the line of the late Indian purchase, or of the tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render it impracticable." By the 9th section of that Act, it is provided that all navigable rivers within the territory mentioned in that Act, should be deemed to be, and remain, public highways, and that, in all cases where the opposite banks of any stream, not navigable, shall belong to different

persons, the stream and the bed thereof should become common to both. 1 Stat. at L., 468.

Provision was made by the Act of February 11, 1806, that townships should be "subdivided into sections, by running straight lines from the mile corners, marked as therein required, to the opposite corresponding corners, and by marking on each of the said lines intermediate corners, as nearly as possible equidistant from the corners of the sections on the same." Corners thus marked in the surveys, are to be regarded as the proper corners of sections, and the provision is, that the corners of half and quarter sections, not actually run and marked on the surveys, shall be placed, as nearly as possible, equidistant from the two corners standing on the same line. 2 Stat. at L., 313. Boundary lines actually run and marked on the surveys returned, are made the proper boundary lines of the sections or subdivisions for which they were intended, and the second article of the 2d section provides, that the length of such lines, as returned, shall be held and considered as the true length thereof. Lines intended as boundaries, but which were not actually run and marked, must be ascertained by running straight lines from the established corners to the opposite corresponding corners; but where no such opposite corresponding corners have been, or can be fixed, the boundary lines are required to be ascertained by running from the established corners due north and south, or east and west, as the case may be, to the water-course, Indian boundary line, or other external boundary of such fractional township.

Express decision of the Supreme Court of the State was, that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion of the state court we entirely concur. *Schurmeier v. The Railroad*, 10 Minn., 82.

Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary.

Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream; but the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be and remain public highways. Grants of land bounded on rivers above tide water, says *Chancellor Kent*, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*,

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as a public highway. 8 Kent, Com. (11th ed.), 427.

The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the center of it, and he, consequently, holds that the fee passes to that extent. Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country. Except in one or two States, those rules have been adopted in this country, as applied to rivers not navigable, when named in a grant or deed as a boundary to land. Substantially the same rules are adopted by Congress as applied to streams not navigable; but many Acts of Congress have provided that all navigable rivers or streams in the territory of the United States, offered for sale, should be deemed to be, and remain public highways. 1 Stat. at L., 491; 2 Stat. at L., 285, 279, 642, 666, 708, 747; 3 Stat. at L., 849.

Irrespective of the Acts of Congress, it should be remarked, that navigable waters, not affected by the ebb and flow of the tide, such as the great lakes and the Mississippi River, were unknown to courts and jurists, when the rules of the common law were ordained; and even when the learned commentaries were written, to which reference is made, it was still the settled doctrine of this court, that the admiralty had no jurisdiction except where the tide ebbed and flowed. *The Jefferson*, 10 Wheat., 428; *The Genesee Chief*, 12 How., 456; *Hine v. Trevor*, 4 Wall., 565 [71 U. S., XVIII., 454].

Extended discussion of that topic, however, is unnecessary, as the court decides to place the decision, in this case, upon the several Acts of Congress, making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys. Such a reservation, in the Acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent, especially as there is nothing in the field notes, nor in the official plat or patent, inconsistent with that explicit reservation. Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words "navigable" and "not navigable," in that sense, as usually understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide-waters, and in which there were no salt water streams.

Viewed in the light of these considerations, the court does not hesitate to decide, that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering

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on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways.

Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide. *Dutton v. Strong*, 1 Black, 23 [66 U. S., XVII., 29].

Argument is scarcely necessary to show, in view of the definite regulations of Congress upon the subject of the survey and sale of the public lands, that the second survey of the space between block twenty-nine and the main channel of the river, cannot affect the title of the complainant as acquired from the United States under the antecedent official survey and sale. *Lindsey v. Hawes*, 2 Black, 554 [67 U. S., XVII., 265]; *Bates v. R. R. Co.*, 1 Black, 204 [66 U. S., XVII., 158]; *Brown v. Clements*, 8 How., 650.

Attempt is also made to justify the acts of the respondents, as grantees of the State, upon the ground that the complainant, in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same, and that the entire title vested in fee in the State. Respondents rely for that purpose upon the Statute of the Territory of Wisconsin, which was then in force in the Territory of Minnesota. Stat. Terr. Wis., p. 159.

Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to the suit, because it is nevertheless true, that the municipal corporation took the title in trust, impliedly, if not expressly, designated by the acts of the party in making the dedication. They could not, nor could the State, convey to the respondents any right to disregard the trust, or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant.

Considered in any point of view, our conclusion is, that the decree of the state court was correct; and the decision in this case also disposes of the appeal brought here by the same appellants, from a decree rendered by the Circuit Court of the United States for the District of Minnesota, in favor of George D. Humphreys and others, which was a bill in equity against the same respondent Corporation. The appeal in that case depends substantially upon the same facts, and must be disposed of in the same way.

Both decrees are affirmed.

Cited—10 Wall., 110, 118, 504, 506; 21 Wall., 302; 23 Wall., 65; 109 U. S., 684; 3 McC., 205; 4 Dill., 569; 1 Bls., 203, 204; 27 N. J. Eq., 639; 90 N. Y., 175; 64 Ill., 490, 492; 23 Minn., 23, 130; 18 Am. Rep., 306 (41 Ind., 41); 23 Am. Rep., 657 (54 Ind., 474); 34 Am. Rep., 664 (12 R. I., 848); 37 Am. Rep., 401 (26 Minn., 23, 34, 220); 40 Am. Rep., 335 (26 Kan., 932); 43 Am. Rep., 157 (90 N. Y., 122); 33 Wis., 263; 42 Wis., 243; 340 St., 512; 61 Mo., 351.

THE UNITED STATES, *ex rel.* P. S. BENBOW, *Plff. in Err.*,

v.

THE MAYOR AND ALDERMEN OF IOWA CITY, IOWA.

(See S. C., 7 Wall., 813-815.)

See 7 WALL.

Mandamus, insufficient return to.

Where a *mandamus* commanded a municipal corporation to levy a tax on its property, sufficient to pay a judgment against it, and collect the tax and pay the judgment, a return to the writ that it did levy a tax for the purpose of paying the judgment and other claims is insufficient, and a demurrer to the return should be sustained.

[No. 17.]

Submitted Dec. 24, 1868. Decided Jan. 25, 1869.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. James Grant, for plaintiff in error:

Leaving out of consideration the formal objections to the return, that it is not sealed, signed nor sworn to, it purports to obey the writ and undertakes to say wherein it has obeyed it. The demurrer shows, as the strongest argument we can make, that the writ commanded a specific levy of a tax sufficient to pay this judgment, to collect said tax and to pay said judgment.

The return is, that the defendants have levied a tax, not a specific tax, of one per cent., without saying on what amount of valuation, "sufficient to pay this judgment and other claims." It does not state the amount or nature of such other claims, whether judgment or simple contract; whether for interest or other similar bonds, or for debts not entitled to this levy under the ordinance which authorized this debt. The mandate ordered a levy and collection of the tax; the return, made six months after the date of the levy, does not aver the collection of the tax, but that the levy has been delivered to the proper officer to collect. Who is he? The mandate is to collect and pay; the return is silent on these two clauses of the writ. It is no return.

[No counsel appeared in this court for defendants in error.]

Mr. Justice Davis delivered the opinion of the court:

The relator recovered judgment on the coupons attached to certain bonds, which Iowa City issued to pay its subscription to the stock of the Mississippi and Missouri Railroad Company, and having failed by the ordinary process at law to obtain satisfaction of his judgment, applied to the Circuit Court for a *mandamus* to compel the Mayor and Aldermen in obedience to the provision of the ordinance authorizing the issue of these bonds, to levy and collect the requisite tax to pay the judgment.

The court awarded the writ and commanded they Mayor and Aldermen forthwith to levy a specific tax upon the taxable property of the City for the year 1865 sufficient to pay the judgment, interest and costs; collect the tax and pay the same, or show cause to the contrary by the next term of the court.

The defendants made return to the writ, that "In obedience to the order of the court they did proceed to levy a tax of one per cent. upon the taxable property of the said City for the purpose of paying the judgment named in the information and other claims, and that the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied."

The sufficiency of the return is the sole question in the case. The return does not deny the

obligation of the writ, nor offer an excuse for not obeying it, but states to the court that its command has been obeyed.

Is this true? The writ commanded that the taxes should not only be levied, but collected and paid to the relator, before the return day of the writ, yet, there is no averment of their collection and payment, nor an excuse furnished for non-performance. If it was impossible to collect and pay the taxes in the time allowed, the return should have stated facts from which the court could have inferred a legal excuse for not doing it. On this point the return is wholly silent.

But the defect in this return reaches much further. In so far as it avers performance, it does it only in the words of the writ, which, if nothing more were required, would put the defendants in place of the court. To make the return properly responsive to the writ, it was necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator.

How could the court decide on the sufficiency of the levy to accomplish the purpose of the writ, without knowing the value of the taxable property of the City? The court should not only have been advised of the amount on which the levy was formed, but as the writ commanded, the year in which the valuation was made. The return is also defective in another important point. The mandate was to levy a specific tax to pay the relator's judgment; the return is, that the tax was levied to pay the judgment and other claims. The nature and extent of these claims were not given, and the court had, therefore, no means of ascertaining whether the fund to be raised would be sufficient for their discharge, and the satisfaction of the relator's demand. But, apart from this, there was no authority to import outside claims into this levy.

The relator has been deprived of his annual interest, because these defendants had neglected to provide for it, as they were required to do by the ordinance which authorized the creation of the debt. To compel the performance of this omitted duty the *mandamus* was issued, and it did not empower the Mayor and Aldermen to embarrass the levy which it directed, by joining with it other obligations against the City, with which this relator had no concern.

Without pursuing the subject further, enough has been said to show that the demurrer to the return should have been sustained.

The judgment of the Circuit Court is reversed, and the cause remanded with directions to proceed in conformity with this opinion.

Cited—98 U. S., 388; 108 U. S., 484; 1 McCrary, 370; 1 Hughes, 285; 5 Dill., 328; 12 Am. Rep., 443 (7 Kan., 479).

THE UNITED STATES, *Plff. in Err.*,
v.

MICHAEL SHOEMAKER, WILLEY R.
REYNOLDS, AND PETER B. LOOMIS.

(See 8 C., 7 Wall., 338-342.)

Collector, when cannot receive extra compensation.

Under the Acts of May 7, 1832, and Aug. 23, 1842, a collector cannot receive extra compensation for the disbursement of public moneys.

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[No. 49.]

Argued Jan. 15, 1869. Decided Jan 25, 1869.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The case is stated by the court.

Messrs. W. M. Everts, Atty-Gen., and J. Hubley Ashton, for plaintiffs in error.

Mr. W. A. Moore, for defendant in error:
By Act of Congress of March 3, 1869, sec. 3 (B. D., p. 820), and by Act of Aug. 23, 1842, sec. 2, it was provided, it is true, that no officer in the public service, whose pay was fixed by law or regulation, should receive any compensation in any form for the disbursement of public money, unless such extra compensation was provided by law, and a clear appropriation made therefor.

These statutes were construed by this court in *Hoyt v. U. S.*, 10 How., 141.

But it is submitted that the cases contemplated by these statutes are those where the special duties are imposed upon the officers by law; and therefore, they are such duties that he must assume and perform them if he holds the office. Where such is not the case, and this disbursing agency is one which can be accepted or rejected, the statute does not apply.

The Act of March 7, 1823, sec. 18, perhaps goes further. It limits the compensation of collectors for services which they may perform in any other office or capacity, to \$400. This is a general provision, and might be decisive when there were no special provisions.

But we claim that in this case there was a special provision.

The Act of Aug. 4th, 1854, sec. 3, expressly appropriated 10 per cent. in addition to the principal sum for compensation of architects, superintendents, advertising, and other contingent expenses. This was reiterated in the Act of Aug. 18, 1856, making a further appropriation.

The Secretary of Treasury was directed by the Act to cause these buildings to be constructed. He, of course, was authorized to employ all necessary agents. Money was appropriated for their compensation. In the absence of any stipulation, they were entitled to receive a fair compensation.

Such, we think, has been the ruling of this court.

Convers v. U. S., 21 How., 468 (62 U. S., XVI., 192).

We also think that this view confirmed by the subsequent legislation of Congress on this very subject.

Act, June 12, 1858.

Mr. Justice Nelson delivered the opinion of the court:

This suit was brought on a bond executed by Shoemaker and his sureties, the defendants, on the 19th May, 1857, in a penalty of \$20,000, conditioned that said Shoemaker, as disbursing agent for the new Marine Hospital, and Custom House at Detroit, Michigan, shall well and truly disburse all moneys that may come into his hands from the Secretary of Treasury for the object mentioned, and account for the same.

Several defenses were set up by way of pleas which it will not be material to notice.

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On the trial the plaintiffs proved that the defendant, Shoemaker, was Collector of the Customs at Detroit in 1857 and 1858; that he was instructed by the Secretary of the Treasury to disburse about \$200,000 appropriated by Congress for building a custom-house and marine hospital at that port; and that between the 1st April, 1857, and the 13th June, 1858, and subsequently, the collector made disbursements accordingly.

It was proved, also, that during all the above period he had been allowed and had received his general maximum compensation under the Act, March 2, 1831, sec. 4, as collector; and, also, his special maximum of \$400 under the Act of May 7th, 1823, sec. 18, and had been allowed one quarter of one per cent. of all disbursements made after the Act of June 12th, 1858 (11 Stat. at L., 327).

The plaintiff then rested; and the defendants, to maintain their defense, gave in evidence, that the balance, shown in the treasury transcripts against the collector, was composed of an excess over the \$400 allowed under the Act of 1823 of two and a half per cent. upon his disbursements; and that this per centum was but a reasonable compensation for the service.

The Act of August 4th, 1854 (10 Stat. at L., 571), authorized the building of a custom-house and marine hospital at Detroit, and made an appropriation for the same. Secs. 2, 3 and 4.

The duty was devolved upon the Secretary of the Treasury, and a sum equal to ten per centum of the moneys appropriated was also appropriated to cover the compensation of architects, superintendents, advertising, and other contingent expenses. Sec. 8.

The 17th section of the Act of June 12th, 1858, provided that the Collectors of Customs should thereafter be disbursing agents for the payment of all moneys appropriated for the construction of custom-houses, court-houses, etc., with a compensation not exceeding one quarter of one per cent. This Act appropriated a small sum for fencing and grading the grounds about the hospital at Detroit. With this exception no compensation has been allowed to the collector for the disbursement of the moneys made by him.

This state of the case presents the question whether or not there is any law affording compensation for this service performed by the collector.

The argument in support of it is, that before the Act of 1858, which imposed this duty, and prescribed a compensation, the Secretary of the Treasury had no right to require any such duty of the collector, and might as well have appointed some other person to perform it; and hence, having appointed the collector, who accepted the appointment and has performed the service, he is entitled to the same compensation as any other agent.

It may be that the collector might have refused the duty, and compelled the Secretary to appoint another person. But this does not advance the argument, unless there can be shown some law providing for a compensation to be allowed such agent. No such provision is made in this Act, nor are we aware of any authority in any other.

The question here, however, is—the collector
See 7 WALL. U. S. Book 19.

having accepted the appointment and performed the service—is there any authority of law entitling him to retain, out of the moneys received, the 2½ per cent. as compensation for the disbursements? It is admitted that there is no Act of Congress authorizing it. The claim must rest, therefore, in a *quantum meruit*. This might, under some circumstances, present a strong case against the government for the allowance of a reasonable compensation. But the difficulty here is, that there is not only no law providing for compensation, but the collector is forbidden to receive it. The Act of May 7th, 1823, sec. 18, provides that “no collector, etc., shall ever receive more than \$400, annually, exclusive of his compensation as collector, etc., for any services he may perform for the United States in any other office or capacity.” And the Act of 8d March, 1839 (5 Stat. at L., 349), that “no officer in any branch of the public service, or any other person, whose salaries or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law.” This Act was substantially re-enacted 23d August, 1842 (2 Stat. at L., 510), with this addition: “And the appropriation, therefore, explicitly set forth that it is for such additional pay, extra allowance, or compensation.” This Act was noticed and commented on in *Hoyt v. U. S.*, 10 How., 141. The court there observe that it cuts up by the roots these claims of public officers for extra compensation on the ground of extra services; that there is no discretion left in any officer or tribunal to make allowance, unless it is authorized by some law of Congress. This construction of the Acts of 1823 and 1839 was affirmed in the case of *Converse v. U. S.*, 21 How., 478 [62 U. S., XVI., 197]. In that case a compensation was allowed for an extra service rendered by the collector, but it was allowed for the reason that the service was rendered in pursuance of existing laws, and the appropriation for a compensation was made by law. The principle settled in that case is decisive against the allowance in the present one.

Judgment reversed.

HENRY KELLOGG, *Appt.*,

v.

THE UNITED STATES.

(See S. C., 7 Wall., 361-364.)

One, not a party to a contract, cannot recover in Court of Claims.

One who is not a party to a contract, either originally or by substitution, cannot maintain a claim before the Court of Claims for compensation under it.
[No. 41.]

Argued Jan. 13, 1869. Decided Jan. 25, 1869.

APPEAL from the Court of Claims.

This case comes into this court by appeal from the judgment of the Court of Claims. The case was heard in that court upon the petition, and demurrer filed thereto by the United States.

The demurrer was sustained and the petition dismissed; and from the judgment of said court, dismissing said petition, this appeal is prosecuted.

The material facts appearing from the appellant's petition and exhibits (which are made a part of the petition) are as follows:

1. That, by an Act approved March 3, 1853 (10 Stat. at L., 206), Congress authorized the commencement of an aqueduct to supply the City of Washington with water upon such a plan as the President of the United States should approve; that a plan was approved, and Captain Montgomery C. Meigs, of the corps of engineers, was appointed to superintend the execution of the work.

2. That, Jan. 23, 1854, Captain Meigs, on behalf of the United States, and with the approval of the Secretary of War, entered into a contract with William H. Degges and Francis H. Smith, by which they, said Degges & Smith, agreed to furnish for said work, not less than twenty-five nor more than forty million bricks, for which the United States agreed to make payment at the rate of \$8.75 per thousand. To secure the faithful performance of this contract, Degges & Smith gave bond in the penal sum of \$30,000, with Alexander H. Mechlin and Columbus Alexander as sureties.

3. The contract entered into between Captain Meigs, on behalf of the government, and Degges & Smith, contained the following provisions, viz.:

(a) And this contract is also expressly understood to be subject to the terms and conditions of the Joint Resolution of Congress, approved April fourteenth, one thousand eight hundred and fifty two, containing a proviso in the following terms, to wit: provided, nothing herein contained shall be so construed as to authorize any officer of the United States to bind the United States by contract beyond the amount appropriated by Congress, or to sanction any such contract heretofore made.

(b) Provided, also, that it is expressly understood and agreed that this contract, nor any part thereof, shall not be sub-let nor assigned.

4. That, on the 12th day of March, 1855, Congress having appropriated \$250,000 for continuing the work on the Washington aqueduct, Captain Meigs gave notice to Degges & Smith, and also to their sureties, Mechlin & Alexander, that there would be required, for the work contemplated on the aqueduct for that season, four million bricks, to be delivered at such points along the work as might from time to time be designated. To this notice Degges & Smith made no response, but utterly abandoned their undertaking and failed to comply with their contract.

5. That, Degges & Smith having made default in the performance of their contract, Mechlin & Alexander, in order to save themselves from loss and prosecution on their bond, entered into an arrangement with Captain Meigs, by which they assumed the contract which had been made with Degges & Smith, upon the same terms and conditions as made with Degges & Smith.

6. That Mechlin & Alexander purchased land adjacent to the line of the intended work, containing clay suitable for making bricks, and proceeded to make extensive preparations for

the manufacture of the number of bricks necessary to fulfill their contract; but before completing their arrangements they did, on the 9th day of May, 1855, enter into an agreement with William H. De Groot, whereby they transferred all the property which had been acquired by them for the purpose of performing said contract, to said De Groot, who undertook and agreed to furnish the bricks which Mechlin & Alexander had contracted to furnish. De Groot was to pay Mechlin & Alexander five per cent. of the amount which the government was to pay for the manufacture and delivery of the bricks. Mechlin & Alexander executed a power of attorney to De Groot, by which he was authorized to receive from the government the money which would become due to Mechlin & Alexander under their contract.

7. De Groot failed to comply with this agreement with Mechlin & Alexander, and they thereupon, afterwards, to wit: on the 3d day of March, 1856, entered into a contract with the claimant, Kellogg, by which he undertook to furnish all the bricks required, and to be required of Mechlin & Alexander for the construction of the aqueduct, and to receive payment therefor from the United States at the contract price, and to pay over to Mechlin & Alexander five per cent. of the amount so received; and Mechlin & Alexander by deed constituted the claimant their lawful attorney, to furnish the bricks and to receive payment therefor.

8. The complainant continued to furnish bricks as the agent of Mechlin & Alexander and under his contract with them, during the summer of 1856, until what remained of the appropriation for the building of the aqueduct was exhausted, when the claimant was notified by Captain Meigs not to make nor deliver any more bricks.

9. That, on the 3d of March Congress passed a Joint Resolution which, in substance, contained a proposition to the parties interested in said brick contract to the effect that, if they would consent to cancel the contract, and would turn over to the United States the bricks made and the machinery and other appliances for making bricks, the United States would settle with the parties interested in said contract, "on the principle of justice and equity, all damages, losses and liabilities incurred or sustained by said parties respectively, on account of their contract."

10. After the passage of said Joint Resolution, Captain Meigs, superintendent of the work aforesaid, called upon Mechlin & Alexander, as well as the claimant, to elect whether they would proceed to fill the contract or accept the proposition contained in the Joint Resolution. They elected to accept the proposition of the resolution and cancel the contract, and thereupon executed a deed to surrender, and transferred to the United States all the bricks made, together with all the machinery and appliances and other personal property prepared for executing said contract.

11. Upon the execution and delivery of said deed of surrender and the transfer of the property aforesaid, the Secretary of the Treasury proceeded to make a settlement contemplated by said Joint Resolution, and awarded to Mechlin & Alexander, as the only persons included in the provisions of the said Joint Resolution, the

sum of twenty-nine thousand five hundred and thirty-four dollars and nineteen cents (\$29,534 19), and that of the sum so awarded by the Secretary of the Treasury to Mechlin & Alexander, the claimant received the sum of ten thousand four hundred and seventy-six dollars and ninety-six cents (\$10,476.96), as the amount he was entitled to receive under his contract with said Mechlin & Alexander.

12. The claimant insists that the award of said sum of money to Mechlin & Alexander, and the exclusion of him from the benefits of said Joint Resolution by the Secretary of the Treasury, was erroneous, and contrary to the plain intent and purpose of said Joint Resolution; and that the Secretary of the Treasury should have awarded him, as the amount he was entitled to receive under said resolution, as a party interested in said contract, the sum of sixty-two thousand, six hundred and ninety-two dollars and forty-two cents (\$62,692.42), to recover which sum, and the interest thereon, amounting in all to ninety-one thousand three hundred and eighty-nine dollars and eighty-seven cents (\$91,889.87), the suit was instituted.

Upon demurrer filed by the Solicitor of the United States, the Court of Claims ruled:

1. That the United States, by the Joint Resolution of March 3, 1857, set forth in the petition in this case, and the claimant, by certain instruments of writing also set forth in the said petition, submitted themselves to the award of the Secretary of the Treasury, as to the matter of claim in said petition stated.

2. That the Secretary of the Treasury made an award upon the said claim.

3. That the award so made was according to the submission.

4. That the Secretary of the Treasury, by his award, gave to Mechlin & Alexander and Alexander, a fund, as trustees for themselves and whoever else might be entitled to share in it.

5. That the claimant, by receiving from Mechlin & Alexander a sum of money as stated in the said petition, ratified the award and is concluded now to dispute its validity.

6. That, upon the facts stated in the petition, the claimant is not entitled to recover from the United States the amount of the damages, losses, and liabilities incurred and sustained by him on account of the contract for manufacturing brick for the Washington aqueduct, referred to in the Joint Resolution hereinbefore cited.

Messrs. J. M. Carlisle and J. D. McPherson, for appellant.

Messrs. Talbot, Wm. M. Hearts, Atty. Gen., E. P. Norton and John J. Weed, for appellee.

Mr. Justice Grier delivered the opinion of the court:

The history of this case, as eliminated from the voluminous documents accompanying it, has been well stated by the reporter, and need not be repeated.

It sufficiently demonstrates that there was no error in the decision of the Court of Claims sustaining the demurrer to the plaintiffs' petition.

The claimant has not shown that he was ever known or recognized by the United States as one of the parties to, or as interested in, the contract made by Captain Meigs, on behalf of the

United States, for furnishing bricks for the construction of the Washington aqueduct. That contract provides that it should not be sub-let or assigned.

The petition shows that the claimant was acting under a contract with Mechlin & Alexander (who were the sureties for the fulfillment of the contract of Degges & Smith), and not under a contract with the United States, and was recognized only as agent, attorney in fact, or *employé* of the sureties; and that under the Resolution of Congress, approved March 3d, 1857, by which the Secretary of the Treasury was authorized to settle with all the parties, respectively, in the contract, the claimant was not included, because he was no party to it, either originally or by substitution.

The award made by the Secretary of the Treasury, and the payment of the money under it, were in strict accordance with the provisions of the resolution. The Secretary properly declined to settle the account between Mechlin & Alexander as to how the money so paid should be divided between them and their agent. Of this sum the petitioner received \$10,476.96, which he accepted "under protest," which could only mean saving his right to importune Congress or the Court of Claims for more. This has sometimes proved a valuable privilege. But something more is necessary to recover in a court of justice.

The judgment of the Court of Claims is affirmed.

THE BARK GRAPESHOT, GEORGE LAW,
Claimant, *Appellant*,

v.

WALLERSTEIN, MASSET & CO.

(See S. C., "*The Grapeshot*," 7 Wall., 563, 564.)

Proof of papers lost from record—Louisiana court decree appealable.

Proof that papers not in the record were used in the court below and have been lost, must be made by affidavit: the certificate of the clerk is not evidence of these facts.

A decree of the Provisional Court of Louisiana, established by the military authority of the President, transferred by statute into the circuit court, may be appealed to this court.

[No. 179.]

Argued Jan. 15, 1869. Decided Jan. 25, 1869.

A PPEAL from the Circuit Court of the United States for the District of Louisiana.

The libel in this case was filed in the District Court of the United States for the Eastern District of Louisiana, July 3, 1858, by the appellees, to enforce the payment of a certain bottomry bond, given to the libelants by the captain of *The Grapeshot* at Rio Janeiro, to secure the payment of \$9,869.45 and a premium thereon of 19½ per cent. The *Grapeshot* was seized and sold and the proceeds were deposited in the registry of the court. The said court having entered a decree early in 1860, in favor of the libelants, the claimant took an appeal to the circuit court. Before that court had disposed of the case the rebellion broke out, and nothing further was done until January 13, 1860, when it was removed to the Provisional Court of Louisiana.

That court entered a decree affirming the decree of the district court.

The decree of the Provisional Court having become that of the circuit court, under this statute the claimant, on December 6, 1866, took an appeal to this court.

For a further statement of the facts of the case, see the report of the opinion of this court on the merits. Vol. 78 U. S., *post*.

On motion to dismiss.

The questions arising on these motions sufficiently appear in the opinion of the court.

Messrs. O. Cushing, John W. Ashmead, W. W. Boyce and B. F. Butler, for appellant.
Mr. Thomas J. Durant, for appellees.

Mr. Chief Justice Chase delivered the opinion of the court:

A motion to dismiss this appeal has been made upon the ground that the transcript of the record is incomplete, because of the omission of certain papers said to have been used in the court below, but not to be found when the transcript was made.

The motion must be denied. Proof that the papers alleged to be wanting were used in the court below, and have been lost, must be made by affidavit. The certificate of the clerk who made the transcript cannot be received as proper evidence of these facts.

The other motion is made upon the ground that the decree below was rendered by the Provisional Court of Louisiana, established by the military authority of the President, during the late rebellion, from which no appeal could be properly taken.

But we find, on looking into the statutes, that when the Provisional Court ceased to exist, its judgments and decrees were directed to be transferred into the circuit court, and to stand as the judgments and decrees of that court. And it is from the decree of the circuit court that the appeal under consideration was taken. As an appeal from that court it was regular, and the motion to dismiss must be denied.

All questions concerning the validity of judgments and decrees of the Provisional Court will remain open until after final hearing.

S. C.—9 Wall., 129.

Cited—9 Wall., 759; 10 Wall., 201, 212, 217; 13 Wall., 336; 15 Wall., 384; 17 Wall., 639; 19 Wall., 524, 536; 20 Wall., 164, 394; 21 Wall., 88, 588; 22 Wall., 295, 306; 23 Wall., 469.

THE SCHOONER ALICIA, *Appellant*,

v.

THE UNITED STATES.

(See S. C., "*The Atleta*," 7 Wall., 571-573)

Appellate jurisdiction in prize cases—order of transfer ineffectual.

Under the Constitution, this court can exercise in prize causes appellate jurisdiction only.

Where there is no order, judgment or decree of the court below from which appeal could be taken, an order of transfer of the cause under the Act of June 30, 1864, is without effect.

Decided Jan. 25, 1869.

APPEAL from the District Court of the United States for the Southern District of Florida.

On motion to docket and dismiss.

The history and statement of the case appear in the opinion of the court.

Mr. J. Hubley Ashton, for the United States, in behalf of the motion.

Mr. Chief Justice Chase delivered the opinion of the court:

We have considered the motion to docket and dismiss this cause.

It appears from the certificate of the Clerk of the Circuit Court of the United States for the Southern District of Florida, that on the 9th of January, 1863, a decree of condemnation was entered in the district court, for the condemnation of *The Alicia* and her cargo, for the violation of the blockade.

From this decree an appeal was allowed and taken to the circuit court, and on the 18th of May, 1867, an order was made in that court on the application of the parties in interest for the transfer of the cause to this court.

It appears that the appellant has not docketed the cause and filed the record within the time allowed by the rule in cases of appeals. The motion would be allowed as of course, if the appeal could be regarded as taken to this court from the decree of the district court. But the decree of condemnation in that court was rendered in January, 1863, and the appeal to the circuit court was allowed, and bond given the same month. By these proceedings, and the transmission of the record to the circuit court, the cause was duly removed to that court under the laws regulating appeals at that time. Subsequently, by the 18th section of the Act of June 30, 1864, provision was made for appeals in prize cases directly from the district court to this court; and it was directed that appeals from the circuit courts, in cases remaining therein, should be allowed to this court in the same manner as appeals from the district court under the Act. But it was also provided in the same section that prize causes, depending in the circuit courts, might be transferred, upon the application of all parties in interest, to this court; and it was under this provision that the application and order for transfer were made.

Can this court acquire jurisdiction of the cause through this order of transfer?

It cannot be doubted that the cause was removed to the circuit court by the appeal from the decree of the district court in 1863. That decree was vacated by the appeal, and the circuit court acquired full jurisdiction of the cause. It might, in its discretion, make orders for further proof, and was fully authorized to proceed to final hearing and decree, in all respects, as if the cause had been originally instituted in that court. Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree or order of an inferior tribunal, from which an appeal has been taken. But in this case there had been no such order, judgment or decree in the circuit court; and there was no subsisting decree in the district court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution and,

consequently, that the order of transfer was without effect. The cause is still pending in the circuit court. We must decline, therefore, to make an order to docket and dismiss the appeal; but this opinion may be certified to that court for information.

Cited—9 Wall., 506.

AMOS KENDALL AND JOHN E. KENDALL, Appts.,

THE UNITED STATES.

(See S. C., 7 Wall., 112-118.)

Equitable assignment, of what fund may be made—not of unliquidated claim—a contract to prosecute a demand does not constitute an equitable assignment.

The debt or fund of which an equitable assignment can be made, must be some recognized or definite fund or debt, in the hands of a person who admits the obligation to pay the assignor, or some liquidated demand, capable of being enforced in a court of justice.

A claim of no fixed amount, or time or mode of payment, which has never received the assent of the person against whom it is asserted, cannot be so assigned as to give the assignor an equitable right to prevent the original parties from compromising or adjusting the claim.

One, by making a contract to prosecute a demand against the government, does not thereby acquire a hold on the government for his compensation, which will prevent it from compromising or settling with the claimants, without consulting him or incurring any liability to him.

[No. 19.]

Argued Dec. 24, 1869. Decided Feb. 1, 1869.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. R. H. Gillet, J. M. Carlisle, and John D. McPherson, for appellants:

1. The contract and order given by the Indians, operated as a valid assignment of one twentieth part of the amount due the Indians.

The right of a creditor to assign his debt in whole or in part, is stated by Story in his Eq. Jur., section 1044, and supported by the cases there cited, viz.:

Smith v. Everett, 4 Bro. Ch., 64; *Lett v. Morris*, 4 Sim., 607; *Morton v. Naylor*, 1 Hill, 588; *Watson v. Wellington*, 1 Russ. & M., 605; *Burn v. Carvalho*, 4 Myl. & C., 699; *Ross v. Dawson*, 1 Ves., Sr., 381; *Taylor v. Bates*, 5 Cow., 376; *Wheeler v. Wheeler*, 9 Cow., 84; *Pattison v. Hull*, 9 Cow., 747; *Legh v. Legh*, 1 B. & P., 447.

The contract of July 12, 1848, authorizing the appellants to receive the amount from the United States, and the order of Aug. 14, 1848, directing the Secretary of War to pay, were each a sufficient assignment of a part of the fund.

The rights of assignees are recognized and protected in courts of law.

Prescott v. Hull, 17 Johns., 284; *Legh v. Legh*, 1 B. & P., 447; *Jackson v. Blodget*, 5 Cow., 202; *Littlefield v. Storey*, 3 Johns., 426; *Wheeler v. Wheeler*, 9 Cow., 84.

Such assignments were not against any statute, nor against the policy of the government at that time.

The first Act of Congress restricting the right of assigning claims against the United States was not passed till Feb. 28, 1853 (10 Stat., 170),

See 7 WALL.

and by the most direct implication it recognized the existence of the right up to that time, and by its terms was made applicable only to transfers and assignments thereafter made. And a previous Act of July 29, 1846 (9 Stat., 41), which regulated the execution of powers of attorney to draw moneys appropriated in satisfaction of claims allowed by Act or Resolution of Congress, was made applicable only to claims thereafter allowed. Both of these Acts were subsequent to the assignment to these appellants.

No discrimination was made against Indians in the exercise of this right until 1848.

Op. Atty-Gen., March 31, 1838; Ops., Gilpin ed., 1178; Mar. 26, 1840, *Id.*, 1303; Aug. 5, 1848; 5 Ops., Hall's ed., 18.

Neither the Treaty of 1846, nor of the Act of 1850, prohibited the payment of this claim.

It is true that the policy prohibits the assignment of the *per capita*, and provides for its payment directly to the Indians, or to their legal representatives, and the Act directs that the money appropriated be paid to the Indians.

These provisions will not be construed to defeat existing vested rights, in the absence of clear and express words requiring such injustice. Such a construction is not acquired.

By the agreement, the plaintiffs acquired a lien upon the fund secured by their agency. Congress has no power to change or annul this lien.

The United States knew of and was notified of this lien, which amounted to an assignment, and was bound to recognize it and act accordingly. *McElrath v. McIntosh*, 2 Law Rep. (N. S.), 899.

The government, by its own acts, having prevented the plaintiffs from receiving their pay, and having put it out of the power of the Western Cherokees to pay them, and having caused their extinction as a separate tribe, is bound to pay them the amount due under the contract.

Messrs. William M. Hoar, Atty-Gen., T. Lyle Dickey, Asst. Atty-Gen., E. P. Norton, and J. J. Wood, for appellee:

The pretended assignment, by the Indians, of a portion of their claim could not, if valid, be enforced in a court of law.

Mandeville v. Welch, 5 Wheat., 286; *Tiernan v. Jackson*, 5 Pet., 597.

The Court of Claims has no equity jurisdiction.

Act of Feb. 24, 1855, 10 Stat. at L., 612; Act of Mar. 3, 1863, 12 Stat. at L., 765; *U. S. v. Alire*, 6 Wall., 573 (78 U. S., XVIII., 947).

The assignment to appellants is not valid, unless recognized to be so by the United States. *Cherokee Nation v. Georgia*, 5 Pet., 16; Ops. Atty-Gen., VI., 49, Pottowatomie contracts; Ops. Atty-Gen., VII., 166, (*R. W. Thompson's case*). The Treaty of 1846 and the Act of 1850, prohibited the payment of this claim.

Treaty with the Cherokees, 9 Stat. at L., 871; Indian Appropriation Act, 9 Stat. at L., 544.

Mr. Justice Miller delivered the opinion of the court:

The plaintiffs made an agreement in the year 1843, with persons representing a branch of the Cherokee tribe of Indians called the Western Cherokees, to prosecute a claim which the Indians set up against the United States. It was

a part of the agreement that plaintiffs were to receive directly from the United States five per cent. upon all sums that might be collected on the claim. The plaintiffs allege that they rendered faithful and valuable assistance in prosecuting the claim, and that it resulted in a Treaty and a corresponding Act of Appropriation by Congress by which the tribe received over \$800,000. As the case was decided on demurrer, or what is equivalent to a demurrer, these and other statements must be taken to be true. They show a faithful and laborious performance of their contract by the plaintiffs, for which no compensation was ever received.

The Treaty, which provided for this claim of the Indians as finally ratified by the Senate and by the tribe, provided that the sum of money found due should be held in trust by the United States and paid out to each individual Indian or head of a family, and that this *per capita* allowance should not be assignable, but should be paid directly to the persons so entitled. This was in 1846. On the 30th of September, 1850, Congress made an appropriation of the amount necessary to fulfill this Treaty, and the Act contained a provision that no part of the money should be paid to any agent of said Indians or to any other person than the Indian to whom it was due.

It is insisted by plaintiffs, that because the Government of the United States was aware of the contract between them and the Indians, and failed to reserve and pay over to them the five per cent., which by that contract they had a right to claim of the Indians, the United States is liable for the amount. It is supposed that the doctrine of an equitable assignment of a debt or fund due from one person to another, by the order of the creditor to pay it to a third party, when brought to the notice of the debtor, is a sufficient foundation for the claim. But, if we concede that the government is to be treated in the present case precisely as a private individual, it is not easy to see how that doctrine can be made to apply. The debt or fund as to which such an equitable assignment can be made, must be some recognized or definite fund, or debt, in the hands of a person who admits the obligation to pay the assignor; or, at least, it must be some liquidated demand, capable of being enforced in a court of justice. We apprehend that the doctrine has never been held, that a claim of no fixed amount, nor time, or mode of payment; a claim which has never received the assent of the person against whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignor an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them. That is just what is claimed in this case. For it is very clear that if this equitable claim in the hands of plaintiffs was not effectual before the Treaty, it can have no effect afterwards.

The Treaty, by its terms, is incompatible with the claim of plaintiffs. None of the money could be paid to the plaintiffs if all of it was to be paid to the Indians individually, in proportions to be determined by their numbers.

This principle of paying to the Indians *per capita* was not adopted with any reference to the plaintiff's claim as a means of exclusion.

The Treaty was made with the entire tribe of Cherokees, of which these Western Cherokees were but a small part; and the claims which they were urging on our government constitute a still smaller part of the matters settled by the treaty.

Land claims were adjusted, and the difficulties between this branch and the main body of the tribe were arranged. Other payments were made to the main tribe, in which the rule of paying *per capita* was adopted. Now, the argument assumes that unless in adjusting all these important interests the United States kept in view the sum to be paid to plaintiffs, by their contract with the Indians, and provided for it, they must either make no treaty at all, or must pay their claim. It cannot be permitted that by contracting with other parties, without requiring or asking the consent of the government, anyone can establish such a right to control the action of that government in making treaties or contracts.

The claim of the Western Indians was nothing more than a claim prior to the Treaty. Its justice had never been admitted. Its amount was uncertain. These, together with the mode of payment, were all unsettled, and open to negotiation. Is it possible, that by making a contract with claimants to prosecute this demand against the government, the plaintiffs thereby acquired such a hold on that government, as not only made the claim good to that extent, but prevented it from compromising or settling with the claimants on the best terms to be obtained?

We have no hesitation in saying that the United States, under the circumstances, had the right to make the Treaty that was made, without consulting plaintiffs, or incurring any liability to them. The Act of Congress which appropriated the money, only followed the treaty in securing its payment to the individual Indians, without deduction for agents. And both the Act and the Treaty are inconsistent with the payment of any part of the sum thus appropriated to plaintiffs.

The judgment of the Court of Claims rejecting the demand, is, therefore, affirmed.

THE BOARD OF SUPERVISORS OF MERCER CO., *Plff. in Err.*,

v.

JOHN E. COWLES.

(See S. C., 7 Wall., 118-122.)

Board of Supervisors may be sued by citizens of other States—state Statute of Limitations ineffectual.

The Board of Supervisors of Mercer County can be sued in the Circuit Court of the United States, by citizens of other States than Illinois.

No state Statute of Limitation of liability can defeat a jurisdiction given by the Constitution.

[No. 56.]

Submitted Jan. 19, 1869. Decided Feb. 1, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The defendant in error commenced an action of *assumpsit* against the plaintiff in error, in

the court below, on certain coupons issued with bonds by the County of Mercer in the State of Illinois.

Upon the return of the summons, the plaintiff in error appeared for that purpose only, and moved to dismiss the suit for the want of jurisdiction of the County. The motion was overruled and exception taken.

The plaintiff in error claims that the decision and order of the court were erroneous.

Mr. W. C. Goudy, for plaintiff in error:

The Supreme Court of Illinois has decided that a county can neither sue nor be sued at common law, independent of legislative provisions, and have construed the foregoing sections of the statute to exclude the right to sue any county elsewhere than in the Circuit Court of the County sued.

Schuyler Co. v. Mercer Co., 4 Gilm., 20.

The same doctrine has since been re-affirmed.

Rock Island Co. v. Steele, 81 Ill., 544; *Randolph Co. v. Ralls*, 18 Ill., 80.

Since the Revision of 1845, township organization of counties was provided for by the Constitution and laws of the State, and Mercer County adopted it.

The statute in force when this suit was commenced, declares that each county, as a corporate body, shall have power to sue and be sued in the manner prescribed by law, and that all proceedings by and against a county in its corporate capacity, shall be in the name of the Board of Supervisors of the county. Laws, 1861, 235.

The manner prescribed by law referred to in the legislation of 1861, is found in the Revision of 1845 and the Statute of 1861. *Rock Island Co. v. Steele*, 81 Ill., 544.

It will be perceived by reference to the cases cited, that a distinction is made between the corporate body of a county, which is a municipal body, for the purpose of government, and a private corporation, and that the statute has been so strictly construed that a misnomer of the title by which the county is sued, is held to make the judgment void.

These decisions rest upon the ground that the county can only exercise such powers as may be conferred by the Legislature of the State, and that the provision as to the court in which it may be sued is protective, and intended to guard the body of the inhabitants associated for the purposes of local government, from suits in any court except in the circuit court of its own county.

The state court having settled the construction of its own statute, the courts of the United States will regard these decisions as conclusive.

Is there any provision of the Federal Constitution or laws superior to the rule established in the State?

The only provision of the Constitution conferring judicial power on the courts of the United States, is the first paragraph of the 2d section of article III., and the only part of that provision which can be claimed as conferring jurisdiction of a county, is that which declares that the judicial power shall extend to controversies between citizens of different States.

A corporation is not a citizen within the meaning of this article of the Constitution. The right to bring a suit against a corporation has been sustained upon the theory that the

different natural persons who were members of the corporate body were in fact, or conclusively presumed to be, citizens of the State creating the corporation.

Louisville, C. & C. R. R. v. Letson, 2 How., 497; *O. & M. R. R. v. Wheeler*, 1 Black, 286 (66 U. S., XVII., 130).

It was thought wise to adopt the 11th amendment to the Constitution, prohibiting all suits against a State; the same idea, doubtless, influenced the Legislature of Illinois in providing that a body of the people of the State, organized solely for local government, should only be sued in the principal court of their own county.

In doing so we cannot perceive that any provision of the Federal Constitution has been violated.

This doctrine does not impose any hardship on any person. The same statute which made a county a corporation, declared that it could only be sued in the circuit court within its own limits. The authority to issue the bonds and coupons in controversy was not conferred until long afterwards, namely: in 1849, and they were not issued until 1856.

(No counsel appeared in this court for defendant in error.)

Mr. Chief Justice Chase delivered the opinion of the court:

This cause is brought here by writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the Board of Supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois. It presents but little difficulty.

The Board of Supervisors is a corporation created by Acts of the Legislature of Illinois.

It has never been doubted that a corporation, all the members of which reside in the State creating it, is liable to suit upon its contracts by the citizens of other States; but it was for many years much controverted whether an allegation in a declaration that a corporation defendant was incorporated by a State other than that of the plaintiff, and established within its limits, was a sufficient averment of jurisdiction. And in all the cases, prior to 1844, it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough re-examination in the case of *R. R. Co. v. Letson*, 2 How., 497; and it was held that a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen within the meaning of the Constitution giving jurisdiction founded upon citizenship. This decision has been since re-affirmed, and must now be taken as the settled construction of the Constitution.

In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution.

But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the circuit courts of the county. And this seems to be the construction given to the statutes concerning coun-

ties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in national courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the Board of Supervisors to be a corporation authorized to contract for the County. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suit-ability can defeat a jurisdiction given by the Constitution. We cannot doubt the constitutional right of the defendant in error to bring suit in the Circuit Court of the United States upon the obligations of the County of Mercer against the plaintiff in error. And we find no error in the judgment of that court.

It must, therefore, be affirmed.

Cited—20 Wall., 454; 1 Flipp., 612; 10 Bias., 55; 2 Abb. U. S., 235; 8 Blatchf., 140; 5 Dill., 417; 7 Sawy., 213; 7 Am. Rep., 506 (105 Mass., 141); 11 Am. Rep., 676 (52 N. Y., 111).

THE NORTHERN CENTRAL RAILWAY COMPANY, Plff. in Err.,

v.

JOHN G. JACKSON.

(See S. C., 7 Wall., 262-269.)

Pennsylvania Tax Law—effect of, on coupons—Act of June 30, 1864—of March 10 and July 13, 1866.

Pennsylvania law taxing money owing by solvent debtors, by bond or otherwise, is not operative upon coupons of bonds upon a railroad company lying partly without the State.

By the Act of June 30, 1864, it was not the intent of Congress to impose an income tax on non-resident aliens.

Whether the subsequent Acts of March 10th and July 13th, 1866, which imposed a tax on alien non-resident bondholders, are within the power of Congress, this court expresses no opinion.

[No. 16.]

Argued Mar. 17, 1869. Decided Feb. 1, 1869.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The case is stated by the court.

Messrs. J. Mason Campbell and Bernard Carter, for plaintiff in error:

It is submitted—

That section 122 of the Internal Revenue Act, passed June 30, 1864, covers, by express and adequate language, the whole question as far as the national tax is concerned.

The language used is plain and not susceptible in itself of misconstruction. It applies in terms to all the coupons of the class named, and to all holders of such coupons, without any other exception or reservation than the obvious one of cases covered by special contracts. No exception is in terms made in favor of aliens.

The true view taken of the 122d section of the Act of Congress of June 30, 1864, 13 Stat. at L., p. 284, ch. 173, is, that it is a tax on the whole property of the corporation; or tax on the income of the Corporation, treating the Corporation, for this purpose, as a natural person;

NOTE.—*Power of States to tax.* See note to *Prov. Bk. v. Billings*, 29 U. S. (4 Pet.), 514; and note to *Dobbin v. Erie Co.*, 41 U. S. (16 Pet.), 435.

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and taking its whole revenue after deducting working expenses, it imposes a tax of five per cent. on this revenue. Now, these net earnings are ascertained, first, by taking what is appropriated to paying interest on its bonds, if any it has; and, second, by taking the amount paid for dividends to its stockholders; these two sums embrace its whole net earnings; these are what are taxed, and the tax thus imposed having been paid to the United States, only what is left is to be paid to the holders of the bonds in the one case, and the owners of the stock in the other.

The same principle is acted on in sections 120, 121 of same Act.

The plaintiff in error, though incorporated by the State of Maryland, has existence and is in the exercise of its powers in Pennsylvania, in consequence of the legislation of that State, and the proceedings set forth in the record; and having its habitation as well as its property there, and issuing the bonds held by defendant in error under its laws, is subject to and embraced by the tax laws of that State.

Laws of Pa., 1854, No. 531; Laws of Md., 1854, ch. 250; *Bank of U. S. v. Deaneau*, 5 Cranch, 61; *Bk. of Augusta v. Earle*, 13 Pet., 519; *Society, etc., v. New Haven*, 8 Wheat., 482; *Binney's case*, 2 Bland (Md.), Ch., 143; *R. R. Co. v. Letson*, 2 How., 497.

The 32d section of the Act of Apr. 29, 1844 (Purd. Dig., §49), enumerates the objects of taxation, and among others, "money owing by solvent debtors."

The 34th section imposes a tax of three mills on every dollar of the value of the properties enumerated in the 32d section.

The Act of May 1, 1854 (Purd., §42), places a legislative construction upon the Act of 1844.

The right to deduct the tax from the coupons is declared by the Act of April 30, 1864, sec. 3 (Purd., 1878).

These several Acts have received a judicial interpretation by the highest legal tribunal in that State, in the recent case of *Maltby v. R. & C. R. Co.*, 52 Pa., 140.

By that decision the tax is sustained, as well as the right of the Company to deduct it from the amount of the coupons, without reference to the citizenship or residence of the holder.

This court will adopt the construction placed on the Pennsylvania Statutes by the Supreme Court of that State, in the case of *Maltby v. R. & C. R. Co.*, 52 Pa., 140, although this decision was rendered after the decision of the circuit court now under review.

U. S. v. Morrison, 4 Pet., 124; 6 Pet., 291; 4 Wall., 217 (71 U. S., XVIII., 342).

The State of Pennsylvania, as well as the United States, had a clear right to impose the taxes in question, and the fact that the defendant in error is a British subject and resident abroad, is altogether immaterial.

The principles announced in the authorities hereto appended, support this proposition.

McCulloch v. Maryland, 4 Wheat., 429; *Prov. Bank v. Billings*, 4 Pet., 561; *Tilghman, Ch. J.*, in *Milne v. Moreton*, 6 Binn., 353; *Ogden v. Saunders*, 12 Wheat., 358; *Story, Conf. L.*, secs. 549, 550; *Harrison v. Sterry*, 5 Cranch, 299.

The taxes in question are not taxes on the person of the defendant in error, but on his property, which in this case is the debt due to

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him, as evidenced by the bonds of the plaintiff in error, which are secured on the whole of its property in Maryland and Pennsylvania; this debt, for the purposes of taxation, has location here.

We deduce this proposition from the cases cited under the last point, and also from the following: 16 Pet., 447; *Gordon v. Appeal Tax Court*, 3 How., 188; *The Tax Cases*, 12 Gill & Johnson, 117.

Messrs. George H. Williams and Wm. A. Fisher, for defendant in error:

The defendant in error will insist that, by the true construction of the Internal Revenue Act of Congress, approved June 30, 1864, no attempt was made to tax the incomes of persons, except of citizens of the United States wherever resident, and the incomes of residents, whether citizens or not. Sec. 116, 117, 122.

That, for like reasons, the State of Pennsylvania had no right to tax the coupons on bonds where both debtor and creditor were outside its territory, and neither of them its subject. That the Northern Central Railway Company was a Maryland Corporation, and had no legal existence as such in Pennsylvania, and the coupons were payable at the Company's office in Baltimore.

Ohio & Miss. R. R. v. Wheeler, 1 Black, 286 (86 U. S., XVII., 180); *State v. N. C. R. R. Co.*, 18 Md., 213, 216.

That, by the true construction of the Tax Laws of Pennsylvania, no such attempt has been made. *Bank of Hamilton v. Dudley*, 2 Pet., 574; *Swift v. Tyson*, 16 Pet., 18.

Mr. Justice Nelson delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Maryland.

The suit was brought by Jackson, a non-resident alien, against the Northern Central Railway Company, incorporated by the State of Maryland, to recover \$3,650 coupons attached to bonds issued by the Company. A copy of one is as follows:

"The Northern Central Railway Company will pay to the bearer, January 1, 1865, \$30, being a half year's interest on bond No. 1827 for \$1,000. J. S. LIEB, Treasurer."

The signature of the treasurer was admitted. The plaintiff then proved a demand of payment, at which time and place the Company offered to pay the amount, deducting the tax of five per centum per annum to the United States, under an Act of Congress; and a further tax of three mills per dollar of the principal of each bond claimed to be due to the State of Pennsylvania; which offer of payment was refused.

The plaintiff also gave in evidence charters incorporating the Northern Central Railroad Company by the State of Maryland, and of Pennsylvania, and rested.

Defendant then gave in evidence the articles of consolidation of four railroad companies, one of which had been incorporated by the State of Maryland, and the three others by the State of Pennsylvania, embracing a line of road extending from Baltimore to Sunbury, Pennsylvania.

This consolidation was entered into by the respective companies in pursuance of the Acts

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of the Legislatures of the two States; and by means of which the four companies were merged in one, called the Northern Central Railway Company, and was incorporated by the same name by the Legislature of each State. The stockholders of the old companies received from the new twice the number of shares held by them in the old and, upon the receipt of which, the old shares were canceled after this Company was thus organized and the directors elected; and, on the 20th December, 1855, it executed a mortgage to a Board of Trustees upon the entire line of its road from Baltimore to Sunbury, including all its property and estate situate within both the States, which mortgage was given to secure the payment of \$2,500,000 in bonds, to be issued in amounts therein specified. The bonds were issued by the Company accordingly. A portion of them is in the hands of the plaintiff, the coupons attached to which are the subject of this suit.

Upon this state of the case, it is insisted on the part of the defense that the Northern Central Railway Company is entitled to have a deduction from the coupons of three mills per dollar, of the principal of each bond as a tax imposed on the same by the State of Pennsylvania. This is denied by the plaintiff.

It has been argued for the plaintiff, that the Acts of the Legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject; for, it is not to be denied, as the courts of the State have expounded these laws, that they authorize the deduction, and if no other objection existed against the tax, the defense would fail. If this was an open question we should have concurred with the interpretation of the court below, which concurred with the views of the plaintiff's counsel. These Acts, as expounded, tax "money owing by solvent debtors whether by promissory note, penal or single bill, bond or judgment," and imposed three mills on the dollar of the principal, payable out of the interest, and it is made the duty of the president or other officer of the Company, who pays the coupons or interest to the holder, to retain the amount of the tax. Nor shall we inquire into the competency of the Legislature of Pennsylvania to impose this tax, upon general principles, as we shall place the objection upon other and distinct grounds, though we must say, that the tax upon the promissory note or bond, given by the resident debtor, and the withholding of the amount from the interest due to the non-resident holder, would seem to be a tax upon such non-resident. It is not a tax of the money loaned, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond, which is in the hands of the non-resident holder.

The ground upon which we place the objection in this case to the tax is, in brief, that the bonds, amounting to \$2,500,000, of which those in question are a part, were issued by this Company upon the credit of the line of road, its franchises and fixtures, extending from Baltimore to Sunbury, a given portion of which line lies within the jurisdiction of the State of Maryland. The old Company, to which this line belonged, by the Act of Consolidation, transferred it, with its fixtures and all other interests

connected therewith, including their stock, to the new organization which have issued these bonds. The security, therefore, pledged and bound for the payment of them and of the interest embraces this Maryland portion of the road; and in case of a failure to pay the principal or interest, this portion with its franchises and fixtures would be liable to sale in satisfaction of the bonds and interest.

Now, it is apparent, if the State of Pennsylvania is at liberty to tax these bonds, that, to the extent of this Maryland portion of the road, she is taxing property and interests beyond her jurisdiction. This portion avails her tax roll as effectually as if it was situate within her own limits. The Maryland portion is not liable for the payment of any specified part or quantity of these bonds thus taxed, but is liable, with all its interests, for the whole amount, the same as that portion of the road within the State of Pennsylvania. The bonds were an issue, in the usual way, by this N. C. Railway Co., and the security given by mortgage on the entire line of the road. No portion of the bonds belong to one part more than to another. No severance was made of the bonds and, therefore, none can be made, in the taxation, with reference to the line within the respective jurisdiction of the States. If the tax is permitted as it respects one bond, it must be as it respects all.

Again; if Pennsylvania can tax these bonds, upon the same principle Maryland can tax them. This is too apparent to require argument. The only difference in the two cases is, that the line of road is longer within the limits of the former than within the latter. Her tax would be a more marked one beyond the jurisdiction of the State, as the property and interest outside of its limits would be larger.

The consequence of this tax of three mills on the dollar, if permitted, would be double taxation of the bondholder. Each State could tax the entire issue of bonds, amounting, as we have seen, to \$2,500,000.

The effect of this taxation upon the bondholder is readily seen. A tax of three mills per dollar of the principal, at an interest of six per centum, payable semi-annually, is ten per centum per annum of the interest. A tax, therefore, by each State, at this rate, amounts to an annual deduction from the coupons of twenty per centum; and if this consolidation of the line of road had extended into New York or Ohio, or into both, the deduction would have been thirty or forty. If Pennsylvania must tax bonds of this description, she must confine it to bonds issued exclusively by her own corporations.

Our conclusion on this branch of the case is, that to permit the deduction of the tax from the coupons in question, would be giving effect to the Acts of the Legislature of Pennsylvania upon property and interests lying beyond her jurisdiction.

The next question is, whether or not the coupons were subject to a tax of five per centum per annum to the United States on the 1st of July, 1865, when they became due?

The first income tax was imposed by the Act of Congress, passed August 5th, 1861. (12 Stat. at L. 309). The 49th sec. of that Act directed to be levied and collected upon the annual income of every person residing in the United States, from whatever source derived, a tax of three

per centum on the amount of the excess of such income over \$800; and, upon the income, rents or dividend accruing upon property, etc., owned in the United States by any citizen residing abroad, a tax of five per centum.

The next Act was passed July 1, 1862 (*Ib.*, p. 473), and sec. 90 directed to be levied and collected a tax of three per centum on the annual income of every person residing in the United States, over \$600 and under \$10,000, and exceeding \$10,000, a tax of five per centum; and upon the income of citizens residing abroad a tax of five per centum. The next section provides that the portion of income derived, among other things, from interest on bonds, or other evidence of indebtedness of any railroad company or other corporation which shall have been assessed and paid by said companies, shall be deducted from that prescribed in the previous section; and section 81 directs that this tax on the bonds and evidences of indebtedness shall be paid by the companies which may deduct the same to the payment of interest to the bondholders.

The next is the Act of June 30, 1864 (13 U. S. St. 281, sec. 116), and directs the levy and collection of a tax of five per centum upon the excess of income, and every person residing in the United States, or of any citizen residing abroad, over \$600 and under \$5,000; seven and a half per centum over \$5,000 and not exceeding \$10,000, and a tax of ten per centum over \$10,000. The next section provides for the same deduction from the income arising out of bonds and other evidences of indebtedness of railroad companies, as in the Act of July 1, 1862, and also for the payment of the same by the companies.

This Act was in force when the coupons in question fell due, and is the one by which the tax of five per centum claimed on the bonds of the plaintiff must be determined. The court below held that the Act did not include a non-resident alien, and directed a verdict and judgment for the whole amount of interest. The decision was placed mainly on the ground that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad; and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view. It is not important, however, to pursue the argument, as Congress has since, in express terms, by the Acts of March 10th and July 13th, 1866, imposed a tax on alien non-resident bondholders. The question hereafter will be, not whether the laws embrace the alien non-resident holder, but whether it is competent for Congress to impose it; upon which we express no opinion.

The judgment of the court below is affirmed.

Mr. Justice Clifford dissenting:

I dissent from the opinion and judgment of the court in this case, because I think the taxes in question, both state and federal, were legally

assessed, and that the officers of the railway company properly deducted the same from the amount of the coupons described in the declaration.

Also dissenting, *Mr. Justice Swayne*.

Cited—11 Wall., 432; 15 Wall., 318, 327; 17 Wall., 304, 325; 106 U. S., 332; 1 Low., 448; 2 Wood, 455; 9 Ben., 72; 23 Am. Rep., 463 (11 R. I., 321); 25 O. St., 10.

JOHN EDMONSON AND LITTLETON
WADDELL AND WIFE, *Appts.*,

ADAM BLOOMSHIRE ET AL.

(See S. C., 7 Wall., 306-318.)

Filing transcript on appeal necessary to jurisdiction—what constitutes an appeal—new appeal, when taken.

This court has no jurisdiction of a case on appeal, unless the transcript be filed during the term next succeeding the allowance of the appeal.

The prayer for an appeal and the order allowing it, constitutes a valid appeal; the bond is not essential to it.

Proceeding, by representatives of deceased appellant, to become parties to the appeal, is not a new appeal.

After an appeal is dismissed, a new appeal may be taken within the time prescribed for taking an appeal.

[No. 15.]

Argued Jan. 8, 1869. Decided Feb. 1, 1869.

A PPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is sufficiently stated by the court. *Messrs. Henry Stanbery and John B. Baldwin*, for appellant:

This appeal is clearly sustainable:

1. Upon the exception of the Judiciary Act of 1789, which gives the appeal in the case of coverture of the party entitled to it "within five years, as aforesaid, exclusive of the time of such disability." Mrs. Waddell, the party entitled to an appeal, was under coverture at the date of the decree, and at the time of her death, June 20, 1864.

The disability of one co-complainant saves the other also.

Moose v. Keefe, 10 Ohio, 362.

But it is not necessary to bring the case within the exceptions of the statute. The exception would save us if there had been no allowance of the appeal within the five years; but in this case there was an allowance within that time. All that remained to be done was to perfect the appeal so taken, by giving bond and filing transcript in this court, which might be done by order of court after the expiration of five years.

This court has settled that point in *The Dos Hermanos* case, 10 Wheat., 306.

The cases of *Villabolas v. U. S.*, 6 How., 90; *The Virginia v. West*, 19 How., 182 (60 U. S., XV., 594); *Mesa v. U. S.*, 2 Black, 721 (67 U. S., XVII., 850); *U. S. v. Gomez*, 1 Wall., 690 (68 U. S., XVII., 677); *S. C.*, 8 Wall., 752 (70 U. S., XVIII., 212); *Castro v. U. S.*, 3 Wall., 46 (70 U. S., XVIII., 163); *German v. U. S.*, 5 Wall., 825 (72 U. S., XVIII., 502); and *Musina v. Cavazos*, 6 Wall., 355 (78 U. S., XVIII., 810), are not in point, and do not overrule or

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purport to overrule *The Dos Hermanos* case. The important fact which distinguishes *The Dos Hermanos* case, and the case at bar from those other cases is the subsequent action of the circuit court in the approval of the bond and its recognition as a compliance with the order allowing the appeal; a very different thing from a *nunc pro tunc* allowance of an appeal, which was the point in *Garrison v. Case Co.*, 5 Wall., 823 (72 U. S., XVIII., 491).

But, if both the foregoing points are ruled against us, our appeal is saved on another ground; and that is, that the objection to its regularity comes too late.

The case has been pending in this court more than three years. It has been fully argued on the merits by both parties. No motion has at any time been made by the appellees to dismiss it for any irregularity. The supposed irregularity was discussed for the first time, by one of the members of the court, while the argument was in progress.

Under such circumstances, the court will not dismiss the appeal. The practice has been uniform, to require a motion to dismiss before the case proceeds to a hearing.

Mandeville v. Riggs, 2 Pet., 490; *Brooks v. Norris*, 11 How., 204.

Mr. J. W. Robinson, for appellees.

Mr. Justice Miller delivered the opinion of the court:

The decree in this case was rendered July 16, 1851, and an appeal was prayed and allowed May 26, 1860; the amount of the appealed bond which was to be approved by the clerk, being fixed at \$1,000.

No further step was taken in the case until November 14, 1865, when the following order was made in the circuit court:

WADDELL, EDMONSON *et al.*, } 426—Petition to
v. } Perfect Ap-
ADAM BLOOMSHIRE *et al.* } peal.

And now come the said petitioners, and the court being satisfied that the facts set forth in said petition are true, and that the prayer thereof ought to be granted, do order that said petitioners, Elizabeth W. Edmonson, Lucy A. Edmonson, Mary H. Edmonson and Edwin L. Edmonson, be admitted as parties plaintiff in the place of said John Edmonson, deceased; and that the said William D. Cooke, Lucy A. Cooke, James A. Waddell, Littleton Waddell, Jr., and William H. H. Waddell be admitted as parties plaintiff in the place of the said Elizabeth Waddell, deceased; and that said petitioners have leave to perfect said appeal so allowed at the June Term, 1859, of this court, by giving bond in the sum of \$1,000 as therein provided.

On the 8th December following, this citation was signed by the district judge, which recited the allowance of an appeal at the October Term, 1865. The transcript was filed in this court for the first time January 8, 1866.

In the cases of *Villabolas v. U. S.*, 6 How., 81, and *U. S. v. Curry*, 6 How., 106, decided at the December Term, 1847, and especially in the latter case, it was held, on full consideration, that whether a case was attempted to be brought to this court by writ of error, or appeal, the record must be filed before the end of the term next succeeding the issue of the

writ or the allowance of the appeal, or the court had no jurisdiction of the case. This was repeated in *The Virginia v. West*, 19 How., 182 [60 U. S., XV., 594]; *Mesa v. U. S.*, 2 Black, 721 [67 U. S., XVII., 350]; and *U. S. v. Gomez*, 1 Wall., 690 [68 U. S., XVII., 677].

In *Castro v. U. S.*, 8 Wall., 46 [70 U. S., XVIII., 163], the same question was raised. The importance of the case, together with other considerations, induced the court to consider the matter again at some length. Accordingly, the present *Chief Justice* delivered an opinion, in the course of which the former cases are considered and the ground of the rule distinctly stated.

Other cases followed that, and in *Mussina v. Canasos*, decided at the last term, the whole doctrine is again reviewed, and the rule placed distinctly on the ground that this court has no jurisdiction of the case unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court; that the writ of error, like all other common law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable; that the Act of 1803, which first allowed appeals to this court, declared that they should be subject to the same rules, regulations and restrictions as are prescribed in law in writs of error. These principles have received the unanimous approval of this court, and have been acted upon in a large number of cases not reported, besides several reported cases not here mentioned. And the court has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court, we cannot do otherwise.

In the case of *U. S. v. Curry*, *Chief Justice Taney*, answering the objection that the rule was extremely technical, replied, that nothing could be treated by this court as merely technical, and for that reason be disregarded, which was prescribed by Congress as the mode of exercising the court's appellate jurisdiction. We make the same observation now, and add, that it is better, if the rule is deemed unwise or inconvenient, to resort to the Legislature for its correction, than that the court should depart from its settled course of action for a quarter of a century.

We are of opinion that the present case falls within the principle of these decisions. The only appeal that this record shows to have been either asked for or allowed, was that of May 26, 1860. The transcript was not filed during the term next succeeding the allowance of this appeal, nor until January, 1866.

Two grounds are assigned as taking the case out of the rule we have stated.

1. It is said that the appeal of 1860 was not perfected until the bond was given under the order of November 14, 1865, and that until this was done, there was in fact no appeal which required the transcript to be filed.

The answer to this is, that the prayer for the appeal, and the order allowing it, constituted

a valid appeal. The bond was not essential to it. It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted to the appellant to give bond in this court. *Ex parte Milwaukee R. R. Co.*, 5 Wall., 188 [72 U. S., XVIII., 676]. In the case of *Seymour v. Freer*, 5 Wall., 822 [72 U. S., XVIII., 564], the *Chief Justice* says, that if, through mistake or accident, no bond or a defective bond had been filed, this court would not dismiss the appeal, but would permit a bond to be given here. And in all cases where the government is appellant, no bond is required. It is not, therefore, an indispensable part of an appeal that a bond should be filed; and the appeal in this case must be held as taken on the 26th day of May, 1860.

It is insisted that this view is in conflict with the case of *The Dos Hermanos*, 10 Wheat., 306. We do not think so. While the argument of counsel on the merits in that case is fully reported, we have nothing from them on the motion to dismiss. The opinion of the court states that the question made was, whether the appeal was in due time, and this is answered by saying, it was prayed and allowed within five years from the date of the decree. The appeal was, therefore, taken in due time. It is further said, that the fact that the bond was given after the expiration of the five years, did not vitiate the appeal. This is in full accord with what we have just stated. The bond may be given with effect at any time while the appeal is alive. There is no question made in the present case about the appeal being taken within time. It was taken in time. But the record was not filed in the court in time to save the appeal; and that question was not made or thought of in *The Dos Hermanos* case. It is perfectly consistent with all that we know of that case and, indeed, probable, that, though the taking of the appeal was delayed until near the expiration of the five years, and filing the bond until after that period, the transcript was filed at the next term after the appeal was taken.

2. It is next insisted that a new appeal was taken by the proceedings of the 14th November, 1865.

This, however, is in direct contradiction of the record. The petition of appellants, after reciting the former decree and the order allowing the appeal of May 26, 1860, and the death of some of the plaintiffs in the suit, and that no appeal bond had been given, concludes as follows: "Your petitioners now appear, and pray Your Honors to allow them to become parties to said appeal, and to perfect the same by now entering into a bond for the appeal." And the order made is, "that said petitioners have leave to perfect said appeal, so allowed at the June Term, 1859, of this court, by giving bond, etc." The only appeal referred to in the petition, or the order of the court, is the appeal allowed May, 1860, and no language is used in either which refers to a new appeal, or which is consistent with such an idea.

It is true that the citation speaks of the allowance of the appeal as obtained at the October Term, 1865, but this recital does not prove that an appeal was then allowed, when it stands unsupported by the record. Still less can it be permitted to contradict what the record states to have been done on that subject, at that time.

In the case of *U. S. v. Curry*, the same facts almost precisely were relied on as constituting a second appeal, that exist in this case, including the misrecital in the citation. But the court says, "that after very carefully considering the order, no just construction of its language will authorize us to regard it as a second appeal. The citation, which afterwards issued in August, 1847, calls this order an appeal, and speaks of it as an appeal granted on the day it bears date. But this description in the citation cannot change the meaning of the language used in the order." That is precisely the case before us, and we think the ruling a sound one.

The appeal must, for these reasons, be dismissed. But, we may add, that for anything we have been able to discover in this record, the appellants have the same right now, whatever they may be, to take a new appeal, that they had in November, 1865, when the unsuccessful effort was made to revive the first one.

Cited—10 Wall., 425; 11 Wall., 387; 20 Wall., 574; 90 U. S., 507; 1 Sawy., 715; 5 Sawy., 82.

CHARLES N. TYLER, *Plff. in Err.*,

v.

THE CITY OF BOSTON.

(See S. C., 7 Wall., 827-831.)

Patent for new combinations, what should state—meaning of "equivalent"—question of fact.

A patent for a discovery of a new substance by means of chemical combinations of known materials, should state the component parts of the new manufacture claimed with clearness and precision.

The term "equivalent," when used with regard to the chemical action of such fluids as can be discovered only by experiment, means equally good.

Whether one compound of given proportions is substantially the same as another varying in the proportions, or substantially different, is a question of fact for the jury.

[No. 51.]

Argued Jan. 18, 1869. Decided Feb. 1, 1869.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This action was brought in the court below by the plaintiff in error to recover damages for an alleged infringement of patent. Judgment having been rendered in that court for the defendant, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Messrs. J. E. Maynadier and C. Browne, for plaintiff in error:

The court charged the jury that the claim was confined to a compound composed of equal parts, in bulk, of the mineral oils used, and equal parts, in bulk, of fusel oil, and to such other compounds of the mineral oils and fusel oil in which the proportionate bulks of the two oils were the same substantially, and this without regard to the kind of mineral oil that was used.

It is respectfully submitted that this construction is erroneous; that the proportionate bulks specified are applicable only to the particular kind, grade or density of kerosene,

and the particular kind of fusel oil whose proportionate bulks in the compound are stated, and when any other grade or density of kerosene or any other of the mineral oils or any of the various grades of the other mineral oils or any other kind of fusel oil are to be used, their bulks are to be determined by determining: 1, what bulk of the given mineral oil is necessary to give equivalent effects to a given bulk of the particular kind of kerosene whose proportionate bulk is stated; and, 2, what bulk of the given fusel oil is necessary to give the equivalent effects to a given bulk of the particular kind of fusel oil whose proportionate bulk is stated.

The court below seems to have felt obliged to construe the claims as for equal parts of naphtha and fusel oil, because of the rule of law settled in *Wood v. Underhill*, 5 How., 1, and the general rule that the patent is to be upheld if it can be reasonably done.

This construction, "although adopted in accordance with the rule that the patent is to be construed, if possible, so as to give the patentee the benefit of his invention, practically prevents the patentee from deriving any benefit from his invention, except as to the particular compound consisting of substantially equal parts of kerosene and crude fusel oil; for a compound composed of equal parts of naphtha and crude fusel oil is worthless as a burning fluid, because of the large excess of fusel oil.

The court below was in error in instructing the jury that the substantial sameness or differences depended upon the slight or great variations in the proportions of the ingredients.

Winans v. Denmead, 15 How., 844.

The case of *Allen v. Hunter*, 6 McLean, 813, decides (what may be, perhaps, regarded as undoubted law) that when the compound complained of is composed of a substituted ingredient, "having the same qualities and producing the same result," it is an infringement. Under this rule it would seem beyond doubt that plaintiff would have recovered on his evidence in this case (as to all these oils being the same except in density, and that the bulk of naphtha to be used as a substitute for a given bulk of kerosene, and necessary to produce the same result, was well known) had naphtha not been mentioned in his specification, on the ground that seventy two parts of naphtha was a well known substitute for twenty-eight parts of kerosene, having the qualities and producing the same result. But upon what principle can the fact that he has mentioned naphtha in his specification as a substitute for kerosene (thereby stating only what was perfectly well known) prevent his recovering against the use of a compound which is in law the same compound of which his patent purports to give him the monopoly?

Mr. James B. Robb, for defendant in error:

The language used by the patentee in describing his invention and the manner of compounding the same, is full, clear and exact, in view of the construction adopted by the court below, but to give it the construction contended for by the plaintiff, the obvious intent of the terms used must be disregarded, and the same word must also be taken in different senses in the same sentence; that is, the word "quantity"

NOTE.—*Distinction between inventions and processes; when latter patented.* See note to *Corning v. Burden*, 56 U. S. (15 How.), 252.

See 7 WALL.

when used in reference to fusel oil, alcohol or kerosene, means measure; but when used in reference to naphtha or petroleum, it must be taken to mean weight, against the manifest intention of the patentee when the specification was drawn.

"Words are not to be distorted so as to affect what may be supposed to have been the intention of the one using them; but they are to have a reasonable construction connected with the sentence in which used."

Allen v. Hunter, 6 McLean, 307.

Mr. Justice Grier, delivered the opinion of the court:

The plaintiff claims to have discovered a new compound substance, being a combination of fusel oil with the mineral and earthy oils, which compound constitutes a burning fluid, "by which term," he says, "I mean a liquid which will burn for the purpose of illumination without material smoke, in a lamp with a small solid wick, and without a chimney."

The first claim of his patent (the one which the defendant is charged to have infringed) is: "The compound produced by the combination of the mineral or earthy oils with fusel oil in the manner and for the purpose substantially as herein set forth, said compound constituting a new manufacture."

The component parts of this new manufacture are described as "by measure, crude fusel oil one part, kerosene one part." This combination, the patent states, may be varied by the substitution of naphtha or crude petroleum in place of kerosene, or a part of the kerosene, by an equal quantity of naphtha or crude petroleum; "the exact quantity of fusel oil which is necessary to produce the most desirable compound must be determined by experiment."

Now, a machine which consists of a combination of devices is the subject of invention, and its effects may be calculated *a priori*; while a discovery of a new substance by means of chemical combinations of known materials is empirical, and discovered by experiment. Where patent is claimed for such a discovery, it should state the component parts of the new manufacture claimed with clearness and precision, and not leave the person attempting to use the discovery to find it out "by experiment." The law requires the applicant for a patent-right to deliver a written description of the manner and process of making and compounding his new discovered compound. The art is new and, therefore, persons cannot be presumed to be skilled in it or to anticipate the result of chemical combinations of elements not in daily use.

The defendants used a burning fluid composed of naphtha seventy-two and fusel oil twenty-eight parts; and expert chemists proved that seventy-two parts in bulk of naphtha was the substantial equivalent of twenty-eight parts of kerosene.

This term "equivalent," when speaking of machines, has a certain definite meaning, but when used with regard to the chemical action of such fluids as can be discovered only by experiment, it only means equally good. But while the specification of the patent suggests the substitution of naphtha for crude petroleum, it prescribes no other proportion than that of equal parts by measure. The explanation that the

"kerosene must be replaced by an equal quantity of naphtha" does not alter the case.

The charge which the court gave is a clear and intelligible statement of the principles of law which should govern the jury in making up their verdict. It said properly, that "whether one compound of given proportions is substantially the same as another compound varying in the proportions—whether they are substantially the same or substantially different—is a question of fact and for the jury."

Under this instruction the jury found a verdict for the defendants, with which the parties must be content. If the jury have erred, the remedy is not in this court.

Judgment affirmed.

THOMPSON DEAN, *Appt.*,

v.

THOMAS A. NELSON AND WIFE, AND BEN MAY.

(See S. C., "*Thomson v. Dean*," 7 Wall., 342-346.)

Decree, when final.

A decree which determines the principal matter in controversy between the parties is final although it directs certain accounts to be taken.

[No. 433.]

Argued Jan. 29, 1869. Decided Feb. 1, 1869.

APPEAL from the Circuit Court of the United States for the District of West Tennessee.

The case is sufficiently stated by the court.

For the history and facts of the case, see the decision of this court upon the merits in 77 U. S. (10 Wall.), 158-172.

On motion to dismiss.

Mr. P. Phillips, for appellee.

(No counsel appeared upon this motion for appellant.)

Mr. Chief Justice Chase delivered the opinion of the court:

We are asked to dismiss the appeal in this cause, on the ground that the decree from which it was taken was not final.

On looking into the record, we find that the controversy related to the ownership and transfer of 204 shares of the stock of the Memphis Gas Light Company, and to the rights of the parties under contract relating to the purchase, sale and transfer of the stock.

The decree directs that Dean, the defendant below and appellant here, transfer forthwith upon the books of the Company, 194 shares of the stock, to one of the plaintiffs below, who are appellees here, and ten shares to another. It directs, further, that account be taken and stated as to the amount paid and to be paid for the stock, and as to dividends accrued and to be credited under the contracts between the parties. This decree was rendered on the 12th of March, 1868, and appeal was allowed on the same day; the bond was given on the 23d.

Was this decree final for the purpose of appeal?

NOTE.—What is a "final decree" or judgment of state or other court from which appeal may be taken. See note to *Gibbons v. Ogden*, 15 U. S. (6 Wheat.), 448.

The eighth rule of the court, prescribing the practice of the United States courts in equity, directs that "if the decree be for the performance of any specific act, it shall prescribe the time within which the act shall be done, of which the defendant is bound to take notice," and that, "on affidavit by the plaintiff of non-performance within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which he shall not be discharged unless on full compliance, or by special order enlarging the time."

In this case the decree directs the performance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. No such change or modification was possible after the term, except on rehearing or by bill of review in the circuit court, or through appeal in this court.

So far as the court below was concerned, the decree in the case determined the principal matter in controversy between the parties. And since the decree could not be changed except through a new and distinct proceeding, it determined that matter finally.

Why, then, must it not be regarded as a final decree within the meaning of the Acts of Congress providing for appeals?

The eighth rule of practice to which we have referred certainly regards such a decree as that now under consideration as final in respect to the act to be performed.

But it is insisted that this court has held that no decree which does not completely dispose of the whole cause is final, and that this decree, though disposing completely of the controversy as to the ownership of the stock, is not final, because it directs certain accounts to be taken.

It is true that this court has always desired that appeals be taken only from decrees which are not only final but complete; and has, upon one occasion, at least, directed the attention of the circuit courts to the expediency and importance of refraining from making final decrees on any part of a cause, however important, until prepared to dispose of it completely. Such a course would, undoubtedly, save much inconvenience, both to the circuit courts and this court, and diminish largely the expense of litigation to suitors.

And it may be true, that under the influence of these considerations the degree of finality essential to the right of appeal has been sometimes pushed quite to the limit of construction. But we think that the current of decisions fully sustains the rule laid down by the late *Chief Justice* in the case of *Forgay v. Conrad*, and which we again declare in his own language: "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is

See 7 WALL.

retained in the circuit court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed."

The reasoning in the case just cited fully vindicates this rule, in our judgment, as a sound construction of the Acts of Congress relating to appeals, and is sustained by the authority of several decisions. *Ray v. Law*, 3 Cranch, 179; *Whiting v. Bank U. S.*, 13 Pet., 6; *Michoud v. Girod*, 4 How., 505; *Orchard v. Hughes*, 1 Wall., 73 [68 U. S., XVII., 560]; *Mil. and Minn. R. R. Co. v. Souther*, 2 Wall., 440 [69 U. S., XVII., 860]; *Withenbury v. U. S.*, 5 Wall., 821 [72 U. S., XVIII., 613].

And it is quite clear that the appeal under consideration is within this rule. The decree for which it was taken decided the right to the property in contest, directed it to be delivered by defendant to complainant by transfer, entitled the complainant to have the decree carried immediately into execution, leaving only to be adjusted, accounts between the parties in pursuance of the decree settling the question of ownership.

It follows that the motion to dismiss must be denied.

Cited—7 Wall., 577; 12 Wall., 98; 22 Wall., 245; 106 U. S., 4, 432.

THE PACIFIC INSURANCE COMPANY, Plff.,

v.

FRANK SOULE, Collector of Internal Revenue.

(See S. C., 7 Wall., 433-446.)

Income tax, return of income in currency—is obligatory.

The 9th section of the Internal Revenue Act of July 13, 1866, is to be construed to require that the difference between coined money and legal tender currency shall be added to the return of a person's income when made in coined money; and that he shall pay the tax or duty upon the amount thus increased.

Such tax is not a direct tax, but a duty or excise, and is obligatory.

[No. 43.]

Argued Jan. 14, 1869. Decided Feb. 1, 1869.

ON a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of California.

The case is sufficiently stated by the court. *Messrs. John A. Wills* and *W. O. Bartlett*, for plaintiff:

(The following is an abstract of an argument by Mr. W. O. Bartlett, on the constitutionality of the income tax, filed by Mr. Wills):

Is the income tax a capitation tax?

A capitation tax is thus defined in Bouv. Law Dict.:

"A poll tax; an imposition which is yearly laid on each person, according to his estate and ability."

Dr. Adam Smith, than whom there is no higher authority on this subject, says:

"The taxes which it is intended should fall indifferently upon every species of revenue, are capitation taxes and taxes upon consumable commodities. These must be paid indifferently from whatever revenue the contributors may

possess; from the rent of their land, from the profits of their stock, or from the wages of their labor."

In England poll taxes were at first levied upon certain classes, "At three shillings in the pound of their supposed income;" and subsequently upon the same and other classes according to their rank. Smith, *Wealth of Nations*, 386. In France, in 1695, the capitation tax varied in amount from about five cents to about \$400. 2 *Journal du Plais*, 826.

The larger branch of the inquiry—Is the income a direct tax?—seems to me to dispose of the point of its constitutionality. Is it a direct tax? If it is a direct tax, whether or not it be a capitation tax, not being laid in proportion to the census, it must still be unconstitutional.

What, then, is a direct tax? Dr. Adam Smith sets forth a tax upon a person's revenue—which is but another name for his income—to be a direct tax. 3 *Wealth of Nations*, 381.

J. R. McCulloch divides his work on taxation into two parts: Part I., On Direct Taxes, and Part II., On Indirect Taxes; and under the head of direct taxes, he treats of taxes on property and income.

John Mill, under the title of direct taxes, which are designed to fall upon all sources of income, says: "Assessed taxes, poll taxes, and income taxes, are of this description." *Elements of Political Economy*, 267.

Say defines a direct tax to be, "The absolute demand of the specific portion of an individual's real or supposed revenue." *Political Economy*, 466.

John Stuart Mill proceeds to an elaborate discussion of the subject of income tax, under the head of direct taxes. 2 *Political Economy*, 371, 382.

Dr. Lieber, referring to the different modes of levying taxes, says: "The first way is to direct; to determine from the statement of the parties concerned, or from official information, the net income of persons. This kind of tax is called *direct*." 7 *Encyclopedia Americana*, 155.

Taxes are usually divided into direct and indirect; the former include assessments made upon the real and personal estate of the tax payer upon his income or upon his head. *New Am. Cyclop.*

In the Parliamentary debates of the subject of income tax, the income tax was always spoken of as a direct tax.

The framers of the Constitution attached the greatest importance to the provision respecting direct taxation, and they adopted it understandingly.

The framers of the Constitution considered: First. A tax on land to be a direct tax.

Second. A general assessment on property to be a direct tax.

I then expect to establish by legal decisions,

Third. That if a tax on land be a direct tax, or if a general assessment on property be a direct tax, it follows, as an unavoidable consequence, that the income tax is a direct tax.

See "The genuine information delivered to the Legislature of the State of Maryland, relative to the proceedings of the General Convention held at Philadelphia in 1787, by Luther Martin, Esq., Attorney-General of Maryland," 96

and one of the delegates in the said Convention," from which it appears that direct taxation was "either a capitation on their heads or an assessment on their property." *Ibid.*, 1, p. 368.

In the celebrated carriage case, *Hylton v. U. S.*, 3 Dall., 174, Mr. Hamilton appeared for the government, and in the course of his argument he mentioned as taxes which were to be considered direct taxes, capitation taxes, taxes on land, and buildings, and general assessment.

Samuel Dexter was in Congress in 1794, when arose the first discussion in that body, as to what constitutes direct taxation. Mr. Dexter said he "Thought that a general tax on all taxable property was a direct tax, because it was paid without being repaid by the consumer." *Annals of Congress*, 1798-1799.

In an early case (1796), the court laid down the doctrine that a tax on land is a direct tax, in the following emphatic terms: "Both in theory and practice, a tax on land is a direct tax." *Hylton v. U. S. (supra)*.

"A tax on land is a direct tax, and being unapportioned according to the census, it is consequently unconstitutional and void."

9 Mass., 872; 1 Ashm., 136; 11 Wend., 298; 17 Wend., 402; Washb. Real Prop., 2572, and cases there cited.

In the case of *Almy v. California*, 24 How., 174 (65 U. S., XVI., 646), the Supreme Court of the United States held that a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; and that a law prohibiting a tax on the article shipped, by necessary implication, prohibits a tax on the bill of lading of the same article.

The State of Maryland undertook to levy a tax on the occupation of an importer, by requiring him to pay for a license to carry on his business; but *Chief Justice Marshall* decided that this was a tax on imports, and being laid by a State, was unconstitutional and void.

Brown v. Maryland, 12 Wheat., 429.

If the doctrine on which the income tax is founded is correct; if the United States, being prohibited from laying an unapportioned tax on land, can lay it on the income of the land; then, by parity of reasoning, the States, which are prohibited from taxing imports and exports, may lay a tax on any amount on all incomes, derived from imports and exports.

12 Wheat., 439; 2 Pet., 449; 12 Wheat., 436; 4 Wheat., 316; *Hylton v. U. S.*, 3 Dall., 171.

In the debate on the provision of the Constitution relating to direct taxation, in the Federal Convention, Oliver Ellsworth said: "The sum allotted to a State may be levied without difficulty according to the plan used by the State in raising its own supplies." 5 Elliott, Debates, 305.

In the Virginia Convention, which ratified the Constitution, Governor Randolph said of the direct tax by the General Government: "It must be clearly laid on the most productive article in each particular State. * * * Were the tax laid on one uniform article throughout the Union, its operation would be oppressive on a considerable part of the people." 3 Elliott, Debates, 121, 122.

Fortunately, we have the opinion of John Marshall on this provision of the Constitution. It was expressed very fully in the Virginia Con-

vention, called to ratify the Constitution, and it accords with that of Mr. Ellsworth and that of Governor Randolph, and is entirely at variance with the views which I have criticised, of the judges in the *Hylton* case.

In the debate on the provision relating to direct taxes, James Monroe had asked: "What are the objects of direct taxation? * * * Will the taxes be laid on land? * * * A very considerable part of the community would escape. * * * What is the extent of the power of laying and collecting direct taxes? Does it not give to the United States all the resources of the individual States?" 3 Elliott, Debates, 215. Judge Marshall said, in answer: "Where is the absurdity of having thirteen revenues? Will they clash with and injure each other? If not, why cannot Congress make thirteen distinct laws, and impose the taxes on the general objects of taxation in each State, so as that all persons of the society shall pay equally, as they ought?" *Ibid.*, 235.

Mr. Madison followed John Marshall in the debate, and he said:

"It has been said that ten men deputed from this State, and others in proportion from other States, will not be able to adjust direct taxes so as to accommodate the various citizens in thirteen States. I confess I do not see the force of this observation. * * * If the General Government were tied down to one object, I confess the objection would have some force in it.

But if this be not the case, it can have no weight. If it should have a general power of direct taxation, they could select the most proper objects, and distribute the taxes in such a manner as that they should fall in a due degree on every member of the community. They will be limited to fix the proportion of each State, but they must raise it in the most convenient and satisfactory manner to the public." *Ibid.*, 258, 254, 255.

On a subsequent day Mr. Madison said:

"The most proper articles will be selected in each State. If one article in any State should be deficient, it will be laid on another article." *Ibid.*, 307.

Patrick Henry pointedly asked:

"Does the honorable gentleman mean that the thirteen States will have thirteen different tax laws?" *Ibid.*, 327.

Mr. Madison, in reply, said:

"It has been amply proved that the General Government can lay taxes as conveniently to the people as the state governments, by imitating the state systems of taxation." *Ibid.*, 339.

And Mr. George Nicholas, also in reply to Mr. Henry, said:

"Had taxes been uniform, it would have been universally objected to; for no one object could be selected without involving great inconveniences and oppressions." *Ibid.*, 457.

Mr. George Madison remarked that "The General Government was not precluded from laying the proportion of any particular State on any species of property they might think proper." *Ibid.*, 459.

Mr. W. M. Evarts, Atty-Gen., for defendants:

It was clearly the object of the last subdivision of the 9th section of the Act of Congress of July 13, 1866 (Stat. at L. for 1865-6, p. 147), to compel parties to pay the legal percentage

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on their incomes, estimating them at their value in the legal tender currency; else why, in case of refusal to declare in which currency the income return is made, should the assessor be entitled to disregard the return, and exact, over and above the regular income tax, a penalty of twenty-five per cent.? And, secondly, why are "the lists, required by law to be furnished to collectors, by assessors," required "in all cases to contain the several amounts of taxes assessed, estimated or valued in legal currency only?" This is evident from other provisions of the Internal Revenue Law. Thus, by section 20, of Act of June 30, 1864, as amended by Act of July 13, 1866 (Stat. at L. for 1865, 1866, p. 103), as soon as the assessment has become perfect, the assessor is to make out the list and send it to the collector, and this list is the guide of the collector in the collection of the tax; and by section 34 of same Act as amended (Stat. at L. for 1865 and 1866, p. 110), the collector is charged with the amount of taxes as stated on the lists, and credited with the amount of his collection.

It is difficult to see how the learned judge who held that the law of July 13, 1866, required that the difference between coined money and legal tender money must be added to the return when made in coin money, and that the party must pay the tax or duty upon the amount thus assessed, could also hold that the second, third, fourth and fifth questions set forth in the certificate "occurred" in this case. For, taking the affirmative of the proposition just stated as correct, and applying it to the conceded facts of the case, the only question presented (independently of those numbered six and seven), is, whether a tax legally assessed against the plaintiff, amounting to \$7,365, could be satisfied by the payment of \$5,836.

The Act of July 11, 1862 (12 Stat. at L., p. 582), confers no such right as is claimed by the plaintiff in this suit.

The tax due from the defendant in this case was \$7,365.68, which the defendant refused to pay otherwise than by a tender of \$5,836.75 in legal tender currency. It is clear that the plaintiff has been assessed according to law, provided the law be constitutional. But what objection can be urged against the power of Congress to compel all parties in making their returns to state their income, not in coin dollars, but in dollar treasury notes?

The tax on incomes is not a "direct tax" within the meaning of the Constitution, and is not subject to the rule of apportionment prescribed by article I., section 2, of the Constitution.

The case of *Hylton v. U. S.*, 8 Dall., 171, seems conclusive on the point here raised.

Mr. Justice Swayne delivered the opinion of the court:

The plaintiff brought an action to recover back certain taxes upon its business and income which it had paid to the defendant upon compulsion and under protest. The defendant demurred to the plaintiff's complaint. Upon the argument of the demurrer, the opinions of the judges of the circuit court were opposed upon seven questions, which are set forth in the record. According to the view which we take of the case, it will be sufficient to answer two of them. They cover the entire grounds of the

controversy between the parties, and their determination will be conclusive.

They are the first and the sixth. The first is: "Whether that portion of the ninth (9th) section of the Act of Congress, approved July 13, 1866, entitled 'An Act to Reduce Internal Taxation,' and to amend an Act, entitled 'An Act to Provide Internal Revenue to Support the Government, to pay Interest on the Public Debt, and for Other Purposes,' approved June 30, 1864, and Acts amendatory thereof, which provides as follows, to wit:

"That it shall be the duty of all persons required to make returns or lists of income, and articles or objects charged with an internal tax, to declare in such returns or lists, whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values in coined money; and in case of neglect or refusal so to declare, to the satisfaction of the assistant assessor receiving such returns or lists, such assistant assessor is hereby required to make returns or lists for such persons neglecting or refusing, as in cases of persons neglecting or refusing to make the returns or lists required by the Acts aforesaid, and to assess the duty thereon, and to add thereto the amount of penalties imposed by law in cases of such neglect or refusal. And whenever the rates and amounts contained in the returns or lists, as aforesaid, shall be stated in coined money, it shall be the duty of each assessor, receiving the same, to reduce such rates and amounts to their equivalent in legal tender currency, according to the value of such coined money in said currency, for the time covered by said returns. And the lists required by law to be furnished to collectors, by assessors, shall, in all cases, contain the several amounts of taxes or duties assessed, estimated or valued in legal tender currency only — is to be construed as merely providing a rule as to the currency in which accounts, returns and lists are to be stated, with a view to uniformity in keeping the accounts of internal revenue, or whether it is to be construed as denying to a person who has received in coined money, incomes or other moneys subject to tax or duty, the right to return the amount thereof in the currency in which it was actually received, and to pay the tax or duty thereon in legal tender currency, and be construed to require that the difference between coined money and legal tender currency shall be added to his return, when made in coined money, and that he shall pay the tax or duty upon the amount thus increased."

We think there can be no doubt as to the proper solution of this question. A brief analysis of the provisions of the statute which bear upon the subject, will be sufficient to maintain the conclusion at which we have arrived.

1. The person making the return is required to declare whether the amounts set forth in it are stated according to their value in legal currency or in coined money.

2. If he fail to do so, he is subjected to a penalty, and the assessor is required to make the returns for him.

3. The list, with all the amounts therein stated, according to their values in legal tender currency, is to be placed by the assessor in the hands of the collector.

4. The assessor (*sic*) is charged with the aggregate amount and credited with his collections and otherwise, as is provided by the statute.

5. The taxes are made a lien, and in default of payment, property is to be seized and sold by the collector. Both personal and real estate are liable. Full directions are given for the conduct of the proceedings.

The meaning of the statute, examined by its own light, is so clear that argument or illustration is unnecessary. It was the object of Congress to provide a uniform basis of taxation, in order to secure uniformity in the burdens imposed. "Equality is equity." According to the theory of the plaintiff, it had a right to have the assessment made upon the amounts received in coin, and to pay in currency, while others, whose receipts were in currency, were to be taxed upon that basis, and to pay in the same medium as the plaintiff. Such a result would be subversive of the plainest principles of reason and justice. It cannot be supposed that such was the intention of those who framed the law. Certainly nothing in its language would warrant the construction contended for.

Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government.

To this question it must be answered, that the statute did deny to the plaintiff the right to have the assessment made otherwise than as it was made by the assessor; and that it required the plaintiff to pay the amount of the taxes set forth in the list delivered by the assessor to the collector, and which was paid by the plaintiff, under protest, as appears by the record.

II. The sixth question is:

"Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not direct taxes, within the meaning of the Constitution of the United States."

In considering this subject, it is proper to advert to the several provisions of the Constitution relating to taxation by Congress.

"Representatives shall be apportioned among the several States which shall be included in this Union, according to their respective numbers," etc. Art. 1, sec. 2.

"Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States" Art. 1, sec. 8.

"No capitation or other direct tax shall be laid, unless in proportion to the census of enumeration hereinbefore directed to be taken."

"No tax or duty shall be laid on articles exported from any State." Art. 1, sec. 9.

These clauses contain the entire grant of the taxing power by the organic law—with the limitations which that instrument imposes.

The National Government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary in-

tendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the Act is *ultra vires* and void. This test must be applied in the examination of the question before us. If the tax to which it refers is a "direct tax," it is clear that it has not been laid in conformity to the requirements of the Constitution. It is, therefore, necessary to ascertain to which of the categories, named in the 8th section of the 1st article, it belongs.

What are direct taxes, was elaborately argued and considered by this court in *Hylton v. U. S.*, 8 Dall., 321, decided in the year 1796. One of the members of the court, Justice Wilson, had been a distinguished member of the Convention which framed the Constitution. It was unanimously held, by the four justices who heard the argument, that a tax upon carriages, kept by the owner for his own use, was not a direct tax. Justice Chase said:

"I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit: a capitation or poll tax simply, without regard to property, profession or any other circumstance, and a tax on land."

Patterson, Justice, followed in the same line of remark. He said:

"I never entertained a doubt that the principal, I will not say the only, object the framers of the Constitution contemplated as falling within the rule of apportionment, was a capitation tax and a tax on land. * * * The Constitution declares that a capitation tax is a direct tax; and both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms 'direct taxes,' and 'capitation and other direct tax,' are satisfied."

The views expressed in this case are adopted by Chancellor Kent and Justice Story, in their examination of the subject. 1 Kent, Com., 267; Story, Const., 670; Rawle, Const., 8; The Federalist, No. 94; 4 Tuck. Bl., App., 394.

Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than "taxes." It is applied in its most restricted meaning to customs; and in that sense is nearly the synonym of "imposts." Tomlin, Law Dic., "Duty"; 1 Story, Const., sec. 952; *Hylton v. U. S.*, 8 Dall., 171.

Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Story, Const. Abr., sec. 474. Cowell says it is distinguished from custom, "because custom is rather the profit which the prince makes on goods shipped out." Cowell, Interpreter, tit. "Impost." Mr. Madison considered the terms "duties" and "imposts" in these clauses as synonymous. 1 Story, Const., 669, n. Judge Tucker thought "they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excises.'"

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. Bateman, Excise Law, 96; 1 Story, Const., sec. 953; 1 Bl. Com., 318; 1 Tuck. Bl. App., 341.

The taxing power is given in the most comprehensive terms. The only limitations imposed are: that direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

It has been held that Congress may require direct taxes to be laid and collected in the Territories as well as in the States. *Loughborough v. Blake*, 5 Wheat., 317.

The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.

The other questions certified up, are deemed to be sufficiently answered by the answers given to the first and sixth questions.

Cited—8 Wall., 547; 23 Wall., 348; 102 U. S., 601; 8 Blatchf., 266, 267; 15 Minn., 43.

CYRUS PALMER, CHARLES A. HAWLEY, DAVID N. HAWLEY, W. A. PALMER, O. W. SPENCER AND G. B. BRADFORD, *Pliffs. in Err.*,

v.

GEORGE DONNER.

(See S. C., 7 Wall., 541, 542.)

Citation on writ of error signed by district judge, void.

Citation on a writ of error to a state court signed by a district judge, is without authority of law and of no effect.

[No. 167.]

Submitted Jan. 29, 1869. Decided Feb. 1, 1869.

IN ERROR to the Supreme Court of the State of California.

Action was brought and judgment obtained in a District Court of the State of California by the defendant in error, for the possession of certain lands. The Supreme Court of that State having affirmed said judgment on appeal, the defendant sued out this writ of error.

On motion to dismiss.

Messrs. Geo. C. Turner and C. Cole, for plaintiffs in error.

Mr. J. H. Bradley, for defendant in error.

Mr. Chief Justice Chase delivered the opinion of the court:

The revisory jurisdiction of this court over the judgments of state tribunals is defined by the 25th section of the Judiciary Act of 1789. It is there provided that the citation must be signed by the *Chief Justice* or *Judge* or *Chancellor* of the court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States. But the citation in the case before us was signed by a district judge. This was without authority of law, and the citation was, therefore, without effect.

The case, therefore, is not properly in this court, and the writ of error must be dismissed.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, *Ptff. in Err.*

JOHN O. HARRIS;

AND

SAME

ELLEN T. HARRIS, Admrx. of JOHN O.
HARRIS, Deceased.

(See S. C., 7 Wall., 574, 575.)

*What necessary to make writ of error a super-
seas.*

The lodging of a copy of the writ of error in the clerk's office within ten days is necessary to make the writ a *superseas*.

This court cannot dispense with compliance with the statute in respect to lodging a copy for the adverse party.

[Nos. 164, 348.]

Argued Jan. 29, 1869. Decided Feb. 1, 1869.

IN ERROR to the Supreme Court of the Dis-
trict of Columbia.

This action was brought and judgment obtained in the court below by John O. Harris, against plaintiff in error, for personal damages. The defendants below sued out a writ of error to this court. Thereafter said Harris died, and appearance was entered in said cause by defendant in error as administratrix. Subsequently, upon a *scire facias*, execution was awarded by the court below upon said judgment to the defendant in error, whereupon a second writ of error was sued out to this court.

A further statement of the case appears in the opinion of the court.

On motion for *superseas*.

Messrs. J. H. Bradley and Jas. A. Buchanan, for plaintiff in error:

An appearance by an attorney cures all irregularity in the process.

Knox v. Summers, 8 Cranch, 496; *Wood v. Lide*, 4 Cranch, 180; *Pollard v. Dwight*, 4 Cranch, 421; *Farrar v. U. S.*, 3 Pet., 460; *Buckingham v. McLean*, 18 How., 151; *Carroll v. Dorsey*, 20 How., 206 (61 U. S., XV., 804).

The *scire facias* in this case is a new action, and the judgment rendered in it conferred a new right upon the said administratrix.

Evans, Pr., 65; *Foot. Scire Facias* (78 Law Lib.), 13, note, G, 352; 3 Inst., 472; *Obrian v. Ram*, 3 Mod., 186; 2 Tidd, *Pr.*, 8th ed., 1258;

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2 Chit. Archb., 1082; *Farran v. Boreford*, 10 Cl. & F., 319; *Giles v. Hutt*, 1 Exch., 704; 2 Inst., 470; Com. Dig. Pl., 8, l. 10; *Rea v. Mann*, 2 Str., 749; and see *Foot. Sci. Fa.* (73 Law Lib.), 352 (304); *Kemp v. Cook*, 6 Md., 305; *Moore v. Garretson*, 6 Md., 44, and 6 Md., 78; *McFarland v. Irwin*, 8 Johns., 61; *Nesbit v. Bishton*, 9 Ad. & E., 426; *Mullikin v. Duwall*, 7 Gill & J., 355; *Harden v. Campbell*, 4 Gill, 29; *Campbell v. Booth*, 8 Md., 107; *Booth v. Campbell*, 15 Md., 569; *McCullough v. Franklin Coal Co.*, 21 Md., 256.

Messrs. T. J. D. Fuller, and W. D. Davidge, for defendant in error:

I. A writ of error is not a *superseas*, unless served within ten days after rendition of judgment.

1 Cranch, (C. C.), 108, 180, 583; 2 Cranch, (C. C.), 266; *Wood v. Lide*, 4 Cranch, 180; *Hogan v. Ross*, 11 How., 294; 8 Blatchf., 890; *Brooks v. Norris*, 11 How., 204.

II. Appearance did not cure the failure. *U. S. v. Yates*, 6 How., 605.

III. If execution erroneously or improvidently issue after a *superseas*, a *superseas* may issue from the Supreme Court. 2 How., 74.

The judgment in this case is not one of such a character that a writ of error will lie upon it.

Toland v. Sprague, 12 Pet., 300; 6 Pet., 654; 17 Johns., 484; *Stockton v. Bishop*, 2 How., 74; 5 Wall., 188 (73 U. S., XVIII., 676); 9 Pet., 4; *Barton v. Forryth*, 5 Wall., 109 (73 U. S., XVIII., 519); *Brockett v. Brockett*, 2 How., 240.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion for writs of *superseas* to the Supreme Court of the District of Columbia to stay execution upon two judgments recovered in that court, one by John O. Harris against the Baltimore and Ohio Railroad Company, and the other by Ellen T. Harris, as administratrix of John O. Harris, against the same defendant.

The first judgment was for injuries by Harris when a passenger on the defendant's railroad. The second was a judgment upon *scire facias* to revive the former judgment, abated by the death of Harris, and to make his administratrix party to that judgment, and to have execution.

To bring the first judgment into this court for review, a writ of error was sued out by the Railroad Company, and a sufficient bond for prosecution was filed within ten days after rendition; but no copy of the writ of error appears to have been lodged in the clerk's office for the use of the defendant in error.

The right of the plaintiff in error to the writs for which the motion now before us is made, depends on the question whether, by the proceedings taken in the case, the writ of error upon the first judgment became *superseas*.

And this question is answered by the express words of the 23d section of the Judiciary Act. 1 Stat. at L., 84.

"A writ of error shall be a *superseas* and a stay of execution, in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment and passing the decree complained of." The Legis-

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lature has seen fit to make the lodging of a copy of the writ, within ten days, a prerequisite to the operation of the writ as a *supersedeas*. The cause was removed from the inferior court to this court, by the issuing of the writ, and the due service of it upon the court to which it is addressed; but its additional effect, as a *supersedeas*, depends upon compliance with the conditions imposed by the Act. We cannot dispense with that compliance in respect to lodging a copy for the adverse party.

The motion for writs of *supersedeas* in both cases must, therefore, be denied; and as the second writ of error brings nothing before us, unless the writ in the first case operated as a *supersedeas* under the statute, that writ must be dismissed.

Cited—14 Wall., 405; 93 U. S., 88, 417.

THE COUNTY OF LANE, *Plff. in Err.*,

THE STATE OF OREGON.

(See S. C., 7 Wall., 71-81).

This court bound by state decisions as to state statute—U. S. legal tender notes not a tender for state taxes—Act of February 25, 1862, relates to ordinary debts.

Where the circuit court and the Supreme Court of the State have held that the Statutes of Oregon required the collection of taxes in gold and silver coin, this court is bound by such decisions.

The clause in the Act of Feb. 25, 1862, making the United States notes a legal tender for debts, has no reference to taxes imposed by state authority.

It relates only to debts in the ordinary sense of the word, arising out of simple contracts or contracts by specialty, which include judgments and recognizances.

[No. 5.]

Argued Dec. 26, 1867, Mar. 2, 1868. Decided Feb. 8, 1869.

IN ERROR to the Supreme Court of the State of Oregon.

The case is stated by the court.

Mr. George H. Williams, for plaintiff in error:

Plaintiff in error maintains that the County of Lane was not bound to pay the sum of \$5,460.96 in gold and silver coin, but had a right to pay the same in any other lawful money of the United States, for the following reasons:

The County was bound to pay said sum to the State, out of the first money collected and paid into the County Treasury. Stat. of Oregon, sec. 46, p. 441.

This tender was made, as the demurrer admits, out of the "first money collected and paid," as aforesaid.

The taxes are, in fact, due from the individuals assessed to the State, and the County is only an agent for their collection; and whatever the tax payer had a right to pay to the

County, the County has a right to pay to the State.

There was no law in the State of Oregon in 1863 requiring those to whom the taxes were assessed to pay the same in gold and silver coin and, therefore, they had a right to pay in any lawful money.

Section 82, p. 438, Statutes of Oregon, says that "The sheriff shall, in all cases, pay over to the County Treasurer the full amount of state and school taxes, in gold and silver coin." Section 46, p. 441 says: "The several county treasurers shall pay over to the State Treasurer, in gold and silver coin, the state tax," etc. These two paragraphs are the only warrant found in the Laws of Oregon for the proceedings in this case.

As to these it may be said, that they define the duties of officers charged with the collection of taxes, but do not define the rights of tax payers.

No doubt the inference from these paragraphs, standing alone, would be, that the taxes were to be paid to said officers in gold and silver coin, but the right of the taxpayer to pay his taxes in such lawful money of the United States as he is bound to receive for all debts due him, ought not to be destroyed by an inference.

The words "gold and silver coin" in this statute, should be taken to mean no more or less than lawful money.

May not the court take judicial notice of the historical fact, that in the States upon the Pacific coast, prior to the late war and at the date of this Act in question, nothing was recognized or in circulation as money except "coin?"

Was it the particular metals named that the State wanted, or was it what it could use in every way and which all persons would be bound to receive as money? Plaintiff in error claims that the court below erred in holding that the state laws warranted its judgment in this case.

Assuming, however, that the law of the State always was as it is declared to be in the Act of 1864, then it is claimed that such law is of no force, because it is in conflict with an Act of Congress approved Feb. 25, 1862, authorizing the issue of United States notes.

Manifestly this Act was intended to invest the treasury notes with all the attributes of money, with the exceptions specified.

"*Expressio unius est exclusio alterius.*"

Can the legislative power of a State deny to a citizen thereof and a citizen of the United States, the right to pay his taxes in lawful money?

Referring to the complaint in this case, it will be seen that judgment is claimed for a certain sum of money due from the County to the State.

Does not that describe a pecuniary obligation of the County?

May not a pecuniary obligation be discharged with lawful money?

Is not this suit in the nature of an action for money had and received by the County for the use of the State?

Webster defines a debt to be "That which is due from one to another, whether goods, money or services; that which one is bound to pay or perform for another." Worcester,

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws; power of state courts to construe their own statutes. See note Jackson v. Lamphire, 28 U. S. (3 Pet.), 280. It is for state courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorized by statute. See note to Commercial B'k v. Buckingham, 46 U. S. (5 How.), 317.

See 7 WALL.

Richardson and Barclay concur in this definition.

Is not a tax lawfully assessed upon a person, that which he is bound to pay?

Bouvier describes a debt as "A sum of money due by certain and express agreement. In a less technical sense, it means any claim for money. In a still more enlarged sense, it denotes any kind of a just demand." Is not a tax, lawfully assessed, a "claim for money"? Is it not a just demand?

To show that a tax is not a debt, reliance is placed upon the following authorities:

Camden v. Allen, 2 Dutch., 398; *Pierce v. Boston*, 8 Met., 520; *Shaw v. Pickett*, 26 Vt., 482; *Appleton v. Hopkins*, 5 Gray, 580; *Perry v. Washburn*, 20 Cal., 818.

To these authorities it may be answered, that debt may exist and not be attachable; bear interest or be the subject of a set-off. These are statutory and not common law incidents of a debt.

1 Tidd, Pr., 638; *Drake, Attach.*, 4; *Bartlett v. Marshall*, 2 Bib., 469.

Perry v. Washburn, 20 Cal., 818, is a case in point.

Prior to the Act of Congress of Feb. 5, 1862, the Supreme Court of California held that a tax was a debt. *Moore v. Patch*, 12 Cal., 270; *People v. Seymour*, 15 Cal., 840.

In the case of *Multnomah Co. v. The State*, 1 Oregon, 358, Justice Stratton, in delivering the opinion of the court and in construing the state law in question, says: "It is important to note the phraseology of these sections, as fixing the relations of the County and the State; the one becomes a debtor and the other a creditor for the amount charged, and on the day when the law has fixed the time of payment, it is a debt due and can be discharged only by payment, not in part but in full, as all other debts are discharged."

In the case of *Rhodes v. O'Farrell*, 2 Nev., 60, Bentley, Justice, holds that a tax is a debt, within the meaning of the Act of Congress, and may be paid in legal tender notes.

An action of law will lie to recover the tax. *Ohio v. Hubbard*, 3 Ohio, 68; *Ohio v. Guley*, 5 Ohio, 14; Chief Justice Shaw says, in *Appleton v. Hopkins*, 5 Gray, 580, that "In a certain large and general sense, taxes may be said to be debts due to the Commonwealth, the county, town and parish respectively."

It is submitted, with the utmost confidence, that the state legislation in question is void, because it clearly contravenes the financial policy of the government.

All the cases in this court, holding that a State has no power to tax the stocks, bonds and other securities of the United States, are antagonistic to the decision of the court below in this case.

Bk. of Commerce v. N. Y., 2 Black, 620 (67 U. S., XVII., 451), and cases there cited.

All these cases proceed upon the ground that a State Legislature has no right to burden or embarrass the means employed by the General Government in the execution of its powers.

Legal tender notes are clearly a means within the purview of these decisions.

Treasury notes issued and made legal tender, is one of the modes of "borrowing money on the credit of the United States."

Reliance is placed upon the proceedings of the Convention that framed the Constitution, to prove that Congress has no power to make treasury notes a legal tender.

All the proceedings of that Convention show that the men who composed it were unwilling that Congress should have the same substantive power to emit bills of credit as to coin money, but that the right to emit bills of credit should only be exercised as incidental to the execution of an express power and upon extraordinary occasions.

Acts of Congress authorizing the issue of treasury notes, have been passed as follows: June 30, 1812; Feb. 25, 1813; March 4, 1814; Dec. 30, 1814; Oct. 12, 1837; Jan. 31, 1842; Aug. 31, 1843; July 26, 1846; Jan. 28, 1847; Dec. 23, 1847. To hold that the treasury notes under the Act of Feb. 25, 1862, were unlawful tender for debts then existing, does not impair the obligation of contracts.

Faw v. Marsteller, 2 Cranch, 20; *Downman v. Downman*, 1 Wash. (Va.), 26; *Pong v. Lindsay*, 1 Dyer, 82 A; *U. S. v. Robertson*, 5 Pet., 644.

The Act of Congress passed Feb. 25, 1862, is constitutional. *Metropolitan Bk. v. VanDyck*, 27 N. Y., 400; *Thayer v. Hedges*, 23 Ind., 141.

Messrs. Rufus Mallory and Reverdy Johnson, for defendant in error:

If no other question than the construction of the Statute of Oregon were involved in this case, there could be no doubt that the judgment of the court below would be affirmed.

The Statute of Oregon (p. 441, sec. 46) provides that "The several county treasurers shall pay over to the State Treasurer, in gold or silver coin, the state tax," etc., "on or before," etc., "out of the first moneys collected and paid into the County Treasury." By this law the County Treasurer has no authority to pay, and the State Treasurer no right to receive, anything but gold and silver coin for the state tax levied against the county.

The statute further provides (page 438, sec. 32) that "the sheriff shall, in all cases, pay to the County Treasurer the full amount of the state and school tax in gold and silver coin." These two sections of the law require the sheriff to pay to the County Treasurer, in coin, the state and school tax, and the County Treasurer to pay to the State Treasurer the coin also, and for the purpose of hastening the payment of the tax to the State, a clause is added, requiring that it be paid out of the first money collected and paid into the County Treasury. To what "first money" does the law refer? Clearly such only as is made receivable by the law for state and school taxes, and that is "gold and silver coin." It matters nothing what other money may have been in the County Treasury, if it was not gold and silver it could not be paid for state taxes. If the words "first money," as used in the law, means anything but gold and silver coin, then prior to the Act of Feb. 25, 1862, the sheriff could have paid to the county, and that to the state, whatever he chose to obtain that is called money, no matter whether gold and silver, copper, worthless bank-bills, Continental or Confederate money.

The answer in this case admits that the money was paid to the County Treasurer according to law. The condition of the case,

then, with only the law of Oregon before the court, is, that the sheriff of Lane County paid over to the Treasurer \$5,460.96 in gold and silver coin, and the Treasurer has kept that in his pocket, and put in its place \$5,460.96 of a currency worth at the time of the tender, fifty or sixty cents on the dollar.

It is claimed that there is no law providing the manner in which the citizen shall pay his tax to the sheriff; no provision to prepare the sheriff with the necessary means to pay the County Treasurer the state tax.

This is a question which cannot affect the validity of this pleading. By the law of Oregon, the sheriff is required to pay to the County Treasurer the state and school tax in coin. How it comes into his hands, is no question here for the court. To pay coin is one of the duties of his office, one the law imposes upon him, and the court has no right to inquire into his ability to perform it in deciding this case.

But the plaintiff in error mainly relies upon the Act of Congress approved Feb. 25, 1862, to maintain his case. It is claimed that this Act abolishes the provisions of the statute referred to, and makes paper, and not gold and silver coin, receivable in payment of state taxes.

If the words "taxes, internal duties and excises" are synonymous with debts, public and private, then surely the Legislature is guilty of having encumbered the statutes with unnecessary and meaningless words.

That a tax is not a debt within the meaning of the Legal Tender Acts, we are not without authority to establish.

Camden v. Allen, 2 Dutch., 398; *Pierce v. Boston*, 3 Met., 520; *Shaw v. Pickett*, 28 Vt., 482; *Appleton v. Hopkins*, 5 Gray, 530; *Perry v. Washburn*, 20 Cal., 818.

The points summed up in these cases are, that an action of debt will not lie to recover a tax; a tax is not a set-off; does not bear interest; will not outlaw. Debts are recognized and regulated at common law, while taxes depend wholly upon statutory enactments for their existence. Debts arise upon contracts, express or implied. A tax is a demand by the governing power upon the governed, for a portion of his subsistence, which he is compelled to give, whether he will or not. In the case of *Perry v. Washburn*, 20 Cal., 818, the question is argued at length, and the case is summed up by His Honor, Justice Field, then Chief Justice of the Supreme Court of California, and the court there held that a tax is not a debt within the meaning of this Act, and that it was not the intention of Congress to make these notes receivable for state taxes, nor for any tax except those enumerated in the Act itself.

But if it was the intention of Congress to make these notes receivable for state taxes, a question as to their constitutional power to carry that intention into effect at once arises. The right of a State, under the Constitution, to a distinct municipal organization, in no other manner subject to the will of Congress than that its Constitution is republican in form, necessarily carries with it the right to support and maintain that organization, without congressional permission or dictation.

To give such power to Congress, would be to place the States entirely at the mercy of that body for their existence.

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What power is in Congress to prevent Oregon from collecting its taxes in any specific article, and what right to say that that article shall or shall not be gold and silver, in the shape of United States coin? Manifestly none; and if Congress has attempted to deprive it of that power by legislation, such legislation is wholly without authority of the Constitution and, therefore, void.

Mr. Chief Justice Chase delivered the opinion of the court:

The State of Oregon, in April, 1865, filed a complaint against the County of Lane, in the Circuit Court of the State, for that County, to recover \$5,460.96, in gold and silver coin, which sum was alleged to have become due as state revenue from the County to the State on the first Monday of February, 1864.

To this complaint an answer was put in by the County alleging a tender of the amount claimed by the State, made on the 23d day of January, 1864, to the State Treasurer, at his office, in United States notes, and averring that the lawful money so tendered and offered was, in truth and fact, part of the moneys collected and paid into the County Treasury after the assessment of taxes for the year 1862.

To this answer there was a demurrer, which was sustained by the circuit court, and judgment was given that the plaintiff recover of the defendant the sum claimed, in gold and silver coin, with costs of suit, and this judgment was affirmed upon writ of error by the Supreme Court of the State. The case is brought here by writ of error to that court; and two propositions have been pressed upon our attention, ably and earnestly, in behalf of the plaintiff in error.

The first is, that the laws of Oregon did not require the collection in coin of the taxes in question, and that the Treasurer of the County could not be required to pay to the Treasurer of the State any other money than that in which the taxes were actually collected.

The second is, that the tender of the amount of taxes made to the Treasurer of the State by the Treasurer of the County in United States notes, was warranted by the Acts of Congress authorizing the issue of these notes, and that the law of the State, if it required collection and payment in coin, was repugnant to these Acts and, therefore, void.

The first of these propositions will be first considered.

The answer avers, substantially, that the money tendered was part of the first moneys collected in Lane County after the assessment of 1863, and the demurrer admits the truth of the answer.

The fact, therefore, may be taken as established, that the taxes for that year, in Lane County, were collected in United States notes.

But was this in conformity with the laws of Oregon?

In this court the construction given by the state courts to the laws of a State, relating to local affairs, is uniformly received as the true construction; and the question first stated must have been passed upon in reaching a conclusion upon the demurrer, both by the Circuit Court for the County and by the Supreme Court of the State. Both courts must have held that

the Statutes of Oregon, either directly or by clear implication, required the collection of taxes in gold and silver coin.

Nor do we perceive anything strained or unreasonable in this construction. The laws of Oregon, as quoted in the brief for the State, provided that "the sheriff shall pay over to the County Treasurer the full amount of the state and school taxes, in gold and silver coin" (Statutes of Oregon, 438, sec. 32); and that "the several county treasurers shall pay over to the State Treasurer the state tax, in gold and silver coin." Statutes of Oregon, 441, sec. 46.

It is certainly a legitimate, if not a necessary inference, that these taxes were required to be collected in coin. Nothing short of express words would warrant us in saying that the laws authorized collection in one description of money from the people, and required payment over of the same taxes into the county and state treasuries in another.

If, in our judgment, however, this point were otherwise, we should still be bound by the soundest principles of judicial administration, and by a long train of decisions in this court, to regard the judgment of the Supreme Court of Oregon, so far as it depends on the right construction of the statutes of that State, as free from error.

The second proposition remains to be examined, and this inquiry brings us to the consideration of the Acts of Congress, authorizing the issue of the notes in which the tender was made.

The first of these was the Act of February 25, 1862, which authorized the Secretary of the Treasury to issue, on the credit of the United States, one hundred and fifty millions of dollars in United States notes, and provided that these notes "shall be receivable in payment of all taxes, internal duties, excises, debts and demands due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except interest on bonds and notes, which shall be paid in coin; and shall also be lawful money and legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid."

The second Act contains a provision nearly in the same words with that just recited, and under these two Acts two thirds of the entire issue was authorized. It is unnecessary, therefore, to refer to the third Act, by which the notes to be issued under it are not in terms made receivable and payable, but are simply declared to be lawful money and a legal tender.

In the first Act no emission was authorized of any notes under \$5, nor in the other two of any under \$1. The notes, authorized by different statutes, for parts of a dollar, were never declared to be lawful money or a legal tender. 12 Stat. at L., 592, 711.

It is obvious, therefore, that a legal tender in United States notes of the precise amount of taxes admitted to be due to the State could not be made. Coin was then, and is now, the only legal tender for debts less than \$1. In the view which we take of this case, this is not important. It is mentioned only to show that the general words "all debts" were not intended to be taken in a sense absolutely literal.

We proceed, then, to inquire whether, upon a sound construction of the Acts, taxes imposed by a state government upon the people of the state, are debts within their true meaning.

In examining this question it will be proper to give some attention to the Constitution of the States and to their relations as United States.

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a National Government, acting, with ample power, directly upon the citizens, instead of the Confederate Government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved. The general condition was well expressed by Mr. Madison in the *Federalist*, thus: "The Federal and State Governments are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes."

Now, to the existence of the States, themselves, necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments. Under the Articles of Confederation the Government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture or use, was acknowledged to belong exclusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the National Government, and subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect, and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports or imports, except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business and persons, within their respect-

ive limits, their power of taxation remained and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the Legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress. If, therefore, the condition of any State, in the judgment of its Legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly, a reasonable conclusion that Congress did not intend, by the general terms of the Currency Acts, to restrain the exercise of this power in the manner shown by the Statutes of Oregon.

Other considerations strengthen this conclusion. It cannot escape observation that the provision, intended to give currency to the United States notes, in the two Acts of 1862, consists of two quite distinguishable clauses. The first of these clauses makes those notes receivable in payment of all dues to the United States, and payable in satisfaction of all demands against the United States, with specified exceptions; the second makes them lawful money, and a legal tender in payment of debts, public and private, within the United States, with the same exceptions.

It seems quite probable that the first clause only was in the original bill, and that the second was afterward introduced during its progress into an Act. However this may be, the fact that both clauses were made part of the Act of February, and were retained in the Act of July, 1862, indicates clearly enough the intention of Congress that both shall be construed together. Now, in the first clause, taxes are plainly distinguished, in enumeration, from debts; and it is not an unreasonable inference, that the word "debts" in the other clause was not intended to include taxes.

It must also be observed that the first clause, which may be called the receivability and payable clause, imposes no restriction whatever upon the States in the collection of taxes. It makes the notes receivable for national taxes, but does not make them receivable for state taxes. On the contrary, the express reference to receivability by the National Government, and the omission of all reference to receivability by the state governments, excludes the hy-

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pothesis of an intention on the part of Congress to compel the States to receive them as revenue.

And it must also be observed that any construction of the second, or, as it may well enough be called, legal tender clause, that includes dues for taxes under the words "debts, public and private," must deprive the first clause of all effect whatever. For if those words, rightly apprehended, include state taxes, they certainly include national taxes also; and if they include national taxes, the clause making them receivable for such taxes was wholly unnecessary and superfluous.

It is also proper to be observed, that a technical construction of the words in question might defeat the main purpose of the Act, which, doubtless, was to provide a currency in which the receipts and payments incident to the exigencies of the then existing civil war might be made.

In his work on the Constitution, the late *Mr. Justice Story*, whose praise as a jurist is in all civilized lands, speaking of the clause in the Constitution giving to Congress the power to lay and collect taxes, says of the theory which would limit the power to the object of paying the debts that, thus limited, it would be only a power to provide for the payment of debts then existing. 1 *Story, Const.*, §89, sec. 921. And certainly, if a narrow and limited interpretation would thus restrict the word "debts" in the Constitution, the same sort of interpretation would, in like manner, restrict the same word in the Act. Such an interpretation needs only to be mentioned to be rejected. We refer to it only to show that a right construction must be sought through larger and less technical views. We may, then, safely decline either to limit the word "debts" to existing dues, or to extend its meaning so as to embrace all dues of whatever origin and description.

What, then, is its true sense? The most obvious and, as it seems to us, the most rational answer to this question is, that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this.

We are the more ready to adopt this view, because the greatest of English elementary writers upon law, when treating of debts in their various descriptions, gives no hint that taxes come within either (2 *Bl. Com.*, 475, 476); while American state courts, of the highest authority, have refused to treat liabilities for taxes as debts, in the ordinary sense of that word, for which actions of debt may be maintained.

The first of these cases was that of *Pierce v. Boston*, 3 *Met.*, 520 (1842), in which the defendant attempted to set off against the demand of the plaintiff certain taxes due to the city. The statute allowed mutual debts to be set off, but the court disallowed the right to set off taxes. This case went, indeed, upon the construction of the Statute of Massachusetts, and did not turn on the precise point before us; but the language of the court shows that taxes were

not regarded as debts within the common understanding of the word.

The second case was that of *Shaw v. Pickett*, 26 Vt., 486, in which the Supreme Court of Vermont said: "The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding *in invitum*."

The next case was that of *Camden v. Allen*, 2 Dutch., 898 (1857). That was an action of debt brought to recover a tax by the municipality to which it was due. The language of the Supreme Court of New Jersey was still more explicit: "A tax, in its essential characteristics," said the court, "is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the State. It is not founded on contract or agreement. It operates *in invitum*. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts express or implied."

These decisions were all made before the Acts of 1862 were passed, and they may have had some influence upon the choice of the words used. Be this as it may, we all think that the interpretation which they sanction is well warranted. We cannot attribute to the Legislature an intent to include taxes under the term "debts" without something more than appears in the Acts to show that intention.

The Supreme Court of California, in 1862, had the construction of these Acts under consideration in the case of *Perry v. Washburn*, 20 Cal., 350. The decisions which we have cited were referred to by Chief Justice Field, now holding a seat on this bench, and the very question we are now considering, "What did Congress intend by the Act?" was answered in these words: "Upon this question we are clear that it only intended by the terms 'debts, public and private,' such obligations for the payment of money as are founded upon contract."

In whatever light, therefore, we consider this question, whether in the light of the conflict between the legislation of Congress and the taxing power of the States, to which the interpretation insisted on in behalf of the County of Lane would give occasion, or in the light of the language of the Acts themselves, or in the light of the decisions to which we have referred, we find ourselves brought to the same conclusion, that the clause making the United States notes a legal tender for debts, has no reference to taxes imposed by state authority, but relates only to debts in the ordinary sense of the word, arising out of simple contracts, or contracts by specialty, which include judgments and recognizances. 1 Pars., Cont., 7.

Whether the word "debts," as used in the Act, includes obligations expressly made payable or adjudged to be paid in coin, has been argued in another case. We express at present no opinion on that question.

The judgment of the Supreme Court of Oregon must be affirmed.

Cited—7 Wall., 725; 8 Wall., 541, 607; 9 Wall., 501; 11 Wall., 125; 12 Wall., 624; 18 Wall., 29; 102 U. S., 513; 4 Dill., 67; 6 Sawy., 511; 20 Minn., 403; 2 Am. Rep., 56 (57 Me., 362); 8 Am. Rep., 70 (21 Ohio, 478); 10 Am. Rep., 48 (36 Ind., 367); 17 Am. Rep., 762 (48 Ind., 360); 22 Am. Rep., 422 (56 N. H., 38); 30 Am. Rep., 138 (3 Tex. Ct. App., 263).

ALBERT F. LINCOLN, *Plff. in Er.*,

HORACE B. CLAFLIN, EDWARD E. EAMES, JOHN J. DONALDSON AND HORACE B. CLAFLIN, JR.

(See S. C., 6 Wall., 132-139.)

What bill of exceptions should contain—party aiding fraud is chargeable with it—when evidence of other frauds, admissible—declarations of each fraudulent actor, when admissible against the other—interest as damages—general exception to charge, unavailing.

A bill of exceptions should only present the rulings of the court upon some matter of law, and should contain only so much of the testimony as may be necessary to explain the bearing of the rulings upon the issues involved.

Where a party, knowing the fraud contrived, aided in its execution and shared its proceeds, he is chargeable with all its consequences, and can be treated and pursued as an original party.

Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible.

The declarations of each defendant, relating to the transaction, are evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs.

In cases of tort, the allowance of interest as damages rests in the discretion of the jury.

Where a charge embraces several distinct propositions, a general exception cannot avail, if any one of them is correct.

[No. 57.]

Submitted Jan. 19, 1869. Decided Feb. 8, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below by the defendants in error, against Mileham and Lincoln, to recover for goods alleged to have been obtained by fraudulent representations. Judgment having been entered in said court in favor of the plaintiff, the defendant, Lincoln, sued out this writ of error.

Mr. W. C. Goudy, for plaintiff in error:

If Mileham did make false assertions by which the plaintiffs were induced to sell upon a credit, no injury or damages would occur to them, if the debt was paid at the time agreed.

Fraud or deceit is not a cause of action, unless injury and damage is produced thereby.

Adler v. Fenton, 24 How., 410 (85 U. S., XVI., 697); *Sivile v. Roberts*, 1 Ld. Raym., 374; *Hutchins v. Hutchins*, 7 Hill, 104; *Morgan v. Bliss*, 2 Mass., 112; *Idle v. Gray*, 11 Vt., 615; *Fuller v. Hodgdon*, 25 Me., 248; *Upton v. Vail*, 6 Johns., 183.

But it may be said that the title to the goods would not pass to the defendants or either of them, because of the fraudulent purchase alleged.

But an action on the case does not rest upon the hypothesis that the goods are the property of the plaintiff. The theory of the action is, that they have been deprived of the goods and the title thereto by the wrongful acts of the de-

NOTE.—Interest, when recoverable as damages, or on money. See note to *Smeed v. Wistar*, 21 U. S. (8 Wheat.), 690.

Where an illegal combination is proved, declarations of one about the enterprise are evidence against the other co-conspirators.

Where several are combined for an illegal purpose, the acts and declarations of each, in respect to the common object, are evidence against the

endants, and that they are unable to recover payment from the vendee.

The circuit court refused the prayer of the defendants and charged instead, as follows, to wit:

"The controversy turns chiefly upon Mr. Lincoln's connection with this matter. I do not think it was actually necessary that it should be by preconceived alone. If it was, of course he is a party; but if knowing or having reason to believe that a fraud had been committed by Mileham, he became a party to it by his subsequent acts and conduct, and availed himself of the fraud for the promotion of his own interest. I think that would be sufficient to connect him with it, and it would be the same as though he had been a party to it originally. One or the other of these facts must be found by the jury before they find a verdict against Lincoln. If they find either of them to be true, either that he was an original party or became such subsequently in the way I have stated, then they may find a verdict against him."

The gist of the declaration was the fraudulent purchase of the plaintiff's goods in pursuance of a fraudulent prearrangement or conspiracy between Mileham and Lincoln. Under the allegations of the declaration, the purchase was made as much by Lincoln as Mileham. Of these allegations there was no proof. There was, therefore, a variance; the *allegata* and the *probata* did not agree.

This court has decided that an action cannot be maintained against a debtor and others for fraudulently disposing of the goods purchased on a credit, to avoid the payment thereof. The title is in the debtor; the vendors have no lien; the debtor would be liable, under the Statute of Frauds, to all the remedies provided against such an act, but no action lies against those who conspire with him to defeat the creditors.

Adler v. Fenton, 24 How., 408 (65 U. S., XVI., 697).

The Supreme Court of Illinois have decided that interest can only be recovered in actions *ex contractu* and in the cases specified in the statute.

Sammis v. Clark, 13 Ill., 545; *Hitt v. Allen*, 13 Ill., 592.

Interest cannot be recovered in an action

sounding in damages for a tort. *Dowling v. Stewart*, 8 Scam., 193.

I suppose the law of Illinois to be conclusive on this question; but even if not, interest cannot be recovered in a case like this as a matter of law. Sedg. Dam., 374; 2 Pars. Cont., 383.

The principle that interest is not allowed *ex nomine* in an action to recover damages for the wrongful conversion or tortious taking of property, but is purely a matter of discretion with the jury, is clearly sustained by all the authorities.

Gilpins v. Consequa, Pet. C. C., 85; *Willings v. Same*, *ib.*, 174; *Holmes v. Misroom*, 1 S. C. Const., 21; *Hyde v. Stone*, 7 Wend., 354; *Beals v. Guernsey*, 8 Johns., 447.

The objection to the deposition of Lawrence is good. The witness gave a conversation with Mileham in New York several days before the plaintiffs below sold their goods, and after the witness had sold him some merchandise. It was a street talk in no way connected with the case.

The witnesses testified to conversations with Mileham in the absence of Lincoln, and with Lincoln in the absence of Mileham, at Peoria, after the 20th December, 1865.

In this case, however, there was no evidence whatever of the conspiracy and, therefore, there was no foundation upon which it could be admitted.

Mr. John F. Farnsworth, for defendants in error:

The case at bar was not brought to prevent Mileham from making a disposition of his property, fraudulent or otherwise, or to recover damages for his having made such disposition.

We do not allege that we have suffered damage by reason of the conspiracy between Lincoln and Mileham, fraudulently to dispose of the property of the latter, but to recover damages against them for obtaining, by a fraudulent conspiracy, the possession of our property.

There is no such thing as a civil action of conspiracy. All such actions are merely actions on the case for the recovery of damages. The gist of the action is the fraud.

White v. Merritt, 7 N. Y., 356; Bac. Abr., Actions on the Case, H; *Yates v. Joyce*, 11 Johns., 140; *Wardell v. Foadick*, 13 Johns., 325;

others; yet, before such evidence can be admitted, the court must decide for itself that there is sufficient evidence *prima facie* to prove such combination, which the jury may, nevertheless, negative. *Clayton v. Anthony*, 6 Rand., 283; U. S. v. Cole, 5 McLean, 513; *Rex v. Stone*, 6 Tenn., 527; *Preston v. Bowers*, 13 Ohio St., 1; *Commonwealth v. Brown*, 14 Gray, 410; *Kimmell v. Geeting*, 2 Grant, 125; *Price v. Jones*, 4 Watts, 85; S. C., 23 Am. Dec., 685.

The sufficiency of the evidence of the combination to form a foundation, is in the following cases held a question for the jury. *State v. Ross*, 20 Mo., 32; *Burke v. Miller*, 7 Cugh., 547; *Jones v. Hurlburt*, 29 Barb., 408; *State v. Nash*, 7 Iowa, 347. It seems it has been held to be a question for the jury in some cases. *Oldham v. Bentley*, 6 B. Mon., 428; *Helser v. McGrath*, 58 Pa. St., 458.

A division of the profits of a fraudulent transaction, is sufficient, because it is some evidence of a combination to defraud. *Kimmell v. Geeting*, 2 Grant, 125.

Slight evidence of collusion is all that is required. *McDowell v. Rissel*, 37 Pa., 164; *Peterson v. Speer*, 29 Pa., 479; *Clinton v. Estes*, 20 Ark., 218; *Johnson v. State*, 29 Ala., 62; *Evans v. Watson*, 55 Pa., 54; *Benham v. Cary*, 11 Wend., 83; *Craig v. Craw*, 12 Wend., 41; S. C., 27 Am. Dec., 110; 3 Whart. Ev., sec. 1205; *Biselow on Fr.*, 434.

All acts and declarations performed or made for See 7 WALL.

the purpose of carrying the unlawful design into effect, are admissible in evidence after the existence of such a design has been presumptively established. 2 Stark. on Ev., 401, 403; *Am. Fur Co. v. U. S.*, 27 U. S. (2 Pet.), 384; *Page v. Parker*, 40 N. H., 47; *Lee v. Lamprey*, 43 N. H., 13.

Where a combination is shown between an assignor and assignee for benefit of creditors, to defraud, then declarations of each while acting in furtherance of the wrongful scheme are competent against the other, even when made without the knowledge of the other. *Cuyler v. McCartney*, 40 N. Y., 226; *Lee v. Huntton*, Hoffm., 453; *Adams v. Davidson*, 10 N. Y., 309; *Nudd v. Burrows*, 91 U. S., 438.

The objection of absence goes only to weight of evidence. *Bushnell v. City B'k*, 10 La. Ann., 444.

The declarations of one not a party may be admitted under this rule. *Am. Fur Co. v. U. S.*, 27 U. S. (2 Pet.), 385, 384; *Preston v. Bowers*, 13 Ohio St., 1, 18.

Declarations made before the combination are not competent. *Legg v. Olney*, 1 Den., 202.

Where a combination between father and son to defraud creditors is proved, evidence of the declarations of the father in his son's absence, that a bond was given to keep off creditors, is admissible. *Reitenbach v. Reitenbach*, 1 Rawle, 322; S. C., 18 Am. Dec., 638.

Benton v. Pratt, 2 Wend., 890, and cases there cited; *Sheple v. Page*, 12 Vt., 519.

It is claimed that the court erred in admitting the testimony of the declarations made to each of them by Mileham in the absence of Lincoln, and by Lincoln in the absence of Mileham.

This evidence was, we think, entirely proper.

Where property in the hands of a third person is seized upon an execution against the debtor, the vendor of such third person, on the ground that the transfer was made with intent to hinder, delay and defraud creditors, the declarations of the debtor, even in the absence of the purchaser from him, are admitted to show his intent, that being one of the facts necessary to be proven. His fraudulent purpose being thus established, a knowledge of or participation in such purpose by the purchaser from him, may be established by the declarations of such purchaser. In such cases, fraud must be shown by both parties to the transfer, and this may be done by entirely different methods of proof. Upon this principle, evidence of other fraudulent transactions made about the same time is admissible, as characterizing the particular sale under investigation.

Whittier v. Varney, 10 N. H., 294; *Bridges v. Eggleston*, 14 Mass., 260; *Foster v. Hall*, 12 Pick., 89; *Hove v. Reed*, 12 Me., 515; *Blake v. Howard*, 11 Me., 202; *Lovell v. Briggs*, 2 N. H., 228; *Wiggin v. Day*, 9 Gray, 97; *Scott v. Williams*, 14 Abb. Pr., 50; *Cary v. Hotelling*, 1 Hill, 816.

And especially does this rule obtain in those cases where proof has been introduced tending to show a fraudulent combination.

McKee v. Gilchrist, 8 Watts, 232; *Waterbury v. Sturtevant*, 18 Wend., 353; *Clayton v. Anthony*, 6 Rand., 285; *Reitenbach v. Reitenbach*, 1 Rawle, 362; *Wilbur v. Strickland*, 1 Rawle, 458; *Caldwell v. Williams*, 1 Ind., 409; *Ouyler v. McCartney*, 33 Barb., 165.

In actions of this character, a recovery may be had against any one of the defendants against whom a case is made. Any evidence, as his own declaration tending to fasten the charge of fraud upon him alone, must be admissible.

Jones v. Baker, 7 Cow., 445.

We do not understand that, in order to make Lincoln liable in this form of action, it is essential for us to show that he participated with Mileham in the scheme of fraud at the very moment of its inception. This doctrine is held, even in criminal cases.

People v. Mather, 4 Wend., 261.

Mr. Justice Field delivered the opinion of the court:

The bill of exceptions in this case is made up without any regard to the rules in accordance with which such bills should be framed. It is little else than a transcript of the evidence, oral and documentary, given at the trial, and covers ninety-six printed pages of the record, when the exceptions could have been presented with greater clearness and precision in any five of them. In its preparation counsel seem to have forgotten that this court does not pass, in actions at law, upon the credibility or sufficiency of testimony; that these are matters which are left to the jury, and for any errors in its action the remedy must be sought in the court below by a motion for a new trial. A bill of excep-

tions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed, it can seldom be necessary, for the just determination of any question raised at the trial, to set forth the entire evidence given; and the practice in some districts—quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned. It only serves to throw increased labor upon us, and unnecessary expense upon parties. If counsel will not heed the admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions.

The action in this case is brought to recover damages against the defendants for fraudulently obtaining the property of the plaintiffs. The declaration alleges a combination between the defendants pursuant to which one of them purchased goods to a large amount in the City of New York, of different parties and, among others, of the plaintiffs, upon a false and fraudulent representation of his means and business; and the other defendant disposed of them within a few days afterwards, by auction, at less than their cost price, and appropriated the proceeds to his own use; the whole proceeding being taken with intent to defraud the vendors of their property. The case differs materially from that of *Adler v. Fenton*, reported in 24 Howard [XVI., 696], which is cited to show that the declaration discloses no cause of action. In that case certain creditors, whose demand was not due at the time, brought an action against their debtors and others for an alleged conspiracy to dispose of the property of the debtors, so as to hinder and defeat the creditors in the collection of their demand; and this court held that the action would not lie. The decision proceeded upon the ground that creditors at large have their debtors as to enable them to interfere with no such legal interest in the property of any disposition of it before the maturity of their demands. The creditors in that case possessed no lien or interest in the property of their debtors to impair or clog in any respect the right of the latter to make any use or disposition of it they saw proper. The exercise of that right, whatever the motive, violated no existing right of the creditors and, consequently, furnished them no ground of action.

The case at bar is not brought upon the allegation that the defendants have fraudulently disposed of their own property, but that they have fraudulently obtained possession of the property of the plaintiffs. It proceeds upon the theory that the title to the goods never passed

to the defendants, but remained in the plaintiffs, from whom they were obtained by false and fraudulent representations.

That such representations were made by the defendant, Mileham, and that by means of them the goods were obtained, was not seriously disputed at the trial. The principal controversy turned upon the connection of the defendant, Lincoln, with the fraudulent acts of Mileham. The declaration alleges that the fraud was a matter of pre-arrangement between them, and their counsel insisted that proof of such pre-arrangement was essential to a recovery against Lincoln, but the court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In thus holding we perceive no error. The character of the transaction was not changed, whether Lincoln was an original party in its inception, or became a party subsequently; nor was the damage resulting to the plaintiffs affected by the precise day at which he became a co-conspirator with Mileham. If, knowing the fraud contrived, he aided in its execution, and shared its proceeds, he was chargeable with all its consequences, and could be treated and pursued as an original party. Every act of each in furtherance of the common design was, in contemplation of law, the act of both.

On the trial, declarations of the defendants were received, which related not merely to the transaction which is subject of inquiry in this action, but to similar contemporaneous transactions with other parties. The evidence was not incompetent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible. Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary v. Hotelling*, 1 Hill, 817, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge. *Hall v. Naylor*, 18 N. Y., 588; and *Castle v. Bullard*, 23 How., 172 [64 U. S., XVI., 424].

The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise they should not be regarded.

It is possible that the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury. But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an express rule of this court. It embraces several distinct propositions, and a general exception in such case cannot avail the party if any one of them is correct.

Judgment affirmed.

Cited—7 Wall., 568; 13 Wall., 465; 17 Wall., 411; 98 U. S., 234; 103 U. S., 73, 96; 106 U. S., 422; 7 Ben., 136; 14 Blatchf., 836, 498.

HANNIBAL GREEN, *Piff. in Err.*,

v.

MORRIS S. VAN BUSKIRK ET AL.

(See S. C., 7 Wall., 139-152.)

Effect of state attachment—proceedings in another State—title under same—valid—dominion of State over property situate there.

Where the effect, which attachment proceedings in Illinois produced in that State on property, was denied to them by the Supreme Court of New York, the judgment of the latter State was erroneous.

The title acquired under the attachment laws of a State, and which is valid there, is to be held valid in every other State.

The dominion of a State over personal property situate there is complete and its right perfect, to regulate its transfer and subject it to process and execution in its own way and by its own laws.

[No. 81.]

Argued Jan. 8, 1869. Decided Feb. 8, 1869.

IN ERROR to the Supreme Court of the State of New York. (*Remittitur.*)

The defendants in error brought suit in the Supreme Court of New York.

The trial was before the court at circuit and upon the facts, as specially found by the court; the court decided, as its conclusions of law respecting the sale, that "The law of the State of New York is to govern the transaction," and not that of Illinois; that by the New York law of sales, "The title to the safes passed on the execution and delivery of the instruments," on November 2 and, therefore, as the safes had thus passed to Bates' vendees, that the subsequent attachment against his property did not reach them, and that such vendees and owners were entitled to judgment.

To this decision upon the question of ownership under the sale of November 3, the plaintiff in error excepted, and appealed to the Supreme Court, at General Term, where the judgment was affirmed. An appeal was taken to the Court of Appeals and this decision there reviewed, and that court affirmed the judgment of the General Term. Then the decision of affirmance by the Court of Appeals was brought here for review, under the 25th section of the Judiciary Act, upon the allegation that full faith and credit were not given therein to the Illinois proceeding against Bates.

A further statement of the case appears in the opinion of the court.

Messrs. Amasa J. Parker and Lyman Trumbull, for plaintiff in error:

NOTE.—Lex loci and lex fori, as to contracts, including notes and bills, as to drawer, indorser, usury, &c. See note to *Slacum v. Pomery*, 10 U. S. (6 Cranch), 221.

The courts of Illinois have repeatedly held that the lien of the attaching creditor, without notice, is superior to the rights of one who has attached personal property, but has not reduced it to possession before the levy of the attachment. In this case the forty-one safes assigned by Bates to the defendants in error—but not having come into their possession, in the language of *Justice Gould*, in his opinion in this case—were “by the laws of the land where the plaintiffs in error sued, the property of Bates.”

Martin v. Dryden, 1 Gilm., 187; *Coffin v. Ray*, 1 Metc., 214; *Burnell v. Robertson*, 5 Gilm., 282; *Jones v. Jones*, 16 Ill., 119; *Wagoner v. Cooley*, 17 Ill., 245.

The principle involved in these decisions of the courts of Illinois, is in accordance with the general principles of international law, and the decisions of courts in many States of the Union.

Story, Conf. L., sec. 416, and cases cited in *n. 1*; *Olivier v. Townes*, 2 Mart. (N. S.), 93, 103, cited at length in *Story*, Conf. L., secs. 887, 888, 8:9; *Lansfear v. Sumner*, 17 Mass., 110, cited in *Story*, Conf. L., p. 822, *n. 1*; see, also, *Story*, Conf. L., sec. 891, where the distinction is drawn between a transfer of goods on lands in some particular country, and at sea in no country.

The attachments issued by the defendants in this case were proceedings *in rem*; and decisions *in rem* are binding and conclusive, not only upon the parties actually litigating the cause, but upon all others, if the suit was commenced against the proper parties, and if the judgment was obtained *bona fide*, and without fraud.

Greenl. Ev., secs. 525, 540, 541, 542, 544, 556; 1 *Stark. Ev.*, 547; *Wadsworth v. Sharpsteen*, 8 N. Y., 392; *Bogardus v. Clark*, 4 Paige, 626; *Hart v. McNamara*, 4 Price, 154, note; *Scott v. Shearman*, 2 W. Bl., 977; 31 N. Y., 140.

If these actions had been brought by the defendants in error in the State of Illinois, on these facts shown, they could be recovered, but the court then would have said the defendants in error had obtained, under the attachment, a good right to the property.

“Such being the effect of the judicial proceeding in question in the State of Illinois, we had a right, under article 4, section 1, of the United States Constitution, and section of the Act of Congress, of May 26, 1790, to insist that the same force, effect and credit shall be given to it in the State of New York.

Hampton v. McConnel, 3 Wheat., 284; *Mayhew v. Thatcher*, 6 Wheat., 129; *Hall v. Williams*, 6 Pick., 282; *Cochran v. Fitch*, 1 Sandf. Ch., 146; *Kent, Com.*, 261; *Story*, Conf. L., sec. 591; *Christmas v. Russell*, 5 Wall., 290 (72 U. S., XVIII., 475); 4 Met. (Ky.), 112, opinion of *Mr. Justice Clifford*.

Messrs. J. S. Black, J. M. Carlisle, J. K. Porter and John B. Gale, for defendants in error:

The New York courts rightly decided that the sale by Bates was governed by the law of sales of New York; for a voluntary transfer of personal property is governed everywhere by the law of the owner's domicile—except, perhaps, as against the citizens of the local situation.

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Still v. Worswick, 1 H. Bl., 690; 2 *Kent, Com.*, sec. 376, p. 426; *Parsons v. Lyman*, 20 N. Y., 103; *Burlock v. Taylor*, 16 Pick., 335; *Story*, Conf. L., 876; *Story's Life and Letters*, 380; *Ogden v. Saunders*, 12 Wheat., 213; *Taylor v. Boardman*, 25 Vt., 589; *Hunter v. Potts*, 4 T. R., 182; *Holmes v. Remsen*, 20 Johns., 229; *Johnson v. Hunt*, 23 Wend., 87; *Müne v. Mordon*, 6 Binn., 353; *Hoyt v. Thompson*, 5 N. Y., 320; *Whipple v. Thayer*, 16 Pick., 25; *Daniels v. Wilard*, 16 Pick., 86; *R. I. Cent. Bank v. Danforth*, 14 Gray, 128; *Van Buskirk v. Hartf. Fire Ins. Co.*, 14 Conn., 583; *Sanderson v. Bradford*, 10 N. H., 260; *Noble v. Smith*, 6 R. I., 446; *Bholen v. Cleveland*, 5 Mas., 175; *Caskie v. Webster*, 2 Wall., Jr., 181; *Burr. Assts.*, 2d ed., 370.

Had the question between these parties been tried in Illinois, the courts there should have determined the effect of Bates sale by the law of his domicile; and for aught that appears, would have so determined it.

This decision, that the New York law governed the sale, was right for the further reason that the parties, as citizens of New York, were bound by its laws.

By the law of sales of New York, the sale by Bates being *bona fide*, was complete without delivery, and the title to the safes passed immediately to the owners.

The decision that the law of New York governed the sale, and that by it the safes became the property of the defendants in error on November 3, fully disposed of the case and prevented any inquiry into the law of sales of Illinois, or as to the subsequent suit against Bates, and the process against his property; and this decision was the only one under review in the Court of Appeals.

The decision of the New York Court of Appeals comes before this court, not only as dictated by a sacred principle of international law, but as guarantied by the fundamental right of a State to adopt its own commercial laws, and govern its own citizens thereby; and on the other hand, that the allegation of error in such decision is founded upon gratuitous assumptions, and is itself pregnant with error.

Among these unfounded assumptions are the following:

1. That the Illinois proceedings were pleaded as a justification.
2. That those proceedings adjudged the question of ownership.
3. That a right was set up or claimed under the Constitution.
4. That any such right was denied.
5. That the sale was invalid by the Illinois law of sales.
6. That the Illinois law was, that sales of movables are governed by the law of their local situation.

Among the errors involved in such allegations are the following:

1. That a suit *in personam* for a debt is a suit *in rem*.
2. That the liability of property to seizure under general process in such a suit, does not depend upon the property being that of the debtor.
3. That such ownership and liability are not determined *aliunde*, but by the judgment in debt and the act of seizure.

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4. That the effect of a previous sale is not determined by the law of sales applicable to it.

5. That the judgment in debt is conclusive against the owner of the property, that it was the debtor's.

6. That unless such judgment have this effect, of concluding strangers upon a question not involved in it, the Federal Constitution is violated.

7. That thus an attachment or execution creditor has greater rights than a *bona fide* purchaser.

8. That the sales of movables are governed by the law of their local situation.

9. That the Constitution prescribes this rule, and prohibits the state courts from administering the *lex fori* or *lex domicilii*, even between their own citizens.

10. That the citizens of a State are not bound by its laws.

Mr. Justice Davis delivered the opinion of the court:

That the controversy in this case was substantially ended when this court refused, 5 Wall., 812 [72 U. S., XVIII., 401], to dismiss the writ of error for want of jurisdiction, is quite manifest by the effort which the learned counsel for the defendants in error now made, to escape the force of that decision.

The question raised on the motion to dismiss was, whether the Supreme Court of New York, in this case, had decided against a right which Green claimed under the Constitution, and an Act of Congress. If it had, then this court had jurisdiction to entertain the writ of error, otherwise not.

It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the Supreme Court of New York, in the decision which was rendered.

Whether this was so or not, could only be properly considered when the case came to be heard on its merits; but this court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided what effect the attachment proceedings in Illinois had by the law and usage in that State; and as it decided against the effect which Green claimed for them, this court had jurisdiction, under the clause of the Constitution which declares "that full faith and credit shall be given in each State to the public Acts, records and judicial proceedings in every other State," and the Act of Congress of 1790, which gives to those proceedings the same faith and credit in other States that they have in the State in which they were rendered.

This decision, supported as it was by reason and authority, left for consideration, on the hearing of the case, the inquiry, whether the Supreme Court of New York did give to the attachment proceedings in Illinois the same effect they would have received in the courts of that State.

A succinct statement of the facts in the case, which are brief, will give us a clear idea of what those proceedings were, and enable us the better to understand the controverted point concerning them. It seems that, on the 8d day of November, 1857, Bates, who lived in Troy, New

York, and owned certain iron safes in Chicago, Illinois, in order to secure an existing indebtedness to Van Buskirk and others, executed and delivered (in the State of New York) to them a chattel mortgage on the safes. Two days after this, Green, the plaintiff in error, also a creditor of Bates, sued out of the proper court of Illinois, a writ of attachment, caused it to be levied on these safes, got judgment in the attachment suit, and had the safes sold in satisfaction of his debt. At the time of the levy of this attachment, the mortgage had not been recorded in Illinois; nor had possession of the property been delivered under it; nor had the attaching creditor notice of its existence. Green, Van Buskirk and Bates were all citizens of New York.

As has been stated, the mortgagees sued Green in New York for taking and converting the safes, who defended the taking and conversion under the Illinois attachment proceedings.

It is stipulated in the record that these proceedings were regular, and in conformity with the laws of Illinois; that Bates was the owner of the safes on the 8d of November, 1857, and that Green was a *bona fide* creditor of Bates. After the levy of the attachment, Green was notified of the mortgage, and the claim under it, and the mortgagees were informed of the attachment; but they did not make themselves parties to it, and contest the right of Green to levy on the safes, which they were authorized to do by the laws of Illinois.

By the Statutes of Illinois (R. S., 1845, page 63, *et seq.*) any creditor can sue out a writ of attachment against a non-resident debtor, under which the officer is required to seize and take possession of the debtor's property, and if the debtor cannot be served with process, he is notified by publication; and if he does not appear, the creditor, on making proper proof, is entitled to a judgment by default for his claim, and a special execution is issued to sell the property attached. The judgment is not a lien upon any other property than that attached; nor can any other be taken in execution to satisfy it. These statutes (R. S., ch. 20) further provide, that mortgages on personal property have no validity against the rights and interests of third persons, without being acknowledged and recorded, unless the property be delivered to and remain with the mortgagee.

And so strict have the courts of Illinois been in construing the statute concerning chattel mortgages, that they have held, if the mortgage cannot be acknowledged in the manner required by the Act, there is no way of making it effective, except to deliver the property, and that even actual notice of the mortgage to the creditor, if it is not properly recorded, will not prevent him from attaching and holding the property. *Henderson v. Morgan*, 26 Ill., 431; *Porter v. Dement*, 35 Ill., 479.

The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, get a lien on it; for an attaching creditor stands in the light of a purchaser, and as such will be protected. *Thornton v. Davenport*, 1 Scam., 296; *Jones v. Jones*, 16 Ill., 117. But it is unnecessary to cite any other judicial decisions of that State but the cases of *Martin v.*

Dryden, 1 Gilm., 187, and *Burnell v. Robertson*, 5 Gilm., 389, which are admitted in the record to be a true exposition of the laws of Illinois on the subject, to establish that there the safes were subject to the process of attachment, and that the proceedings in attachment took precedence of the prior unrecorded mortgage from Bates.

If Green, at the date of the levy of his attachment, did not know of the mortgage, and subsequently perfected his attachment by judgment, execution and sale, the attachment held the property, although at the date of the levy of the execution he did know of it. The lien he acquired, as a *bona fide* creditor, when he levied his attachment without notice of the mortgage, he had the right to perfect and secure to himself; notwithstanding the fact that the mortgage existed, was known to him before the judicial proceedings were completed. This doctrine has received the sanction of the highest court in Illinois through a long series of decisions, and may well be considered the settled policy of the State on the subject of the transfer of personal property. If so, the effect which the courts there would give to these proceedings in attachment is too plain for controversy. It is clear, if Van Buskirk had selected Illinois, instead of New York, to test the liability of these safes to seizure and condemnation, on the same evidence and pleadings, their seizure and condemnation would have been justified.

It is true the court in Illinois did not undertake to settle in the attachment suit the title to the property, for that question was not involved in it, but when the true state of the property was shown by other evidence, as was done in this suit, then it was obvious that by the laws of Illinois it could be seized in attachment as Bates' property.

In order to give due force and effect to a judicial proceeding, it is often necessary to show by evidence, outside of the record, the predicament of the property on which it operated. This was done in this case, and determined the effect the attachment proceedings in Illinois produced on the safes, which effect was denied to them by the Supreme Court of New York.

At an early day in the history of this court, the Act of Congress of 1790, which was passed in execution of an express power conferred by the Constitution, received an interpretation which has never been departed from, and obtained its latest exposition in the case of *Christmas v. Russell*, decided in 5 Wall., 290 [73 U. S., XVIII., 480]; *Mills v. Duryee*, 7 Cranch, 481.

The Act declares that the record of a judgment (authenticated in a particular manner) shall have the same faith and credit as it has in the state court from whence it is taken. And this court say: "Congress have, therefore, declared the effect of the record, be declaring what faith and credit shall be given to it;" and that "it is only necessary to inquire in every case what is the effect of a judgment in the State where it is rendered."

It should be borne in mind in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defense. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it op-

erate on any other property belonging to Bates than that which was attached. But, as by the law of Illinois Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows that when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justified in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a State the power to regulate the transfer of personal property to legal proceedings.

Attachment laws, to use the words of *Chancellor Kent*, "are legal modes of acquiring title to property by operation of law." They exist in every State for the furtherance of justice, with more or less of liberality to creditors. And if the title acquired under the attachment laws of a State, and which is valid there, is not to be held valid in every other State, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor.

The *Vice-Chancellor* of New York, in *Cochran v. Fitch*, 1 Sandf. Ch., 146, when discussing the effect of certain attachment proceedings in the State of Connecticut, says: "As there was no fraud shown, and the court in Connecticut had undoubted jurisdiction *in rem* against the complainant, it follows that I am bound in this State to give to the proceedings of that court the same faith and credit they would have in Connecticut." As some of the judges of New York had spoken of these proceedings in another State, without service of process or appearance, as being nullities in that State, and void, the same *Vice-Chancellor* says: "But these expressions are all to be referred to the cases then under consideration, and it will be found that all those were suits brought upon the foreign judgment as a debt, to enforce it against the person of the debtor, in which it was attempted to set up the judgment as one binding on the person."

The distinction between the effect of proceedings by foreign attachments, when offered in evidence as the ground of recovery against the person of the debtor, and their effect when used in defense to justify the conduct of the attaching creditor, is manifest and supported by authority. *Cochran v. Fitch*, cited above; *Kane v. Cook*, 8 Cal., 449. *Chief Justice Parker*, in *Hall v. Williams*, 6 Pick., 232, speaking of the force and effect of judgments recovered in other States, says: "Such a judgment is to conclude as everything over which the court which rendered it had jurisdiction. If the property of the citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive."

It would seem to be unnecessary to continue this investigation further, but our great respect for the learned court that pronounced the

judgment in this case, induces us to notice the ground on which they rested their decision. It is, that the law of the State of New York is to govern this transaction, and not the law of the State of Illinois where the property was situated; and as, by the law of New York, Bates had no property in the safes at the date of the levy of the writ of attachment, therefore none could be acquired by the attachment. The theory of the case is, that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and as *Judge Story* says, "yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined." It has yielded in New York on the power of the State to tax the personal property of one of her citizens, situated in a sister State (*People v. Commr. of Taxes*, 23 N. Y., 225), and always yields to "laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State; and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete and her right perfect, to regulate its transfer and subject it to process and execution in her own way and by her own laws.

We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer with that of the State where the owner lives.

We have been referred to the case of *Gustlander v. Howell*, 85 N. Y., 657, recently decided by the Court of Appeals of New York, and as we understand the decision in that case, it harmonizes with the views presented in this opinion. A citizen of New York owning personal property in New Jersey made an assignment, with preferences to creditors, which was valid in New York but void in New Jersey. Certain creditors in New Jersey seized the property there under her foreign attachment laws and sold it, and the Court of Appeals recognized the validity of the attachment proceeding, and disregarded the sale in New York. That case and the one at bar are alike in all respects, except that the attaching creditor there was a citizen of the State in which he applied for the benefit of the attachment laws, while Green, the plaintiff in error, was a citizen of New York; and it is insisted that this point of

difference is a material element to be considered by the court in determining this controversy, for the reason that the parties to this suit, as citizens of New York, were bound by its laws. But the right under the Constitution of the United States and the law of Congress which Green invoked to his aid is not at all affected by the question of citizenship. We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other States equal privileges with her own in her foreign attachment laws, that the judgment against the personal estate located in her limits of a non-resident debtor, which a citizen of New York lawfully obtained there, should have a different effect given to it under the provisions of the Constitution and the law of Congress, because the debtor, against whose property it was recovered, happened also to be a citizen of New York.

The judgment of the Supreme Court of the State of New York is reversed, and the cause remitted to that court, with instructions to enter judgment for the plaintiff in error.

S. C.—5 Wall., 307; 3 Wall., 448.
Cited—7 Wall., 139; 10 Wall., 291; 16 Wall., 619, 642; 19 Wall., 430; 91 U. S., 148; 92 U. S., 607; 93 U. S., 671; 19 Kan., 415; 81 N. Y., 304; 30 Hun, 327, 331; 22 Am. Rep., 23 (5 S. C., 368); 23 Am. Rep., 463 (11 R. I., 321); 40 Am. Rep., 290 (76 Ind., 512).

CHARLES W. TILLINGHAST AND JOSEPH
M. WARREN, *Piffs. in Err.*,

MORRIS S. VAN BUSKIRK ET AL.

IN ERROR to the Supreme Court of the State
of New York. (*Remittitur*).
Same counsel as in preceding case.

Mr. Justice Davis delivered the opinion of the court:

This case is in all respects like the case of *Green v. Van Buskirk* (*ante*, 109), decided at this term, and no separate opinion is necessary.

The judgment of the Supreme Court of the State of New York is reversed, and the cause is remitted to that court, with directions to enter judgment for the plaintiffs in error.

JOHN W. LOCKWOOD, *Appt.*,

THE SCHOONER GRACE GIRDLER,
her Tackle, etc., SAMUEL B. LOTT ET AL.,
Claimants.

(See S. C., "The Grace Girdler," 7 Wall., 196-205.)

Vessel must be without fault, to recover fully for collision—inevitable accident, what is—where reasonable doubt, loss must be sustained by injured party—reversal on conflicting testimony.

In order to recover full indemnity for a collision it is necessary that the suffering vessel should be without fault.

Inevitable accident, is where an accident occurs

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557.

when a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger.

Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.

This court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony.

[No. 62.]

Argued Jan. 27, 1869. Decided Feb. 8, 1869.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. J. M. Carlisle and Charles N. Black, for appellant:

Those in charge of a vessel seeking to pass another, and running her down and sinking her from want of forethought, cannot set up the plea of inevitable accident to excuse their negligence; that plea can only be made when it is shown that the collision could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill.

The Morning Light, 2 Wall., 550 (69 U. S., XVII., 862); see Digest of Maritime Law Cases, 48.

When two vessels are running in the same direction, one of them astern of the other, there rests upon the rear vessel an obligation to exercise precaution against collision, which is not chargeable to the same extent upon the other.

The Governor, Abb. Adm., 108, 18 Stat. at L., 61; 1 Pritch. Adm. Dig., 170, 171.

The vessel to the windward is to keep away when both vessels are going the same course in a narrow channel, and there is danger of their running afoul of each other.

Marsh v. Blythe, 1 McCord, 360.

If a vessel approaching another has it in her power to choose the distance at which she shall tack, and a collision takes place in consequence of her missing stays, she will be held responsible for the damage caused by the collision. Plea, that the collision was inevitable, was not sustained.

The Kingston by Sea, 3 W. Rob., 152; *The Globe*, 6 No. of Cas., 275; 1 Pritch. Adm. Dig., 184; *The Despatch*, 3 Law T., N. S., 220; 1 Pritch. Adm. Dig., 184.

Mr. Charles Donohue, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This is a case of collision. It occurred in the afternoon of the 5th of August, 1868, between the yacht Ariel and the schooner Grace Girdler. Both vessels were beating down the river to the bay. The yacht had made her long tack and had gone about, near the New York shore, and was standing upon her short tack across the river. The schooner had done the same things, and was standing in the same direction. In going about she had passed to the windward of the yacht, and held that position in her short tack. The yacht was to the leeward, and a very little way in advance. As she was beginning to make headway, the approach of a steam ferry-boat coming up the river compelled her suddenly to luff three or four points in order to get out of the way. This threw her unexpectedly in the way of the schooner, and was the proximate cause of the collision.

The vessels came together, and the yacht was sunk and lost. The locality of the collision was opposite to the foot of Stanton or Grand Street, in the City of New York, and about one third of the way across the river.

So far both sides agree as to the facts, but no further. Here begins the stress of the case, and the antagonisms in the testimony of the parties gather around it.

The libelants allege that the schooner was wholly in fault. They say that she ought not to have been so near the yacht; that she ought to have seen the danger to the yacht from the approach of the ferry-boat, and seeing it, ought immediately to have luffed, to get more to the windward; and that if she had done so, the accident would not have occurred. They insist that the schooner, being so nearly in the track of the yacht, and in such close proximity, it was her duty to exercise the greatest vigilance, and to omit no precaution against danger.

The respondents insist that there was no fault on the part of the schooner; that when the yacht suddenly came into her path to avoid the ferry-boat, the schooner, if not in stays, had so little headway on that she was powerless to change her course, or to do anything else to prevent the two vessels from coming in contact. In behalf of the schooner there is testimony to the effect that the yacht, having escaped the ferry-boat by luffing, should have luffed still more to avoid the schooner, and that if she had performed this simple and obvious duty, the collision could not have occurred.

The schooner was thoroughly manned. The captain was an experienced seaman. A regular Hurlgate pilot was at the helm.

A pleasure party was on board the yacht. Lockwood, the captain, was the superintendent of an oil warehouse. He had served as a seaman during a voyage to California in 1849. He had no other nautical experience. Slavin was the sailing master. He was twenty-two years of age, and had some experience as a sailor. He "had been, off and on, five or six years, sailing master of those small vessels about New York," and "had been on The Ariel six or seven weeks at that time." Before he went upon the yacht he had been at work for Lockwood in an oil factory. Lockwood, in his deposition, says: "All on board were gents but Slavin and an extra hand." The testimony of the extra hand has not been taken, and it is not shown who he was, what were his qualifications, or in what capacity he served. It does not appear that anyone was charged with the duty of a lookout. Lockwood, the captain, was at the helm. He says:

"The schooner made a longer tack than I, and followed on nearly in our track—a little to the southward. Before I got across, the steam ferry-boat Cayuga, crossed track on my bow. I luffed a little up to avoid a collision with her, and as I was filling away again The Grace Girdler came up behind and struck me astern. Her jib boom went into my mainsail. We had got about first, and she was about one hundred feet behind us when she got about. I did not pay any particular attention to her, as I was watching the ferry-boat. When I got clear of the latter, then I saw The Grace Girdler coming down upon us. Mr. Slavin, the sailing master, hailed her three times, but received no

answer. She was not further than this room from us when I saw she was coming down on to us. When I saw she was coming I put my helm hard up, expecting she would go off to the windward of me. I also let go my main sheet, to let my vessel run off before the wind; but she hit me before she (the yacht) run off.

* * * * She could have cleared me by coming up into the wind. * * * * The ferry-boat was from fifty to seventy-five feet from me. She was bound to Williamsburg, and crossed my bow, and I came within fifteen or twenty feet of hitting her, notwithstanding I luffed. * * * * I did not suppose it necessary to act to avoid the ferry-boat till she got near us. I luffed three or four points, and continued that long enough to let her run by."

From this testimony it appears that no very great vigilance was exercised on the yacht to supply the place of a lookout, and that the judgment formed by the captain as to the danger involved in the approach of the steamer was by no means accurate.

The chief fault attributed to the schooner is, that she did not luff into the wind and avoid the yacht by passing to the windward. It is not denied that the schooner was to the windward after running out her long tack and coming about, nor that she would have avoided the yacht if the yacht had not thrown herself in the way of the schooner to avoid the ferry-boat.

Horton, the pilot of the schooner, had been a Hurlgate pilot for sixteen years. He says:

"After we went about, we drew away our jibs, let up anything forward; saw the yacht to the leeward, about fifty yards on our lee quarter, dead to the lee quarter. She kept hauling up and nearing us all the while, and we was motionless at the time, and I told them on the yacht to slack the main sheet, but they paid no attention to me, and came right up to our lee bow in contact with our jib boom, which hooked his mainsail. We had not got under headway at the time of the collision. Our jibs had not filled. We could not have done anything in our condition to avoid it. The helm was to the leeward, in the leebecket dover. When we got around so that the jibs took, I put my helm down."

This testimony, if credible, vindicates the schooner and fastens the blame upon the yacht. Perhaps the reason why the warning of the pilot was not heeded was, that the officers of the yacht had not recovered from the perturbation produced by the narrow escape from the ferry-boat, and that there was no lookout to give notice of the dangerous proximity of the schooner, induced by the new position which the yacht had been compelled to assume. The statement of the pilot is fully sustained by the captain and several of the crew of the schooner who were examined. They all aver that she had so little headway that nothing could be done on her part to avert the collision.

The sailing master and gentlemen on the yacht sustain more or less fully the facts stated by Captain Lockwood. As usual, those on board on each side acquit their own and condemn the other vessel. The statement of Lockwood is also sustained by McQueen, the pilot of The Cayuga, and by Goodby, the pilot of the Peck Slip ferry-boats. They saw the col-

lision—inculpate the schooner and exculpate the yacht.

On the other hand, Captain Barber, of the schooner Jenny Lind, who was near at hand and saw everything that occurred, exonerates the schooner and casts the entire responsibility upon the yacht. Such, also, is the effect of the testimony of Gilbert, a pilot on the Hunter's Point line of boats. He, too, was a spectator. Captain Barber says:

"I have followed the water eighteen years, and now am master of a vessel. Know The G. G. I live in Westerly. My vessel belongs to Stonington. I was on the schooner Jenny Lind the day of the collision. We went about somewhere near the coal yard of the Penn. Coal Co. at Williamsburg. After we went about we were in the wake of the yacht and The G. G. All three of us were standing toward New York side. As I was walking back and forth on my deck, I saw the yacht a little ahead of The G. G. As the latter came up with the yacht she kept off a little to go under her lee to clear her quarter. The yacht was a little ahead and tacked first, and The G. G. rounded her and came up to the windward. The yacht made headway. The schooner payed off some, and her jib was shaking all the time until they went clear. I don't see as The G. G. could do anything to prevent this collision, as her head sails were shaking and her gaff topsails and mainsails full. The schooner's foresheets were all slacked up and she payed off and hooked into the yacht. The schooner had no command of herself. The yacht was not ahead at all after I saw them. I did not see the yacht sink. Saw the schooner sag off on to her. The yacht ought to have gone around the schooner's stern or started a sheet and gone off on the other hand."

No one had a better opportunity of seeing and understanding all that occurred than this witness, and there is none whose testimony we deem entitled to more weight. There is no impeaching testimony. The witnesses upon each vessel must have known the condition of things and what occurred there. Unless we impute perjury, which we see no reason to do, they are entitled to credence as to this class of facts. As to what occurred upon the other vessel they are liable to be mistaken, and their testimony is entitled to less weight than the testimony of witnesses who were present.

In respect to the yacht, we pass by the inquiries whether she was properly manned, whether she had a sufficient lookout, and whether, by due vigilance and good seamanship she might not at her leisure have given the ferry-boat a safe berth, and thus have avoided the necessity of placing herself, as it were, by a leap, across the bows of the schooner. These points have not been pressed upon our attention by the learned counsel for the appellants, and in the view which we take of the case their solution is not necessary to its proper determination. The testimony of those on board of the yacht proves clearly that all was done in the emergency that was practicable and proper. If there was any omission, under the circumstances it was an error and not a fault. In the eye of the law the former does not rise to the grade of the latter, and is always venial. *Reeves v. The Constitution*, Gil., 587; *N. Y. & L. S. Co. v.*

Rumball, 21 How., 383 [62 U. S., XVI., 148]; *Gen. Chief v. Fitzhugh*, 12 How., 461. For the purposes of this case we hold that the yacht was blameless. But she suddenly thrust herself before the schooner, and took the latter by surprise. If the testimony of the pilot, captain and crew of the schooner be true, it is indisputable, as is insisted by the appellants, that she had then so little headway as to be impotent to do anything to prevent the impending catastrophe. Her helm was kept where it should have been to have the greatest effect in turning her head more to the windward. Her jib might have been lowered, to give greater effect to the wind upon the sails in the after-part of the vessel; but if, as the proof is, it was shaking at the time, this could have had no effect, and would have been useless. This testimony shows that the schooner, as to this part of the case, was also free from fault. The superadded testimony of Barber and Gilbert leave no room for doubt in our minds upon the subject. The loss of the yacht was not produced by a blow from the schooner, but by the jib boom of the schooner running through her mainsail, and turning her so far upon her side that she filled with water, as soon as her jib stay was cut loose from the anchor of the schooner, she sunk.

But it is insisted that the schooner is blamable for not having provided in advance for the contingencies of the approach of the ferry-boat to the yacht, and the sudden transit of the latter to the windward. To this there are two answers.

First. The schooner came about near the New York shore, under the stern of the yacht, and was passing to the windward of her. Lockwood expected the schooner to pass on that side. The witnesses on both sides agree that she was there when the yacht luffed and changed her course three or four points in the same direction to escape the ferry-boat. It is not denied by anyone that but for this there would have been ample room between them for both to pass in safety. There is no proof that it was in the power of the schooner to put herself any further to the windward than she was. We suppose it will not be insisted that the schooner was bound to stop before running out her long tack, or to make it longer.

Second. The case made against the schooner is contained in the fourth article of the libel. The charges set forth are confined to omissions at the time of the collision or immediately preceding it. Neither in the pleadings nor proofs is fault charged at any other time. It is nowhere charged or proved that it was the duty of the schooner to have foreseen the contingencies which caused the collision, or to have made any provision against them. The record before us is a blank as to that subject.

It is not intended to impugn anything said by this court in the case of *Whitridge v. Dill*, 23 How., 448 [64 U. S., XVI., 581], as to the rules which should govern a vessel behind another and pursuing the same course. This is plainly distinguishable from it in several particulars. It is sufficient to mention one of them. In that case there was no sudden change by the leading vessel to a course across the bows of the one behind her. That is the controlling fact in the case under consideration.

The appellants have invoked the aid of the

Act of Congress of April 29, 1864, "fixing rules and regulations for preventing collisions on the water." The 17th article does, as suggested, provide "that every vessel overtaking another vessel shall keep out of the way of the said last mentioned vessel." But the 18th article provides, subject to certain qualifications, that the other vessel shall keep her course; while the 19th and 20th provide that due regard shall be had to the circumstances which may render a departure from the rules prescribed necessary in order to avoid immediate danger, and that nothing in the Act shall warrant the neglect of any proper precaution, or excuse the fault of bad seamanship, under any circumstances that may occur.

It would be a strange result if the statute should make an innocent vessel liable for an inevitable accident.

In order to recover full indemnity it is necessary that the suffering vessel should be without fault. Generally the burden of proof rests upon the libelants. Where fault is shown on the part of the damaging vessel, it is incumbent on her to show that such fault had in no degree the relation of cause and effect to the accident.

Waring v. Clarke, 5 How., 441.

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances—such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view—the safety of life and property. *The Europa*, 14 Jur., 629; *The Virgil*, 2 W. Rob. 205; *The Lochlubo*, 8 W. Rob., 318; *The W. V. Moses*, 6 Mitch. Mar. Reg., 1553. Where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen. *The Catherine of Dover*, 3 Hagg., 154.

The case of *The Thornley*, 7 Jur., 659, though unlike this case in its facts, has one point of resemblance which renders it worthy of attention. That vessel, while "forging" her way through the North Sands, was hailed by *The Mentor*, a vessel at anchor near them, to come to anchor. She could not then do so without danger of destruction. Very soon after she passed the Sands a collision occurred. She alleged that it was an inevitable accident. It was objected (1) that she should have anchored instead of passing the Sands, and (2) that she should have anchored as soon as she passed them. The Trinity Master said: "We consider the collision accidental. She could not let go her anchor until clear of the Sands; if in this case she had let go her anchor, immediately on being clear, the collision would still have occurred." Dr. Lushington took that view of the case, and pronounced against the claim of the libelants. His judgment proceeded upon the ground that *The Thornley* was powerless to prevent the accident. The point that she should have anchored before attempting to pass the Sands was not noticed.

There is another feature of the case before us to which it is proper to refer. The district court acquitted the schooner and dismissed the libel. The libelants appealed to the circuit court. That court affirmed the decree. The

case is now here by a second appeal. This court ought not to reverse upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal it must be clear that the lower courts have committed an error, and that a wrong has been done to the appellants. *Walsh v. Rogers*, 13 How., 284; 11 How., 528; 23 How., 429 [64 U. S., XVI., 572]; *The Marcellus*, 1 Black, 414 [66 U. S., XVII., 217]; *The Water Witch*, 1 Black, 494 [XVII., 155]; *The Grafton*, 1 Blatchf. C. C., 173; *The Narraganset*, *ib.*, 211; *Cushman v. Ryan*, 1 Story, 95; *Bearse v. Pigs, etc.*, *ib.*, 323; *Tracy v. Sacket*, 1 O. St., 54; 10 *ibid.*, 58. This is not a case of that character. If it were now before us for decision the first time, although our minds are not entirely free from doubt, we could not come to any other conclusion than the one we have announced.

The decree of the Circuit Court is affirmed.

Mr. Justice Davis, dissenting:

I dissent from the opinion in this case, because I think the rules of navigation require that a vessel coming up behind on the same course as the vessel before her, is bound to keep out of the way, and I cannot concur that the collision was the result of inevitable accident, as it occurred in the day time, on smooth water, and in fair weather.

Concurring, in this dissent, **Mr. Chief Justice Chase** and **Mr. Justice Clifford**.

Cited—9 Wall., 639; 98 U. S., 339; 2 Hughes, 20, 123, 142; 16 Blatchf., 450; 7 Sawy., 437; 1 Bro., 248, 402; 5 Biss., 302; 1 Abb. U. S., 453; 8 Am. Rep., 666 (43 N. Y., 81).

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, GEORGE W. STANTON, JR., JOHN ELLIOTT AND BLAKELY WILSON, *Appts.*,

v.

MARK HOWARD, JOHN WEBER, JOSEPH YOUNG, CLARK DURANT, THOMAS W. DURANT, ROBERT MURRAY, HENRY VANDERVEER, WILLIAM ELLIOTT, GEORGE BLISS, BETSEY TRACEY, HARRIET LE CONTE, MARGARET NISBET, JOSEPH W. CLARK, VALKERT P. DONN, CHRISTOPHER Y. LANSING AND JARED F. HARRISON.

(See S. C., 7 Wall., 392-416.)

Railway companies may guarantee bonds—power of corporations to borrow money and execute securities—presumption of validity—judgment against corporation conclusive on stockholders—surplus on mortgage foreclosure—necessary parties—negotiable paper.

Railway companies may guarantee the payment of such bonds as they have lawfully received from cities and counties.

Private corporations may borrow money or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.

Stockholders are precluded from denying the validity of instruments of guaranty, by a judgment thereon against the corporation.

See 7 WALL.

On foreclosure of railroad mortgage, whatever interest remains after the lien of the mortgage is discharged, belongs to the corporation and becomes a fund in trust for the benefit of its creditors.

Neither stockholders nor bondholders are necessary parties to a foreclosure of a railroad mortgage.

Written contracts are not necessarily negotiable, simply because, by their terms, they inure to the benefit of the bearer.

[No. 319.]

Submitted Jan. 26, 1869. Decided Feb. 8, 1869.

A PPEAL from the Circuit Court of the United States for the District of Iowa.

The bill in this case was filed in the court below by the appellees, praying for the application of a certain fund arising from the sale of the Mississippi & Missouri R. R. Co., to satisfy certain judgments held by them. The court having entered a decree in favor of the complainants, the defendants took an appeal to this court.

A full statement of the case appears in the opinion of the court.

Messrs. Cook & Drury and **James Emott**, for the appellants:

Brief for appellants, Stanton, Elliott and Wilson:

1. The claim of the appellees to the fund in controversy in this case, rests upon two propositions:

1. That they are creditors, holding valid obligations and evidences of indebtedness against the Mississippi & Missouri Railroad Company.

2. That the fund or money appropriated to the appellees in the court below, was assets or property of that Company.

But we deny both propositions. We assert that the guaranties of city and county bonds, made by the Mississippi & Missouri Railroad Company, were *ultra vires*, beyond the power of that Corporation or its officers and void. And we assert that the \$541,527 which is the subject of the present controversy, is not the property of the Mississippi and Missouri Railroad Company.

We are not precluded from denying the validity of these guaranties, nor the obligation nor indebtedness of the Railroad Company upon them, by the judgments recovered at law against the Corporation by the appellees.

There has been a doubt whether, in actions against stockholders personally to subject their individual property, or what they claim to be such, to the payment of debts and obligations of the corporation, a judgment against the corporation was evidence at all of the existence or validity of a debt by the corporation. In no such case has it been held to be more than *prima facie* evidence.

Moss v. McCullough, 5 Hill, 131; S. C., 5 Denio, 567; S. C., 7 Barb., 279.

8. The obligations of the Mississippi & Missouri Railroad Company held by the appellees are guaranties, by the officers of that Corporation, of bonds issued by certain cities and counties in Iowa to enable such cities and counties to raise money to subscribe to the stock of the railroad. The Company or its officers had no authority to make any such contracts, and they were illegal and void.

4. A corporation cannot lend its credit to individuals or other corporations, nor guaranty, nor indorse their notes, to enable them to raise money for any purpose. The contract of sure-

tyship is beyond the power of a railroad corporation, unless expressly authorized by its charter; and it was beyond the power of this Corporation, either under its articles of organization or under the general laws of Iowa.

See Articles of Incorporation, fol. 238 of Record; Laws of Iowa, Code, 1851, ch. 43; Revision of 1860, ch. 52; *Bk. of Genesee v. Patchin Bk.*, 13 N. Y., 309; *Bridgeport Bk. v. Empire Stone Dressing Co.*, 30 Barb., 421; *Morford v. Farmers' Bk. Saratoga*, 26 Barb., 568; *N. Y. F. Ins. Co. v. Ely*, 5 Conn., 560; *Smith v. Ala. Life Ins. Co.*, 4 Ala., 558; *Colman v. East Counties R. R. Co.*, 10 Beav., 1.

5. The fact that these bonds are negotiable instruments, does not estop the Corporation nor its stockholders from this defense. The invalidity of the guaranty appears upon its face. All persons dealing with the Corporation are bound to know that by the general law, by its organic law and by the laws of Iowa respecting corporations, it had no power to make an engagement of guaranty or suretyship.

6. The Corporation having no power or right to make the guaranty, it was not a valid debt or obligation of the Corporation, and the stockholders have a right to set up this defense as a reason why no assistance should be given to the attempt to wrest this fund from them.

E. Ang. Railway v. East Counties Railway, 7 Eng. L. & E., 605; *McGregor v. Deal & Dover Railway*, 16 Eng. L. & E., 180; *So. Yorksh. Railway v. Gr. N. Railway*, 9 Exch., 55; *Eastern Co.'s Railway v. Hawkes*, 35 Eng. L. & E., 8; *Leavitt v. Palmer*, 3 N. Y., 19; *Talmage v. Pell*, 7 N. Y., 328; *Penn. & Del. S. Nav. Co. v. Danbridge*, 8 Gill & J., 248; *Bk. of Mich. v. Niles*, 1 Doug. (Mich.), 401; *Orr v. Lacey*, 2 Doug. (Mich.), 254; *Root v. Godard*, 3 McLean, 103; *Root v. Wallace*, 4 McLean, 8; *Pearce v. Mad. & Ind. R. R. Co.*, 21 How., 441 (62 U. S., XVI., 184); *Head v. Prov. Ins. Co.*, 2 Cranch, 127; *Bk. of Augusta v. Earle*, 13 Pet., 519; *Perkins v. Ches. & Del. Can. Co.*, 9 How., 172.

7. I contend, in the next place, that the fund in controversy here was not assets nor property of the Miss. & Mo. R. R. Company. If it was not, it cannot be reached by its creditors. It is not enough that it should be property of the stockholders, or that they received or acquired it because they were stockholders.

This sixteen per cent. is not a dividend declared to be paid to the individual stockholders.

Ang. & Ames, Corp., 8th ed., p. 539, sec. 557, and p. 583, sec. 600; *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 188.

Members of a corporation are not liable for the debts of the company. This is a private fund not received as a dividend, not as a matter of legal right, but as a gratuity from the bond holders.

There is such a defect of parties that the court cannot grant the relief prayed.

1 Dan. Ch. Pr., 285. See large list of authorities in note.

Assignees of choses in action will be protected.

Van Vechten v. Graves, 4 Johns., 403; *Littlefield v. Storey*, 3 Johns., 425; *Ransom v. Jones*, 1 Scam., 291; *Prescott v. Hull*, 17 Johns., 284.

This last case is also on the point that an assignment of a chose in action need not be in writing, but by delivery. *Briggs v. Dorr*, 19 Johns., 95.

The party had a full, complete and adequate remedy at law; and having such a remedy a court of equity will not take jurisdiction, more particularly to subject the property of sureties to the payment of the debt.

8 Green, 307; 4 Green, 225; 4 How., 298; and a long list of authorities on the same point in 2 Eq. Dig., 151.

Messrs. John N. Rogers and James Grant, for appellees:

The general law of Iowa provides that the capital and assets of corporations like this, shall be a trust fund for creditors. Revision of 1860, ch. 52, sec. 1164.

This liability of dividends in the hands of the recipients to the claims of creditors of the corporation, it was held in *Vose v. Grant*, 15 Mass., 505, and *Spear v. Grant*, 16 Mass., 9, can only be enforced in a court of equity.

But the doctrine we assert is well settled by decisions, independent of express statute. The leading case is *Wood v. Dummer*, 3 Mason, 308, decided by Judge Story in 1824.

Day v. Washburn, 24 How., 353 (65 U. S., XVI., 712); *Curran v. Arkansas*, 15 How., 304; 2 Story, Eq. Juris., sec. 1252; *Mumma v. Potomac Co.*, 8 Pet., 281; the cases of *Wood v. Dummer*, 3 Mason, 308; *Wright v. Petrie*, 1 Sm. & M. Ch., 319; *Nevitt v. Bank of Port Gibson*, 6 Sm. & M., 518; *Hightower v. Thornton*, 8 Ga., 498; *Nathan v. Whitlock*, 3 Edw. Ch., 215; affirmed by the Chancellor, 9 Paige, 152; *Briggs v. Penniman*, 8 Cow., 387; *Scott v. Eagle Fire Co.*, 7 Paige, 198; *Allen v. Montgomery R. R. Co.*, 11 Ala., 437; *Adler v. Milwaukee Man. Co.*, 13 Wis., 57; *Owen v. Smith*, 31 Barb., 641; *Bk. of Natchez v. Chambers*, 8 Sm. & M., 9; *Robins v. Embury*, 1 Sm. & M. Ch., 207; *Ogilvie v. Knox Ins. Co.*, 22 How., 380 (63 U. S., XVI., 349); *Dudley v. Price*, 10 B. Mon., 84; *Grats v. Redd*, 4 B. Mon., 178.

The guaranty of the city and county bonds by the Mississippi & Missouri Company, was an absolute and unconditional guaranty of the payment of principal and interest when due.

Allen v. Rightmere, 20 Johns., 365; *Brown v. Curtis*, 2 N. Y., 225; *Union Bank v. Coster*, 3 N. Y., 203; *Douglass v. Howland*, 24 Wend., 35; *Cooper v. Paige*, 24 Me., 78; *Breed v. Hillhouse*, 7 Conn., 523; *Redfield v. Haight*, 27 Conn., 31; *Train v. Jones*, 11 Vt., 444; *McDougal v. Cates*, 34 N. H., 534, 542; *Campbell v. Baker*, 46 Pa., 243; *Pover v. Bumerate*, 12 Ohio St., 278; *Burnham v. Gallentine*, 11 Ind., 295; *Griffin v. Seymour*, 15 Ia., 30; *Sabin v. Harris*, 12 Ia., 87; *Whiting v. Clark*, 17 Cal., 407.

As the Mississippi & Missouri Railroad Company, the guarantor, though made a party defendant, made no defense in the court below, and does not appeal, the other defendants are thereby concluded from controverting the status of the complainants as creditors of the Railroad Company.

Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush., 576.

It is said by appellants' counsel that the contract of sale of Nov. 1, 1865, was void, because the Mississippi & Missouri Railroad Company had no power under its Articles of Incorporation to sell the road, without the assent of two thirds of its stockholders.

To this there are two good answers.

First. The contract has been carried into ef-

fect, and the consideration paid; and it does not lie with these defendants, who were parties to the contract and have reaped the fruits of it, to set up now its invalidity.

Second. It was in fact ratified and assented to by far more than two thirds of the stockholders, by depositing their stock with the Trust Company and signing the contract with the committee.

We maintain: first, that this fund was never the property of the bond holders; and secondly, that their agreement to relinquish their lien upon it, or rather upon the property by the sale of which it was realized, for a less sum than their whole debt, leaving this remainder, so far from being a gratuity, was made upon a perfectly good and adequate consideration.

The radical error, as we conceive, in the argument on the other side is, that it treats the mortgagees of the railroad as its absolute owners. They were simply creditors of the M. & M. R. R. Co., secured by a pledge of its property.

If the stockholders were necessary parties, it amounts to a denial of justice; for it was wholly impossible to make them parties. Their number was very great; their names were unknown to the complainants; and they nearly all resided beyond the reach of the process of the court. These facts are alleged in the bill, and not denied in the answers.

But on no principle were they necessary parties. Their rights and interests are doubly represented by parties brought before the court, viz.:

1. By the Corporation itself, the Mississippi & Missouri Company, of which they were members.

Bagshaw v. Eastern Union R. Co., 7 Hare, 114; see, also, *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush., 576.

The fact that the road and other appurtenant property of the Mississippi & Missouri Company has passed out of its hands, does not of itself work a legal dissolution of the Company. It still exists for the purpose of winding up its affairs (Laws of Iowa, Rev. of 1860, sec. 1171); and is still capable of suing and being sued.

2. The rights and interests of these stockholders are further fully represented by the trustees selected and appointed by themselves, for the express purpose of taking charge of and distributing this very fund, viz.: Messrs. Stanton, Wilson and Elliott.

See the opinion of Curtis, J., in *Hall v. Sullivan Railroad Company*, in the U. S. Circuit Court for N. H., 31 Law Rep., 138; Redf. Railw., sec. 235, 578, note.

The existence a remedy at law against the principal debtor, has never been held as a bar to a suit in equity to obtain satisfaction from the surety. The "adequate remedy at law," we apprehend, must be a remedy against the same party.

Mr. Justice Clifford delivered the opinion of the court:

Subscriptions were made to the Mississippi and Missouri Railroad Company by certain municipal corporations through which the railroad was located, and the proper authorities of those municipalities issued their bonds in payment of such subscriptions to the stock of the Railroad Company.

Coupons were attached to the bonds provided. See 7 WALL.

ing for the payment of interest semi-annually, and the Railroad Company, as the immediate transferees of the bonds, guaranteed that the principal and interest of the bonds should be paid as stipulated by an instrument in writing on the back of each bond, duly executed by the proper officers of the Railroad Company.

Obvious purpose of that guaranty was to augment the credit of the bonds in the market, and to facilitate their sale to capitalists to raise money to construct their railroad and put it in operation. Complainants became the lawful holders for value of a large number of these bonds, and the guarantors as well as the obligors neglecting and refusing to pay the coupons as the same fell due, they brought separate suits against those parties, and recovered judgments against them respectively, as alleged in the bill of complaint.

Executions were issued as well on the judgment against the obligors of the bonds, as on the judgment against the guarantors of the same; and the return of the officer in each case was, that he found no property. Prior to the date of those judgments, the Railroad Company had executed several mortgages of their railroad to secure the payment of their bonds, issued at different times, to the amount of \$7,000,000, and the Company had become insolvent. They had also become liable as guarantors of the municipal bonds already described, and others of like kind received and used for the same purpose, to the amount of \$300,000, the payment of which was repudiated by the respective municipal corporations, by whose officers the bonds were issued.

Unable to pay the debts of the Company, the stockholders of the same determined to sell their railroad. Arrangements were accordingly made between the stockholders and the holders of the mortgage bonds to get up the stock of the Company through certain agents or trustees, and to execute and deliver to the several holders of those bonds and to the owners of the stock of the Company, certificates of the amounts that they respectively would be entitled to receive under a distribution of the consideration of the proposed sale. Amount of the consideration, as assumed in the arrangement, was \$5,500,000, and the terms of the arrangement were that the consideration should be distributed among the parties interested therein, according to a prescribed scale as set forth in the bill of complaint.

By that scale of distribution sixteen per cent. of the amount, to wit: \$552,400, were to be paid to the owners of the capital stock, but none of the stipulations in the arrangement made any provision for the payment of the bonds or coupons belonging to the complainants. Authorized to carry the arrangement into effect, the proper agents of the Company offered to sell the entire property of the railroad to the Chicago and Rock Island Railroad, and the latter Company, on the first day of November, 1865, accepted the proposition, and the parties entered into written stipulations upon the subject.

Those proposing to sell agreed that they would, with all possible dispatch, cause the mortgages on the railroad to be foreclosed, and that the entire property of the Company, real and personal, should be sold and conveyed to trustees, and that the same should be trans-

ferred to such incorporated company in that State as the other contracting party should designate as the purchaser of the property, if such designation was made within the time therein prescribed.

By the terms of the agreement the Chicago and Rock Island Railroad Company agreed to cause to be incorporated in that State a company which should make the purchase, as proposed, for the sum of \$5,500,000, and complete the railroad to the place therein mentioned, and the other party stipulated that the purchaser at the foreclosure sale should convey the railroad to the new Company for that consideration. Pursuant to that agreement the mortgages were foreclosed, and the new Company, to wit: the Chicago, Rock Island and Pacific Railroad Company, was created under the general laws of the State, and the entire property of the railroad was sold at the foreclosure sale, and the purchasers conveyed the same to the new Company as stipulated in the agreement. All the stockholders in the old Company became thereby entitled, as against all those who joined with them in negotiating the sale, to a *pro rata* share in the sixteen per cent. of the consideration reserved to their use under the scale of distribution prescribed in that arrangement.

Statement of the bill of complaint is, that the new Company is ready to pay that amount to the stockholders of the old Company, and the complainants contend that the facts herein recited show that they are entitled to have their whole debt paid before any portion of the fund derived from that sale shall go to the stockholders of the old Company, which is insolvent, and will become extinct when that arrangement is fully carried into effect.

Views of the complainants were sustained in the court below, where it was ordered, adjudged and decreed, that the complainants and the other parties who were duly admitted as such, and joined in the prosecution of the suit, were entitled, as creditors of the Railroad Company, to so much of the purchase money as was agreed between the parties, and intended to be reserved and distributed among the stockholders of the Company, and from that decree, as more fully set forth in the record, the respondents appealed.

I. Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid.

Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as

the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the moneys so received and in their hands.

Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than *bona fide* creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts.

Story, Eq. Jur. (9th ed.), sec. 1252; *Mumma v. Potomac Co.*, 8 Pet., 286; *Wood v. Dummer*, 3 Mass., 308; *Voss v. Grant*, 15 Mass., 523; *Spear v. Grant*, 16 Mass., 14; *Curran v. Ark.*, 15 How., 307.

Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders, and all others interested in its pecuniary affairs, and any one receiving any portion of the fund by voluntary transfer, or without consideration, may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation.

None of these principles are directly controverted by the appellants; but they deny that the sixteen per cent. agreed to be paid to the stockholders belonged to the Corporation.

Claim of the complainants to the fund in controversy rests mainly upon two propositions, which present mixed questions of law and fact:

1. That they are creditors of the Railroad Company, as evidenced by the judgments set forth in the record.

2. That the fund in question was assets of the Railroad Company.

Authority of the municipal corporations to issue the bonds purchased by the complainants is not denied; but the appellants contend that the Railroad Company had no power to guarantee their payment, and they also deny that the Railroad Company had any title or interest in the fund in controversy. On the contrary, they insist that it was a concession made by the holders of the mortgage bonds to the stockholders as a "gratuitous favor" to save them from a total loss, and to induce them not to interpose any obstacles in the way of a speedy foreclosure of the several mortgages.

Express allegation of the bill of complaint is, that the bonds issued by the municipal corporations were received by the Railroad Company in payment for subscriptions to the stock of the Company, and that the Corporation, as the holders of the same, guaranteed their payment and sold them in the market, and the stipulation of the parties is, that all the allegations of the bill of complaint not denied in the answer are to be considered as admitted. Apart, therefore, from the effect of the judgments, those allegations must be taken to be true, as they were not denied in the answer.

Power to make contracts, and acquire and transfer property, is conferred upon such corporations, by the laws of the State, to the same extent as that enjoyed by individuals; and the record shows, to the entire satisfaction of the court, that the instrument of guaranty was executed and the bonds sold in the market as the means of raising money to construct the railroad and put it in operation.

Counties and cities may issue bonds under the laws of that State in aid of such improvements; and railway companies are expressly authorized to receive such securities in payment of subscriptions to their capital stock, and to sell the bonds in the market for such discount as they think proper.

Abundant proof exists in this record, that railway companies may issue their own bonds to raise money to carry into effect the purposes for which they were created; and it is difficult to see why they may not guaranty the payment of such bonds as they have lawfully received from cities and counties, and put them upon the market instead of their own, as the means of accomplishing the same end. Undoubtedly they may receive such bonds under the laws of the State, and if they may receive them, they may transfer them to others; and if they may transfer them for purchasers, they may, if they deem it expedient, guaranty their payment as the means of augmenting their credit in the market, and saving the Corporation from the necessity of issuing their own bonds to accomplish the same purpose.

Considered, therefore, as an open question, the court is of the opinion that the objection is without merit. Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business. *Canal Co. v. Vallette*, 21 How., 424 [62 U. S., XVI., 157]; *Partridge v. Badger*, 25 Barb., 146; *Barry v. Mer. &c. Co.*, 1 Sandf. Ch., 280; *Ang. & Ames, Corp.*, sec. 257; *Story, Bills*, sec. 79; *Farnum v. Blackstone Canal Co.*, 1 Sumn., 46.

Railroad companies are responsible in their corporate capacity for acts done by their agents, either *ex contractu* or *ex delicto*, in the course of their business and within the scope of the agent's authority. *R. R. Co. v. Quigley*, 21 How., 202 [62 U. S., XVI., 73].

Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just ex-

pectations which their own conduct has superinduced. *Bargate v. Shortbridge*, 5 H. of L. Cas., 297; *Zabriskie v. Railroad Co.*, 28 How., 397 [64 U. S., XVI., 496]; *Bissell v. Jeffersonville*, 24 How., 800 [65 U. S., XVI., 602].

Tested by any view of the evidence, it is quite clear that the corporation possessed the power to execute the instruments of guaranty appearing on the back of the bonds, and the necessary consequence of that conclusion is that on the default of payment they became liable to the holders of the same to the same extent as the obligors.

Present suit is not one against stockholders to compel them to pay a corporate debt out of their own estate, but it is a suit against the Corporation and certain other parties holding or claiming assets which belong to the principal respondent, to prevent that fund from being distributed among the stockholders of the Corporation before the debts due to the complainants are paid. Viewed in that light, it is obvious that the stockholders are precluded by the judgment from denying the validity of the instruments of guaranty, and that the judgments are conclusive as to the indebtedness of the Corporation.

II. Second defense is that the fund in question did not belong to the Corporation, as contended by the appellees. Extended discussion of that proposition is not necessary, as the evidence in the record affords the means of demonstration that it is not correct. Mortgage bond holders had a lien upon the property of the Corporation embraced in their mortgages, and the Corporation having neglected and refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the Corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the Corporation, and as the property of the Corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage, as in this case, may exact the whole amount of the bonds, principal and interest; or they may, if they see fit, accept a percentage as a compromise in full discharge of their respective claims, but whenever their lien is legally discharged, the property embraced in the mortgage, or whatever remains of it, belongs to the corporation.

Conceded fact is, that the property and franchises of the railroad were sold for the consideration specified in the record, and that the mortgage bond holders discharged their lien for eighty-four per cent. of that amount, and that the residue of the purchase money remained in the hands of the purchaser discharged of the lien created by the mortgages, and the complainants contend that it was clear of all liens, except that of the creditors. Such a corporation cannot be said to own anything separate from the stockholders, unless it be the tangible property of the company and the franchises conferred by the charter; and it is conceded by both parties that the fund in question was derived from a voluntary sale and transfer of those identical interests. They were heavily incumbered by mortgages, and our attention is

called to the fact that the provisional arrangement was negotiated by the stockholders and bond holders; but the decisive answer to that suggestion is, that the two Railroad Companies were parties to the subsequent contract of sale, and that they both agreed to all the terms of sale, and purchase, and to the mode of transferring and of perfecting the title. Prompt payment was secured by the bond holders, and it is highly probable that they received under that arrangement a larger portion of their claims than they could have obtained in any other way.

Another suggestion of the appellants is, that the contract of sale was unauthorized, but the suggestion is entitled to no weight, as the contract was ultimately carried into effect by the consent or subsequent ratification of all parties interested in the subject-matter of the sale.

Next objection is, that there is such a want of parties that a court of equity cannot grant the relief as prayed. Principal suggestion in support of this proposition is that the stockholders should have been made parties, but the court is of a different opinion, because their interest is fully represented by the parties before the court. Respondents in the suit are the two Railroad Companies and the committee or trustees chosen and appointed by the stockholders and bond holders through whom the provisional arrangement was perfected and the contract of sale was carried into effect. Neither the stockholders nor bond holders were necessary parties under the circumstances of this case. *Bagshaw v. Railway Co.*, 7 Hare, 181; *Holyoke Bank v. Mfg. Co.*, 9 Cush, 576; *Hall v. Railroad*, 21 Law Rep., 189; 1 Redf. Railways, 578; *Boon v. Chiles*, 8 Pet., 582; *Story v. Livingston*, 13 Pet., 859.

Remaining objection is, that the certificates issued to the stockholders in lieu of their stock were negotiable, and that they may be in the hands of innocent holders; but the objection is entitled to no weight, because it is based upon an erroneous theory.

Written contracts are not necessarily negotiable, simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word "bearer" had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owner. *Mech. Bank v. R. R. Co.*, 18 N. Y., 599.

Particular mention is not made of the defense that the complainants have an adequate remedy at law, as it is utterly destitute of merit.

Decree affirmed.

Cited—20 Wall., 811; 92 U. S., 367; 101 U. S., 183; 1 McCrary, 92; 1 Filipp., 196, 201, 217; 18 Bank. Reg., 450; 18 Bank. Reg., 466; 4 Clift., 579, 546; 67 N. Y., 320; 8 Am. Rep., 659 (55 Ill., 419); 28 Am. Rep., 633 (53 Cal., 60).

THE STEAMSHIP GEORGIA, her Tackle,
etc., EDWARD BATES, Claimant, *Appt.*,

v.

THE UNITED STATES.

(See S. C., "The Georgia," 7 Wall., 32-44.)

Objection to evidence not made below is unavailable—purchase of enemy's ship of war, in neutral port, invalid—such vessel liable to capture.

Objection to deposition comes too late when first made in this court; it should have been made in the court below.

Purchase of a ship of war from an enemy whilst lying in a neutral port, to which it had fled for refuge, is invalid; it makes no difference that the vessel was not then a vessel of war, but had been dismantled, and all guns and munitions of war removed.

Such a vessel may afterwards be captured as prize of war.

[No. 42.]

Argued Jan. 13, 1869. Decided Feb. 15, 1869.

APPEAL from the District Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. Wm. Marvin and Augustin F. Smith, for appellant:

No principle of international law prohibits a neutral, in his home port, from buying and selling to any person, any and every species of property. In a home neutral port there is no room for the operation of international interdicts; nor does international law invalidate any sales in such port.

No decision of our own nor of the British Prize Courts covers the case.

The Minerva, 6 C. Rob., 396, was unlike the recent case in many important particulars.

In the case now before the court, the claimant did not buy a man-of-war, with her guns and ammunition, but a vessel disarmed and dismantled of her guns, and no munitions of war. He bought the vessel for commercial purposes only, and paid in money the full value thereof. The vessel was not captured, as was *The Minerva*, near the enemy's coast, with an enemy crew and a considerable portion of her original war armament on board. Under the facts of the case, there was not the slightest probability that the vessel would again become a part of the enemy's navy.

The validity of the purchase of the enemy's merchant ships by a neutral, even where the purchase and transfer have been effected in the enemy's port, under blockade, has been fully recognized.

The Sechs Geschwistern, 4 C. Rob., 101; *The Vigilantia*, 6 Rob., 128; *The Bernon*, 1 C. Rob., 102.

Mr. W. M. Evarts, Atty-Gen., and J. Hubley Ashton, Asst Atty-Gen., for the United States, and *C. Crowley*, for captors:

It appearing that this steamer was a public vessel of war of the insurgent enemies of the United States, the claimant's purchase in the neutral Port of Liverpool was illegal, and he acquired thereby no title to the vessel, as against the United States.

The French rule of public law and, perhaps, that of other nations of Continental Europe, treats every purchase of an enemy's vessel in time of war, by a neutral, whether public or private, as illegal.

Lebeau, *Nouveau Code des Prises*, tom 11, p. 342; Pistoye et Duverdy, *Traité des Prises Maritimes*, tom 11, p. 1; Hautefeuille, *Droit et Devoirs des Nations Neutres*, tom 41, p. 75.

The general rule of prize law, as administered in the English courts, however, is that the title of a neutral vendee to a vessel sold by

the enemy in time of war, is valid where the property is *bona fide*, and absolutely transferred so as to divest the enemy of all future interest in it.

The Sechs Geschwistern, 4 Rob., 101; *The Joanna Emilia*, 29 E. L. & E., 562; 9 Moore, (P. C.), 119.

But to this general rule there are several quite as well recognized exceptions in the English prize law.

The first is, that effect will not be given to a sale of an enemy's ship *in transitu*. In such a case the court will not examine the question of *bona fides*, but will treat the fact of sale as conclusive evidence of *mala fides*.

The Danckbaar Africaan, 1 Rob., 112; *The Herstdel*, 1 Rob., 115.

The second exception seems to be, that the purchase of an enemy's vessel by a neutral, in a blockaded port, is illegal.

The Gen. Hamilton, 6 Rob., 61; *The Vigilantia*, 6 Rob., 124; *The Potadam*, 4 Rob., 89.

A third exception arises in the case of an enemy's ships of war, the purchase of which by neutrals is held to be illegal.

The Minerva, 6 Rob., 396; 2 Wheat., App., 30; Lawrence Wheat. Int. Law, 581, *note*; 3 Phillim., Int. Law., 608; 2 Wildm. Int. L., 90; Haz. & R., 209.

The counsel of the appellant have attempted in their brief to distinguish the case at bar from that of *The Minerva*; but it must be clear to anyone who reads the judgment of Lord Stowell, that he intended to lay down, as a rule of decision, the explicit doctrine that a sale by a belligerent of his vessel of war to a neutral, in a neutral port, could not operate to transfer the title of the property as against British right of capture, independently of any circumstances tending to show fraud or collusion in the particular transaction.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the District Court of the United States for the District of Massachusetts.

This is a libel in prize against the steamship, Georgia. She was captured by the United States ship of war, Niagara, Commodore Craven, commander, off the coast of Portugal, on the morning of the 15th of August, 1864; and was sent into New Bedford, Massachusetts, for condemnation. A claim was interposed by Edward Bates, of Liverpool, a subject of Great Britain, who afterwards, on the 31st January, 1865, filed a test affidavit, averring that he was the sole owner of the vessel; was a merchant in Liverpool, and a large owner of vessels; that he had fitted out The Georgia at Liverpool, for sea, and chartered her to the Portuguese Government for a voyage to Lisbon, and thence to the Portuguese settlements on the coast of Africa; and that while on her voyage to Lisbon, in a peaceable manner, she was captured as already stated.

The proofs in the case are not confined to the documentary evidence found on board the prize, and to the answers to the standing interrogatories *in preparatorio*, but have been taken and were heard before the court below, without restriction and without any objection in that court.

See 7 WALL.

It is now insisted by the learned counsel for the claimant, that all the depositions in the record, except those *in preparatorio*, should be stricken out or disregarded by the court on the appeal, for the reason that it does not appear that any order had been granted on behalf of either party to take further proofs. But the obvious answer to the objection is, that it comes too late. It should have been made in the court below. As both parties have taken further proofs, very much at large, bearing upon the legality of the capture, without objection, the inference is unavoidable that there must have been an order for the same or, if not, that the depositions were taken by mutual consent. They were taken on interrogatories and cross interrogatories, in which the counsel of both parties joined and among other witnesses examined is the claimant himself, whose deposition, with the papers accompanying it, fill more than one third of the record.

The Georgia was built at Greenock, on the Clyde, and called "The Japan," in the years 1862-1863, as a war vessel for the Confederate Government, or, if not thus built, she certainly passed into the hands of that government early in the spring of 1863; and on the 2d of April, under the pretext of the trial trip, steamed to an obscure port near Cherbourg, in France, where she was joined by a small steamer with armaments and a crew from Liverpool. This armament and crew were immediately transferred to The Japan, upon which the Confederate flag was hoisted, under the orders of Captain Maury, who had on board a full complement of officers. Her name was then changed to "The Georgia." She set out on her cruise from this port against the commerce of the United States; and after being thus employed for more than a year, having in the mean time captured and burnt many vessels belonging to citizens of the United States, she returned and entered the Port of Liverpool on the 2d of May, 1864, a Confederate vessel of war, with all her armament and complement of officers and crew on board. How long she remained in that port before she was dismantled, is not distinctly in proof, though probably but a few weeks. It appears that Captain Bullock, a Confederate agent at the port, at first thought of selling her at private sale, together with her full armament; but, failing in that, she was advertised for public sale the latter part of May and the first of June. The broker, Curry, concerned in making the sale, states that "Bates was desirous of knowing what would buy the ship but he wished the armament excluded, as he did not want that." All the guns, armament and stores of that description, were taken out at Birkenhead, her dock when she first entered the Port of Liverpool. The sale to the claimant was perfected on the 11th June, 1864, who afterwards fitted her up for the merchant service, and chartered her, as stated in the test oath, to the Portuguese Government, in whose service she was when captured.

We are satisfied, upon the proofs, that the claimant purchased The Georgia without any purpose of permitting her to be again armed and equipped for the Confederate service, and for the purpose, as avowed at the time, of converting her into a merchant vessel. He had,

however, full knowledge of her antecedent character, of her armament and equipment as a vessel of war of the Confederate navy, and of her depredations on the commerce of the United States, and that, after having been thus employed by the enemies of this government upwards of a year, she had suddenly entered the Port of Liverpool with all her armament and complement of officers and crew on board. He was not only aware of all this, but, according to his own statement, it had occurred to him that this condition of the vessel might afford an objection to her registry at the customs; and before he perfected the sale, he sought and obtained information from some of the officials that no objection would be interposed. He did not apply to the government on the subject.

The claimant states "that he knew from common report she (The Georgia), had been employed as a Confederate cruiser, but I thought," he says, "if the United States Government had any objection to the sale, they or their officers would have given some public intimation of it, as the sale was advertised in the most public manner." If, instead of applying to an officer of the customs for information, the claimant had applied to his government, he would have learned that as early as March 14, 1863, Mr. Adams, our minister in England, had called the attention of Lord Russell, the foreign Secretary, to the rule of public law, as administered by the highest judicial authorities of his government, which forbids the purchase of ships of war, belonging to the enemy, by neutrals in time of war, and had insisted that the rule should be observed and enforced in the war then pending between this government and the insurgent States; and also he had addressed a remonstrance to the British Government on the 9th of May, but a few days after The Georgia had entered the Port of Liverpool, against her being permitted to remain longer in that port than the period specified in Her Majesty's Proclamation. His own government could have advised him of the responsibilities he assumed in making the purchase. Mr. Adams, after receiving information of the purchase by the claimant, in accordance with his views of public laws, above stated, communicated with the commanders of our vessels cruising in the Channel, and expressed to them the opinion that, notwithstanding the purchase, The Georgia might be made lawful prize whenever and under whatever colors she should be found sailing on the high seas.

This principle was first adjudged by Sir William Scott in the case of *The Minerva*, 6 C. Rob., 397, in the year 1807. The head note of the case is: "Purchase of a ship of war from an enemy, whilst lying in a neutral port to which it had fled for refuge, is invalid." It was stated in that case by counsel for the claimant, that it was a transaction which could not be shown to fall under any principle that had led to condemnation in that court or in the Court of Appeal. And Sir W. Scott observed, in delivering his opinion, that he was not aware of any case in his court, or in the Court of Appeal, in which the legality of such a purchase had been recognized. He admitted there had been cases of merchant vessels driven into ports out of which they could not escape, and there

sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase had been sustained. But "whether the purchase of a vessel of this description, built for war and employed as such, and now rendered incapable of acting as a ship of war, by the arms of the other belligerent, and driven into a neutral port for shelter—whether the purchase of such a ship can be allowed, which shall enable the enemy, so far to secure himself from the disadvantage into which he has fallen, as to have the value at least restored to him by a neutral purchaser, is a question on which he would wait for the authority of the superior court, before he would admit the validity of the transfer." He denied that a vessel, under these circumstances, could come fairly within the range of commercial speculation.

It has been insisted in the argument here, by the counsel for the claimant, that there were facts and circumstances in the case of *The Minerva*, which went strongly to show that the sale was collusive, and that, at the time of the capture, she was on her way back to the enemy's port. This may be admitted. But the decision was placed mainly and distinctly upon the illegality of the purchase. And such has been the understanding of the profession and of text writers, both in England and in this country; and as still higher evidence of the rule in England, it has since been recognized as settled law by the judicial committee of Her Majesty's Privy Council. In the recent learned and most valuable commentaries of Mr. Phillimore, now Sir Robert Phillimore, Judge of the High Court of Admiralty of England, on international law, he observes, after stating the principles that govern the sale of enemies' ships, during war, to neutrals: "But the right of purchase by neutrals extends only to merchant ships of enemies, for the purchase of ships of war belonging to enemies is held invalid." And Mr. T. Pemberton Leigh, in delivering judgment of the judicial committee and Lords of the Privy Council, in the case of *The Baltica*, observes: "A neutral, while war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war), from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. Mr. Justice Story lays down the same distinction in his "Notes on the Principles and Practice of Prize Courts," p. 63, Pratt's Lond. ed.—a work that has been selected by the British Government for the use of its naval officers, as the best code of instruction in the prize law. 11 Moore, P. C., 185. The same principle is found in Wildman on International Rights in Time of War, a valuable English work published in 1850, and in a more recent work, Hosack on the Rights of British and Neutral Commerce, published in London in 1854, this question is referred to in connection with sales of several Russian ships of war, which it was said had been sold in the ports of the Mediterranean to neutral purchasers, for the supposed purpose of defeating the belligerent rights of her enemies in the Crimean War, and he very naturally concludes, from the case of *The Minerva*, that no doubt could exist as to what would be the decision in case of a seizure, p. 83, note. This work was published before the judgment of the Privy Council in the case

of *The Baltica*, which was a Russian vessel, sold *imminente bello*; being, however, a merchant ship, the purchase was upheld; but, as we have seen from the opinion in that case, if it had been a ship of war it would have been condemned. See, also, *Lawrence, Wheat.*, n. 182, p. 561. *U. S. v. The Etta*, 4 Am. Law Reg. (N.S.), 38.

It has been suggested that, admitting the rule of law as above stated, the purchase should still be upheld, as *The Georgia*, in her then condition, was not a vessel of war, but had been dismantled, and all guns and munitions of war removed; that she was purchased as a merchant vessel, and fitted up *bona fide*, for the merchant service. But the answer to the suggestion is, that if this change in the equipment in the neutral port, and in the contemplated employment in future of the vessel, could have the effect to take her out of the rule, and justify the purchase, it would always be in the power of the belligerent to evade it, and render futile the reasons on which it is founded. The rule is founded on the propriety and justice of taking away from the belligerent, not only the power of recouping his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy. The removed armament of a vessel, built for war, can be readily replaced, and so can every other change be made, or equipment furnished for effective and immediate service. The *Georgia* may be instanced in part illustration of this proof. Her deck remained the same, from which the pivot guns and others had been taken; it had been built originally strong, in order to sustain the war armament, and further strengthened by uprights and stanchions beneath. The claimant states that the alterations, repairs and outfit of the vessel for the merchant service, cost some £3,000. Probably an equal sum would have again fitted her for the replacement of her original armament as a man of war.

The distinction between the purchase of vessels of war from the belligerent, in time of war, by neutrals in a neutral port, and of merchant vessels, is founded on reason and justice. It prevents the abuse of the neutral by partiality towards either belligerent, when the vessels of the one are under pressure from the vessels of the others, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy.

That *The Georgia* in the present case, entered the Port of Liverpool to escape from the vessels of the United States in pursuit, is manifest. The steam frigates *Kearsarge*, *Niagara* and *Sacramento* were cruising off the coast of France and in the British Channel, in search of this vessel and others that had become notorious for their depredations on American commerce. It was but a few days after the purchase of *The Georgia* by the claimant, *The Alabama* was captured in the Channel, after a short and brilliant action, by *The Kearsarge*. The *Georgia* was watched from the time she entered the Port of Liverpool, and was seized as soon as she left it.

The question in this case cannot arise under See 7 WALL.

the French Code, as, according to that law, sales even of merchant vessels to a neutral *flag-rante bello*, are forbidden. And it is understood that the same rule prevails in Russia. Their law, in this respect, differs from the established English and American adjudications on this subject.

It may not be inappropriate to remark, that Lord Russell advised Mr. Adams, on the day *The Georgia* left Liverpool under the charter-party to the Portuguese Government, August 8th, 1864, Her Majesty's Government had given directions that, "In future no ship of war, of either belligerent, shall be allowed to be brought into any of Her Majesty's ports for the purpose of being dismantled or sold."

The decree of the court below affirmed.

SOLOMON T. NICHOLL ET AL., *Appts.*,

v.

THE UNITED STATES.

(See S. C., 7 Wall., 122-181.)

Government can only be sued in the manner provided for by itself—written protest necessary to recover back duties—Court of Claims has no jurisdiction of revenue cases.

Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. A written protest, signed by the party, with the definite ground of objection, is a condition precedent to the right to sue for duties paid, and if it be omitted, all right of action is gone.

Where no protest is made, the duties are not illegally exacted, in the legal sense of the term.

Cases arising under the revenue laws are not within the jurisdiction of the Court of Claims.

[No. 61.]

Argued Feb. 8, 1869. Decided Feb. 16, 1869.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. Morgan L. Ogden and Wm. Allen Butler, for appellants:

The Court of Claims had jurisdiction of the petitioner's claim, the same being founded upon a law of Congress and upon regulations of the Executive Department, as well as upon an implied contract with the Government of the United States.

Sec. 1 of the Act of Feb. 24, 1855, 10 Stat. at L., 612, establishing the Court of Claims.

The petitioners' claim also rests upon an implied contract springing from the obligation of the Government to refund the duties, if illegally exacted.

The Court of Claims has uniformly exercised jurisdiction over this class of cases, and has expressly decided that they come within the provisions of the Acts conferring jurisdiction upon the court.

See *Schlesinger's case*, 1 Nott & H., 16, 17.

While the court has been divided upon the question of allowing the claims, it has never sustained a demurrer on the ground of want of jurisdiction.

It is plain that the Act of Feb. 26, 1845, did not impair nor affect the right of the importer to petition Congress on the ground of illegality or error involved in the exaction of duties by any

revenue officer, and his claim being thus founded on a legal right, was cognizable by the Court of Claims, within the strictest rule of construction relating to the powers of that tribunal.

Lindsay v. U. S., Dev. Ct. of Cl., 105; *Todd v. U. S.*, *Id.*, 106.

The Court of Claims erred in sustaining the demurrer and dismissing the petition, on the ground that the duties in question had not been paid under protest, in the manner prescribed by the Act of Feb. 28, 1845.

Opinion of Casey, *Ch. J.*, in *Schlesinger's* case, 1 Nott & H., 16.

Upon a fair construction of the several Acts regulating the collection of duties on imports, and the rights of importers in respect to duties erroneously or illegally exacted, the provisions in the Act of Feb. 26, 1845, prescribing a written and specific protest, as a prerequisite to maintaining an action against a collector to recover back duties illegally exacted, apply only to cases where the remedy of the importer is sought against the collector, and do not in any manner limit nor affect his right to claim a return of the duties thus illegally exacted, in any other mode permitted by law.

The Court of Claims erred in sustaining the demurrer and dismissing the petition, on the ground that the payment of the duties in question was made and received under a mutual mistake of law, and was, therefore, a voluntary payment, and as such irrecoverable.

The rule as to voluntary payments, although somewhat obscured by apparent discrepancies in its application by the courts, is well settled. It is conclusively stated in *Shaw v. Woodcock*, 7 B. & C., 78. "Upon a question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay in order to obtain possession of things to which he is entitled, the money so paid is not voluntary but compulsory payment, and may be recovered back." The test is not whether the party submitting to the exaction objects at the time, but whether he pays under a compulsion which leaves him no alternative but to submit to the exaction, and pursue his remedy to recover back the money.

Astley v. Reynolds, 2 Str., 915; *Smith v. Bromley*, 2 Doug., 695, note; *Shaw v. Woodcock*, 7 B. & C., 78; *Atlee v. Backhouse*, 8 M. & W., 633; *Moses v. Macferlan*, 2 Burr., 1012; *Ripley v. Gelston*, 9 Johns., 201; *Clinton v. Strong*, 9 Johns., 870; *Hall v. Shulte*, 4 Johns., 240; *Steele v. Williams*, 20 Eng. L. & E., 819; *Parker v. Gt. Western R. R. Co.*, 7 Man. & G., 293; *Boston & Sandwich Co. v. Boston*, 4 Metc., 181; *Preston v. Boston*, 12 Pick., 7; *Harmony v. Bingham*, 12 N. Y., 99; *Tutt v. Ide*, 8 Blatchf., 249, 255; *Am. Ea. Ins. Co. v. Britton*, 8 Bos., 148; *Bradford v. Chicago*, 25 Ill., 411.

Messrs. Wm. M. Evarts, Atty-Gen., T. Talbot, E. P. Norton, and T. Lyle Dickey, for appellees:

I. At common law, the appellant has no right of action for such recovery against the United States. The common law implies no contract on the part of the government to repay money erroneously collected into the public treasury for public dues.

Cary v. Curtis, 3 How., 256, Story, *J.*, dissenting opinion.

Not on the part of the several state govern-

ments, nor even against municipal corporations, as appears from cases cited for the appellant (12 Pick., 7; 4 Metc., 181), where the action was brought under a statute creating the liability of the defendant city (Mass. Stat. of 1828, ch. 188, sec. 5), in the following words:

"The assessors of cities, towns, * * * shall not hereafter be made responsible, * * * but the liability, if any, shall rest solely with said city, town, district, parish or religious society, and the assessors shall be responsible only for their integrity and fidelity."

Hemingway v. Machias, 85 Me., 445; 9 Rich.; 8 Barr.

This point sustained, the appeal fails; but it is proper to present other views of this case, as follows:

II. No new liability on the part of the government in this respect has been created by the statutes establishing or relating to the Court of Claims.

Act of Feb. 24, 1855, sec. 1; Stat. at L., 10, 612; Act of Mar. 8, 1868, sec. 2, Stat. at L., 13, 765.

Further, this brief maintains that:

III. What the statutes define to be a compulsory payment, in a case like this and that alone is such. Everything else is voluntary; this because:

a. The whole matter of the collection into, and repayment from the Treasury of the United States, of money paid as duties, is the creature of statute.

b. At common law there was no obligation to repay, and the statutes on which the appellants base their right were passed as regulating the sole remedy in such cases.

c. These statutes were passed when there was no right to sue in the Court of Claims.

Act of March 8, 1849, sec. 2, Vol. 5, p. 348, Act of Feb. 26, 1845, Vol. 5, p. 727; 83 Maine, 445.

IV. The Statute of August 8, 1846, cited on the other side, does not enlarge this definition or the rights of the appellant: for the action of the Secretary under that Act is to conform to the decisions of the courts, where it has been decided that payments like this raise no obligation to repay.

Elliott v. Swarthout, 10 Pet., 187; *Curtis v. Fiedler*, 2 Black, 481 (67 U. S., XVII., 277); *Lawrence v. Cannell*, 18 How., 496; *Bend v. Hoyt*, 18 Pet., 268.

V. At common law, the payment alleged by the petition is not compulsory. See the cases cited for the appellant, also *Bend v. Hoyt*, 18 Pet., 268.

Mr. Justice Davis delivered the opinion of the court:

Solomon T. Nicholl & Co., importing merchants of the City of New York, filed their petition in the Court of Claims, to recover from the United States an excess of duties paid on certain importations of liquors in casks, from 1847 to 1851 inclusive.

They claim that they paid full duties on the original invoices on the liquors, without regard to leakage on the voyage, whereas they were only required to pay on the quantity contained in the casks on their arrival at the Port of New York. *Marriott v. Brune*, 9 How., 619.

As a reason for not presenting their claim to

the Treasury Department for payment, they state that they omitted to protest.

The Court of Claims sustained the demurrer to this petition, and from that decision this appeal is taken.

Two questions arise in this case:

1. Was there any liability on the part of the government to refund these duties prior to the Act establishing the Court of Claims?

2. If not, has that Act fixed any new liability on the government?

The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.

It is not important for the purposes of this suit, to notice any of the Acts of Congress on the subject of payment of the duties on imports, anterior to the Act of Feb. 26, 1845. 5 Stat. at L. 727. This Act altered the rule previously in force, and required the party of whom duties were claimed, and who denied the right to claim them, to protest in writing, with a specific statement of the grounds of objection.

Through this law Congress said to the importing merchant, you must pay the duties assessed against you; but as you say they are illegally assessed, if you file a written protest stating wherein the illegality consists, you can test the question of your liability to pay, in a suit against the collector, to be tried in due course of law and, if the courts decide in your favor, the treasury will repay you; but in no other way will the Government be responsible to refund.

The written protest, signed by the party, with the definite grounds of objection, were conditions precedent to the right to sue, and if omitted, all right of action was gone. These conditions were necessary for the protection of the Government, as they informed the officers charged with the collection of the revenue from imports, of the merchants' reasons for claiming exemption, and enabled the Treasury Department to judge of their soundness, and to decide on the risk of taking the duties in the face of the objections. There was no hardship in the case, because the law was notice equally to the collector and importer, and was a rule to guide their conduct, in case differences should arise in relation to the laws for the imposition of duties. The allowing a suit at all, was an act of beneficence on the part of the Government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same. After the passage of the Law of 1845, the duties in controversy were paid.

See 7 WALL.

The appellants say they were illegally exacted, because it was decided by this court, in *Lawrence v. Caswell*, 13 How., 488, that the duties ought to be charged only upon the quantity of liquors actually imported, and not on the contents stated in the invoices; but the *Chief Justice* took occasion to observe in deciding that case, "that where no protest was made the duties are not illegally exacted in the legal sense of the term. If the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal (the Secretary of the Treasury) to which the law had confided the power of deciding the question." *Lawrence v. Caswell*, *supra*. In view of this decision and the plain requirements of the law, how can Nicholl & Co. complain? They knew by proceeding in a certain way they could resort to the legal tribunals, and yet for a series of years they imported liquors and paid the duties demanded without objection. They had an equal right, with the Secretary of the Treasury, to construe the law under which the duties were claimed, and as they chose not to appeal to the courts, they adopted the construction which the Secretary put on the law, and are concluded by his decision. If a party who did not adopt that construction placed himself in a way to contest it, and got a decision that it was erroneous, such decision cannot inure to the benefit of Nicholl & Co., who by their conduct notified the government, so far as they were concerned, they acquiesced in the Secretary's construction of the law. It may be their misfortune that they did not appeal from the Secretary's decision; but it is a misfortune that occurs to any party, in a lawsuit, who refuses to appeal from the decision of an inferior court, and afterwards finds, by means of another's litigation, that if he had appealed the decision would have been reversed.

If the duties demanded of Nicholl & Co. had been paid under protest, their payment, in the sense of the law, would have been compulsory, but as they were paid without protest it was a voluntary payment, doubtless made and received in mutual mistake of the law; but in such a case, as was decided in *Elliott v. Swartwout*, 10 Pet., 153, no action will lie to recover back the money. And so this court has repeatedly held. *Bend v. Hoyt*, 13 Pet., 268; *Lawrence v. Caswell*, 13 How., 488; *Curtis v. Fiedler*, 2 Black, 461 [67 U. S., XVII., 273].

It is clear, therefore, that the appellants are without remedy, unless a new liability has been imposed on the Government by the Act creating the Court of Claims.

Does this Act confer on the appellants any further or different rights than they had prior to its passage? If not, there is an end to this suit.

The Court of Claims has power to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States.

Conceding that this jurisdiction draws to it cases arising under the revenue laws, then it is contended, as this suit is founded on one of the Tariff Acts of Congress, which has been judicially interpreted so as to sustain the claim,

therefore the case of the appellants is brought within the first jurisdictional clause of the Act creating the Court of Claims. But this result does not follow, for if the court has decided that the appellants, if they had protested, would have been entitled to be reimbursed for the excess of duties paid by them, it has also decided, by not protesting they lost all right to ask for repayment; and there has been no law of Congress passed since this decision placing them in the position they would have been if they had protested. Neither can they invoke to their aid a regulation of the Treasury Department, which alone of all the departments deals with the question of duties on imports, for there is no regulation touching the subject, as is very evident from the averment in their petition, that the Treasury Department would not pay them because they omitted to protest.

Besides, if there had been a regulation of the department on the subject, it could not affect the rights of the appellants, for such a regulation cannot change a law of Congress.

It is insisted, however, if this suit cannot be sustained on these grounds, it can be sustained on an implied contract springing from the obligation of the Government to refund all duties that are illegally exacted. But we have seen that these duties that are illegally exacted, were paid voluntarily, and there is no such thing as an implied promise to pay against the positive command of a statute. *Cary v. Curtis*, 3 How., 236.

Enough has been said to show that if the Court of Claims could take jurisdiction of this class of cases, its judgment was right on the merits of this particular case.

But after all, the important subject of inquiry is: did Congress, in creating the Court of Claims, intend to confer on it the power to hear and determine cases arising under the revenue laws?

The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government. Depending as the government does on its revenue to meet, not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the Treasury should be able to make a reliable estimate of the means, in order to meet liabilities. It would be difficult to do this, if the receipts from duties and internal taxes paid into the Treasury, were liable to be taken out of it, on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officer charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell, in advance, how much money would be required to pay the judgments obtained on them, and the result would be, that the treasury estimates for any current year would be unreliable. To guard against such consequences, Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system, which Congress has provided for the benefit of those persons

who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of good, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.

And an equal provision has been made to correct errors in the administration of the internal revenue laws. The party aggrieved can test the question of the illegality of an assessment or collection of taxes, by suit; but he cannot do this until he has taken an appeal to the Commissioner of Internal Revenue. If the commissioner delays his decision beyond the period of six months from the time the appeal is taken, then suit may be brought at any time within twelve months from the date of the appeal. 14 Stat. at L., 111, amendment to sec. 44, sec. 19, p. 152. Thus it will be seen that the person who believes he has suffered wrong at the hands of the assessor or collector, can appeal to the courts; but he cannot do this until he has taken an intermediate appeal to the commissioner, and at all events, he is barred from bringing a suit, unless he does it within a year from the time the commissioner is notified of his appeal. The object of these different provisions is apparent. While the government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time.

These provisions are analogous to those made for the benefit of the importing merchant, and the same results necessarily follow. If the importer does not protest, his right of action is gone. So, if the party complaining of an illegal assessment does not appeal to the commissioner, he is also barred of the right to sue, and he is without remedy, even if he does appeal, unless he sues within twelve months. Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the taxpayer and importer a further and different remedy?

The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws, than such as are particularly given by those laws.

Without pursuing the subject further, we are satisfied that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims.

Judgment affirmed.

Cited—8 Wall., 275; 10 Wall., 444, 553; 12 Wall., 14; 98 U. S., 88, 614; 98 U. S., 599; 101 U. S., 345; 106 U. S., 227; 3 Hughes, 245; 1 Holmes, 6; 2 Abb. U. S., 108; 10 Blatchf., 246.

THE STEAMER "SIREN" AND CARGO,
AND THE UNION HORSESHOE COMPANY,
Claimants, *Appts.*,

v.

THE UNITED STATES.

AND

THE STEAMERS SIREN AND CARGO, ETC.,
HENRY S. RACKETT, WILLIAM D. ANDREWS,
AND GEORGE H. ANDREWS, Claimants,
Appts.,

v.

THE UNITED STATES.

(See S. C., "*The Siren*," 7 Wall., 152-165.)

Claim for collision against vessel of United States—cannot be enforced without consent of government—claims against or liens upon property of government, how enforced—maritime claims extend to proceeds of sale of vessel—what claims on captured vessel, district court may hear—damages for maritime tort.

A claim for the damages occasioned by collision of vessels at sea, may be enforced in the admiralty by a proceeding *in rem*, except where the vessel doing the damage is the property of the United States.

In such case, the claim exists equally as if the vessel belonged to a private citizen, but it cannot be enforced against the Government without its consent.

Claims against or liens upon property of the United States are incapable of enforcement by action, but may be enforced by the courts, whenever the property becomes subject to their jurisdiction and control.

All maritime claims upon a vessel extend equally to the proceeds arising from its sale.

The district court, sitting as a prize court, may hear and determine all questions respecting claims arising after the capture of the vessel; but claims upon the vessel existing previous to the capture are superseded by the capture.

Damages for a maritime tort, committed by a ship in possession of a prize master and crew, may be assessed and paid out of the proceeds of the vessel before distribution to the captors.

[No. 65, 66.]

Argued Feb. 3, 1869. Decided Feb. 25, 1869.

A PPEALS from the District Court of the United States for the District of Massachusetts.

The case is stated by the court.

Messrs. S. Bartlett, D. Thaxter, and Caus-ten Browne, for appellants:

In cases of maritime tort, it has formerly been held in England that the injured party must resort for his remedy to suit against the officer in command of the offending ship. But the uncertainty and embarrassment of such remedy has led more recently to the practice of filing a libel *in rem* against the offending ship upon which the Court of Admiralty directs its registrar to write the Lords of Admiralty, requesting that an appearance be given by the Crown, and it is uniformly given and the proceedings go on.

Coote, New Adm. Pr., 20; 2 Pritch. Dig. (new ed.), 642; *The Volcano*, 2 W. Rob., 388; *The Swallow*, Swab., 80; *The Inflexible*, Swab., 83; *The Athol*, 1 W. Rob., 374.

It is to be noted that this form of proceeding admits that a lien has been created by the tort, since otherwise the court could have no jurisdiction in such a libel, even by consent.

With regard to prize ships captured by a
See 7 WALL.

U. S., Book 19.

foreign government, they constitute a class of property which will be held in our ports subject to lien for salvage, notwithstanding the rule that vessels of war, belonging to a foreign neutral power, cannot be arrested for such lien.

Booth v. The L' Esperanza, Bee, Adm., 92; 2 Pars. Mar. L., 624.

The liability of prize ships to proceedings *in rem* for salvage, is declared in *The Maria Bishop*, Blatchf. Pr. Cas., 553.

The grounds of the liability of property of the government, of a commercial or pecuniary character, to maritime liens and their enforcement, are pointed out with great distinctness by Judge Story, in *U. S. v. Wilder*, 3 Sumn., 308, 315.

The liability of captured property to a lien for freight, is settled in *Eight hundred and fifty-eight Bales of Cotton*, Blatchf. Pr. Cas., 825.

It is obvious that within the principles thus stated, this proceeding against money in the registry of the court, proceeds of the prize (the offending vessel), belonging as it does in part only to the government, the other part being held by it in trust for the captors, deals merely with a pecuniary question, in no way affected by public policy; and the settled doctrine of the court of admiralty is, that the court "is bound to consider every claim against the fund or *res* in its hands, however it may have been brought there."

The Constancia, 10 Jur., 845.

Indeed, in this country it seems to be determined, that where proceeds are rightfully in the possession of the admiralty, it has jurisdiction to decree that third persons, who could not have proceeded against the property *in rem*, may receive satisfaction of their claims against the owner.

Zane v. The President, 4 Wash. (C. C.), 458; *The Boston*, Blatchf. & H. (Adm.), 809; *Gardner v. The New Jersey*, 1 Pet. (Adm.), 228; *The Stephen Allen*, Blatchf. & H., (Adm.), 175; *Andrews v. Wall*, 3 How., 568.

Whosoever the government itself brings a suit at law, it opens to the defendant all set-offs, legal and equitable; and it follows that when it proceeds *in rem* it must recognize all liens or equities in regard to the *res*.

Gratiot v. U. S., 15 Pet., 370; S. C., 4 How., 80; *U. S. v. Bank of The Metropolis*, 15 Pet., 408.

Now, in the present case the government is not a defendant, but a plaintiff—the actor in the suit—and that suit it seeks to forfeit, and appropriate the property which is the subject of it. In doing so, it invites, and must subject to adjudication, all claims or liens on that property, as is well stated in *Briggs v. Light Boats*, 11 Allen, 157; *St. Jago de Cuba*, 9 Wheat., 409.

It is submitted that there is no foundation for the objection that liens for maritime torts cannot be dealt with and adjusted in a prize court.

1 Kent, 354, 349; *Athol*, 1 Wm. Rob., 374; *The Thomas A. Scott*, 10 Law Times, N. S., 726.

If the court find no prize, it has jurisdiction to decide the question of probable cause, "and to decree damages against the captors; to decide questions of torts committed in and about the act of capture; and to punish the captors in damages therefor; and to decide questions of the tortious or negligent use of the prize while

in the hands of the captors, and to punish the captors in damages."

St. Juan Baptista, 5 Rob., 38; *The Die Vire Damer*, 5 Rob., 357; *The Der Mohr*, 8 Rob., 129; *The Catherine & Anna*, 4 C. Rob., 89; *The Carolina*, 4 C. Rob., 256; *The William*, 6 C. Rob., 316; *Del Col v. Arnold*, 3 Dall., 338; *The Anna Maria*, 2 Wheat., 327.

If the court finds prize, it takes jurisdiction of all liens which are imposed by the general law of mercantile world, as distinguished from secret liens created by contract between the parties.

The Tobago, 5 Rob., 218; *The Marianna*, 6 Rob., 24 (where the lien accrued after capture); *The Francis*, 8 Cranch, 418; *Abb. Ship.*, 544; see *Abb. Ship.*, *ubi supra*; *Harmer v. Bell*, 23 Eng. L. & E., 72; *Upton, Prize*, 888; *Story, Prize*, 81; 1 Kent, Com., 359.

Messrs. W. M. Earle, J. Hubley Ashton, and C. Coveley, for appellee:

The prize master and prize crew in possession of this vessel, and controlling her navigation at the time of the collision, were agents of the government and not of the captors of the prize.

The government is not liable for the torts nor wrongs of subordinate officers or agents employed in the public service, committed in the course of their agency. Nor in this case can the captors be held liable nor responsible for the torts of the officers and persons in charge of the prize at the time of collision.

Story, Agen., 431, sec. 819; *Johnson v. U. S.*, 2 Nott & H., 415; *Nicholson v. Mounsey*, 15 East, 384.

The doctrine of that class of cases in which it is held that officers of the government compellable in the course of their official duties, to employ sub-agents and clerks and servants in the naval service, are not responsible, without fault of their own, for misfeasance or negligence or omissions of duty of such subordinates, militates strongly against affecting captors with liability for the acts of prize masters, in such a case as this.

Dunlop v. Munroe, 7 Cranch, 242; *Hall v. Smith*, 2 Bing., 156; *The Mentor*, 1 C. Rob., 179; *The Athol*, 1 W. Rob., 382.

In the absence of legal liability or responsibility on the part of the government or the captors, for the tortious act of the persons in charge of the prize, no lien, *ex delicto* by reason of the collision, can exist upon nor attach to the fund in court in favor of the appellants.

The district court, sitting as a prize court of admiralty, is a court of special and extraordinary jurisdiction; and it has no power nor authority to adjudicate or determine any claim for loss or damage sustained by collision with a captured vessel in charge of a prize crew, or toward payment of such claim or demand from the proceeds of the sale of such vessel.

Dana, Wheat., 480, *note* 186; *The Adventure*, 8 Cranch, 226; 5 Rob., 176.

All other outstanding claims or liens attaching to property of hostile ownership or in hostile possession, are disregarded by the prize court and excluded from its consideration.

The Marianna, 6 Rob., 26; *The Tobago*, 5 Rob., 218; *The Frances*, 8 Cranch, 418; *The Hampton*, 5 Wall., 374; *The Battle*, 6 Wall., 498.

Assuming, as we may, that the title of this

property was vested in the United States by capture, no lien, we contend, was or could be impressed upon the vessel by the maritime tort of the officers and persons in charge of her at the time of the collision.

But admitting that a lien *ex delicto* was impressed upon this vessel by the maritime tort of the prize crew, and that such lien was transferred and does attach to the proceeds in the registry of the court, we contend, in the last place, that it cannot be executed nor enforced by the court in favor of the appellants, from or against those proceeds.

Briggs v. Light Boats, 11 Allen, 157; *Buchanan v. Alexander*, 4 How., 20.

Mr. Justice Field delivered the opinion of the court:

The steamer *Siren* was captured in the harbor of Charleston, in attempting to violate the blockade of that port, in February, 1865, by the steamer *Gladolus*, belonging to the Navy of the United States. She was placed in charge of a prize master and crew, and ordered to the Port of Boston for adjudication. On her way she was obliged to be put into the Port of New York for coal and, in proceeding thence, through the narrow passage which leads to Long Island Sound, known as Hurlgate, she ran into and sank the sloop, *Harper*, loaded with iron, and bound from New York to Providence, Rhode Island.

On the arrival of the steamer at Boston, a libel in prize was filed against her, and no claim having been presented, she was, in April following, condemned as lawful prize and sold. The proceeds of the sale were deposited with the Assistant Treasurer of the United States, in compliance with the Act of Congress, where they now remain, subject to the order of the court.

In these proceedings, the owners of the sloop *Harper*, and the owners of her cargo, intervened by petition, claiming to have a lien upon the vessel and her proceeds for the damages sustained by the collision, and praying that their claim might be allowed and paid out of the proceeds.

The district court held that the intervention could not be allowed, and dismissed the petitions, and hence the present appeal.

The counsel of the United States maintained the correctness of this ruling, mainly upon these grounds:

First. That to allow the intervention would be, in substance, to allow the citizens to implead the government, which is asserted to be universally and under all circumstances repugnant to settled principles.

Second. That the question as to a claim upon a prize ship, created after capture, is not within the jurisdiction of a prize court, which, it is asserted, can deal only with the question of prize or no prize.

It is a familiar doctrine of the common law, that a sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and dis-

position of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some Act of Congress. Such is the language of this court in *U.S.v. Clarke*, 8 Pet., 444.

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly and suits against its property.

But although direct suits cannot be maintained against the United States, nor against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. In *U. S. v. Ringgold*, 8 Pet., 150, a claim of the defendant was allowed as a set-off to the demand of the government. "No direct suit," said the court, "can be maintained against the United States. But when action is brought by the United States to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress." So in *U. S. v. Macdaniel*, 7 Pet., 16, to which reference is made in the case cited, the defendant was allowed to set off against the demand of the Government a claim for services as agent for the payment of the navy pension fund, to which the court held he was equitably entitled. The question, said the court, was, whether the defendant should surrender the money which happened to be in his hands, and then petition Congress on the subject; and it was held that the Government had no right, legal or equitable, to the money.

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the Government, incapable of enforcement without its consent, and unavailable for any purpose.

In England, when the damage is inflicted by a vessel belonging to the Crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel *in rem*, see 7 WALL.

upon which the court directs the registrar to write to the Lords of the Admiralty requesting an appearance on behalf of the Crown—which is generally given—when the subsequent proceedings to decree are conducted as in other cases. Coote, New Adm. Prac., 81. In the case of *The Athol*, 1 Wm. Rob., 882, the court refused to issue a monition to the Lords of the Admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the Crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the Crown, and no bail is given on the appearance, it is insisted that they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only result of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. *The Clara*, 1 Swab., 8; and *The Swallow*, 1 Swab., 80. The vessels are not arrested and taken into custody by the Marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared.

It is true, that in case of damage committed by a public vessel a legal responsibility attaches to the actual wrong-doer, the commanding officer of the offending ship, and the injured party may seek redress against him; but this is not inconsistent with the existence of a claim against the vessel itself. In the case of *The Athol*, already referred to, where the liability of the actual wrong-doer is asserted, damages against the vessel were pronounced after an appearance on behalf of the Crown had been given by the admiralty proctor. See, also, *U. S. v. The Malek Adhel*, 2 How., 238.

The inability to enforce the claim against the vessel is not inconsistent with its existence.

Seamen's wages constitute preferred claims under the maritime law, upon all vessels; yet they cannot be enforced against a vessel of the nation, or a vessel employed in its service. In a case before the Admiralty Court of Pennsylvania, in 1781, it was adjudged, on a plea to the jurisdiction, that mariners enlisting on board a ship of war belonging to a sovereign independent State could not libel the ship for their wages.

In a case in the English Admiralty Court, a libel having been filed to enforce a claim for seamen's wages against a packet ship employed in the service of the General Postoffice, Sir William Scott declined to take jurisdiction until notice was given to the Postoffice Department, and he was informed that no objection was taken to the proceeding. *The Lord Hobart*, 2 Dods., 108. The fact that the court took jurisdiction when the exemption upon which the Government could insist was waived, shows that a claim against the vessel existed, as only upon its existence could the libel in any event be sustained.

Even where claims are made *liens upon property* by statute, they cannot be enforced by direct suit, if the property subsequently vest in

the government. Thus, in Massachusetts the statutes provide that any person to whom money is due for labor and materials furnished in the construction of a vessel in that Commonwealth shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is paid, unless lost by a failure to comply with certain specified conditions; yet in a recent case, where a vessel, subject to a lien of this character, was transferred to the United States, it was held that the lien could not be enforced in the courts of that State. The decision was placed upon the general exemption of the government and its property from legal process. *Briggs v. Light Boats*, 11 Allen, 157.

So, also, express contract liens upon the property of the United States are incapable of enforcement. A mortgage upon property, the title to which had subsequently passed to the United States, would be in the same position as the claim against a vessel of the government, incapable of enforcement by legal proceedings. The United States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises. In *Lutwisch v. Atty Gen.*, a case cited by Lord Hardwicke in deciding *Reeve v. Atty-Gen.*, 2 Atk., 228, a bill was filed to foreclose a mortgage after the mortgagor had been attainted for high treason, and the court refused a foreclosure against the Crown, but directed that the mortgagee should and enjoy the mortgaged premises until the Crown thought proper to redeem the estate.

In *Hodge v. Atty-Gen.*, 3 Younge & C., Exch., 342, the deeds of certain leasehold estates had been deposited by one Bailey with the plaintiffs, who were bankers, secure a balance of a running account between him and them. Bailey was afterwards convicted of felony, and the leasehold estates vested in the Crown. At the time of his conviction he was indebted to the plaintiffs, who filed a bill against the Attorney-General, claiming to be equitable mortgagees of the leasehold estates, to subject the property to sale, and the application of the proceeds to the payment of the amount due them. But the court said that the only decree which could be made in the case, was to declare the plaintiffs to be equitable mortgagees of the property, to direct an account to be taken, and that the plaintiffs hold possession of the property until their lien was satisfied. "I do not think," said Baron Alderson, in giving the decision, "that I have any jurisdiction in this case to order a sale. Here the legal estate is vested in the Crown; and I do not know any process by which this court can compel the Crown to convey that legal estate."

In this country, where, as a general rule, a mortgage is treated only as a lien or incumbrance, and the mortgagor retains possession of the premises, the relief granted in the two cases cited would be of no avail.

The authorities to which we have referred are sufficient to show that the existence of a claim, and even of a lien upon property, is not always dependent upon the ability of the holder to enforce it by legal proceedings. A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and con-

trol. Then the rights and interests of all parties will be respected and maintained. Thus, if the government, having the title to land subject to the mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.

So, if the property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.

Now, it is a settled principle of admiralty law, that all maritime claims upon the vessel extend equally to the proceeds arising from its sale and are to be satisfied out of them. Assuming, therefore, that *The Siren* was in fault and that, by the tort she committed, a claim was created against her, we do not perceive any just ground for refusing its satisfaction out of the proceeds of her sale. The Government is the actor in the suit for her condemnation. It asks for her sale, and the proceeds coming into the registry of the court, come affected with all the claims which existed upon the vessel created subsequent to her capture. There is no authority, that we are aware of, which would exempt them under these circumstances, because of the exemption of the Government from a direct proceeding *in rem* against the vessel whilst in its custody.

This doctrine was applied by this court in the case of *The St. Jago de Cuba*, 9 Wheat., 409, where a libel was filed by the United States to forfeit the vessel for violation of the laws prohibiting the slave trade. Claims of seamen for wages, and of material men for supplies, when the parties were ignorant of the illegal voyage of the vessel, were allowed and paid out of the proceeds. These claims arose subsequent to the illegal acts which created the forfeiture, yet they were not superseded by the claim of the government. "In case of wreck and salvage," said the court, "it is unquestionable that the forfeiture would be superseded; and we see no ground on which to preclude any other maritime claim fairly and honestly acquired." This language, though used with reference to claims arising out of contract, may be applied to claims arising out of torts committed after the capture of the offending vessel.

In *U. S. v. Wilder*, it was held that goods of the United States were subject to contribution equally with goods of private shippers, to meet the expenses incurred in saving them, which were averaged, and that the owners of the vessel could retain the goods, until their share of the contribution to the average was paid or secured. The United States claimed the right to take the goods without paying or securing this share; and this being denied, the action was brought to recover their value. In delivering the opinion, *Mr. Justice Story* stated that he was unable to distinguish the case from one of salvage, and that it had never been doubted that in cases of salvage of private ships and car-

goes, the freight on board belonging to the government was equally subject to the admiralty process *in rem* for its proportion due for salvage with that of mere private shippers; but that it might be, for aught he knew, different in cases of the salvage of public ships. "The same reasoning, however," continued the learned justice, "which has been applied by the government against the lien for general average, applies with equal force against the lien for salvage of government property under all circumstances. Besides, it is by no means true, that liens existing on particular things are displaced by the government becoming or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exists in all cases as much against the government, becoming proprietors by way of purchase or forfeiture or otherwise, as it does against the particular things in the possession of a private person." 3 Sumn., 308.

In the case of *The Davis and Cargo*, recently decided in the Circuit Court of the United States for the Southern District of New York, cotton belonging to the United States was held liable to contribution to meet the allowance made for salvage service in saving vessel and cargo. "The mere fact," said the court, "of the ownership of the cotton by the Government, in the act of being carried to its port of destination for the purposes of a market as merchandise, we think did not exempt it from the lien in case of salvage service. We shall not enter into an argument in support of the position, as the subject, or rather a kindred one—the liability of property of the government for general average—and the present questions incidentally have been already most elaborately examined by Mr. Justice Story. We are inclined, also, to the opinion, that it is the doctrine of the admiralty in England; *Marquis of Huntly*, 3 Hagg., 247, and of the most approved modern elementary writers on the subject in this country." 1 Pars. Mar. Law, 324; 2 Pars. Mar. Law, 625; *Marv. Wrecks and Salvage*, sec. 122; see, also, *The Santissima Trinidad*, 7 Wheat., 283; *U. S. v. Wilder*, 3 Sumn., 308.

There is no just foundation for the objection that claims for maritime torts cannot be dealt with and adjusted by a prize court. "It is a principle well settled, and constantly conceded and applied," said Chancellor Kent, "that prize courts have exclusive jurisdiction and an enlarged discretion as to the allowance of freight, damages, expenses and costs in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captures *jure belli*; and the courts will frequently award large and liberal damages in those cases." 1 Kent, 354. The jurisdiction is not, therefore, limited to the determination of the simple question of prize or no prize. But whatever may be the limitation upon the jurisdiction of a prize court in England, there is no such limitation upon the district court sitting as a prize court in this country. Here, the district court, as was said in *U. S. v. Wood*, 5 Wall., 69 [72 U. S., XVIII., 538], "holds both its prize jurisdiction and its jurisdiction as an instance court of admiralty from the Constitution and the Acts of Congress, and is but one court with these different branches of admiralty jurisdiction, as well as cognizance

of other and distinct subjects." It may, therefore, hear and determine all questions respecting claims arising after the capture of the vessel. Outstanding claims upon the vessel, existing previous to the capture, cannot be considered. This exclusion rests not on the ground of any supposed inability of the court to pass upon these claims correctly, but because they are superseded by the capture. *The Batlle*, 6 Wall., 498 [78 U. S., XVIII., 938]; *The Hampton*, 5 Wall., 872 [72 U. S., XVIII., 659]; and *The Frances*, 8 Cranch, 418.

As to the suggestion that a maritime tort, committed by a ship in possession of a prize master and crew, ought not to create a claim on the vessel against a neutral owner in case the vessel is restored, it is sufficient to say, although the vessel having been condemned the question is not of importance in this case, that the claim in that event, if held to exist, would not be the subject of consideration by the prize court. Here, however, the title was divested from the previous owner by the capture, that being lawful, and vested in the United States (in trust as to one half for the captors), although the legality of the capture was not established until the sentence of condemnation.

It does not appear that the court below considered the evidence as to the character and extent of the alleged tort. It appears to have placed its decision entirely upon the legal proposition, that the captured vessel was exempt from legal process at the suit of the intervenors, and that, consequently, the proceeds of the vessel could not be subjected to the satisfaction of their claims. We have, however, looked into the evidence and are satisfied that the collision was the fault of *The Siren*. It took place in the daytime. The sloop was seen from the steamer in time to avoid her. The steamer was out of the regular track for steamers passing through Hurlgate. The passage is noted for its difficulties and dangers and, under the laws of New York, pilots are specially commissioned to take vessels through it. The prize master engaged a pilot for the sloop to take the steamer from New York to Boston, but refused to engage a Hurlgate pilot, his reason being to avoid expense. With such a pilot she would have been taken in the regular track of steamers northward of Blackwell's Island, and so close to Flood Rock as to avoid the sloop, as might easily have been done. We do not think it important to cite from the evidence in vindication of our conclusion, especially as it was not seriously contested on the argument that *The Siren* was responsible for the collision.

The decree must be reversed, and the cause remanded to the court below, with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors.

Ordered accordingly.

Mr. Justice Nelson, dissenting:

I am unable to concur in the opinion just delivered. The steamer *Siren*, having been captured by the United States steamship *Gladius*, a government vessel of war, *jure belli*, became the property of the United States, subject only to the right of the claimant to have the question of the legality of the capture determined by the prize court to which it was sent

for condemnation. Captures made by government vessels belong to the government, and no title exists in the captors, except to their distributive shares of the proceeds after condemnation. *Dos Hermanos*, 10 Wheat., 806; *The Aigeburth*, Blatchf. Prize Cas., 635; *The Adventure*, 8 Cranch, 226.

I agree that *The Siren*, while on her way, after capture, under the charge of the prize master, was in fault in the collision with the sloop, *Harper*, on her passage from the East River into the Sound; and that, if she had belonged to a private owner, she would have been liable, in the admiralty, for all the damages consequent upon this fault. Nor do I make any question as to a lien for the damages against the vessel in such a case, and which may be enforced by a proceeding *in rem*; or may be by a petition to the court against the proceeds, in the registry, if, for any cause, the offending vessel has been sold, and no prior lien exists against these proceeds. But if the owner of the offending vessel is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the non-liability would amount to nothing. It would be idle to say that the owner was not liable for the wrong, and at the same time subject his vessel for the damages occasioned. In this case, therefore, before a lien can be established or enforced against *The Siren* by a proceeding *in rem*, for the fault in question, or, which is the same thing, before it can be applied to the proceeds of the vessel in the registry, it must first be shown that the United States, the owner, is legally liable for the collision. In saying legally liable, I do not mean thereby legally liable to a suit; but legally liable upon common law principles in case a suit might have been maintained against the government; in other words, legally liable for the wrongful acts for her officers or public agents. That, in my judgment, is the turning point in this case, and the principle is as applicable to the proceeds of *The Siren* in the registry as to the vessel itself. If the government is not responsible, upon the principles of the common law, for wrongs committed by her officers or agents, then, whether the proceedings in the admiralty are against the vessel, or its proceeds, the court is bound to dismiss them.

Now, no principle at common law is better settled than that the government is not liable for the wrongful acts of her public agents. *Judge Story*, in his work on Agency, states it as follows: "It is plain," he observes, "that the government itself is not responsible for the misfeasances or wrongs, or negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." When we take into view the multitude of public officers and agents which the government is obliged to employ in conducting its affairs, the soundness, propriety, and even necessity of this principle, become at once apparent. In our judgment the present case falls directly within it. In all these cases of wrongs committed by public officers

or agents, the legal responsibility attaches to the actual wrong-doer.

It is supposed that the liability of government property for salvage or general average contribution, for services or sacrifices, in cases of impending danger to the property, afford some authority for the judgment in the present case. We are unable to perceive any analogy to the principle we have been discussing. There a portion of the property is taken or appropriated, as a compensation for saving it from a peril that threatened the loss of the whole. The cases involve no principle concerning the liability of the government for the tortious acts of its public officers.

Great stress is laid also upon the circumstance that the United States is the libellant, and has brought the offending vessel or its proceeds into court, and that the proceeding against the fund in the registry is not a suit against the government. But the answer to this is, not that the proceeding may not be taken against the fund in the registry, although there is certainly some difficulty in distinguishing between that and a proceeding against the vessel itself, but that the fund which belongs to the Government is not liable at all for the wrongful acts of its officers, which wrongful acts lie at the foundation of the judgment rendered in the case. It is for this principle I contend, and for which I am compelled to dissent from the judgment.

Rev'g—1 Low., 280.

S. C.—13 Wall., 589.

Cited—10 Wall., 18, 20; 11 Wall., 201; 13 Wall., 304; 92 U. S., 306; 98 U. S., 487, 488; 106 U. S., 207, 215, 227, 247, 248; 107 U. S., 823; 109 U. S., 452; 3 Hughes, 116; 1 Bro., 186, 538; 2 Dill., 306; 26 Blatchf., 573; 5 Sawy., 220.

ROSWELL G. PIERCE, W. S. T. MORTON
AND E. B. WESTON, *Appl.*,

JOHN W. BROWN.

(See S. C., 7 Wall., 205-218.)

Admission in answer—effect of want of replication—duress—contract procured through fear—lien of judgment does not exclude prior equitable title—equitable title protected.

A mere statement by the defendant in his answer, that he has no knowledge that the fact is as stated in the complaint, without any answer as to his belief concerning it, is not an admission which is full evidence of the fact.

Such answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed.

Where there is no replication to the answer, it must have its fair scope as an admission, but the court is not authorized to supply anything not expressed in it.

An evasive and insufficient answer is not helped by the omission of the complainant to file the general replication.

Duress, what is.

Contract, procured through fear of loss of life, produced by the threats of the other party to the contract, may be avoided for duress.

The lien of a judgment constitutes no property in the land.

It creates a preference over subsequently ac-

NOTE.—Deed, when void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, from cestui que trust to trustee, from heir to executor. See note to *Harding v. Handy*, 24 U. S. (11 Wheat.), 103.

quired rights, but in equity it does not attach to defendant's legal title to the exclusion of a prior equitable title in a third person.

The Court of Chancery will protect the equitable rights of third persons against the legal lien.

[No. 87.]

Submitted Feb. 3, 1869. Decided Feb. 15, 1869.

APPPEAL from the Supreme Court of the Territory of Nebraska.

On the 7th of September, 1860, Brown filed in the District Court for the Territory of Nebraska his bill in chancery against these appellants, to have a deed, made by him to Pierce, declared void.

A decree was filed according to the prayer of the bill.

The cause then went to the Supreme Court of the Territory, where the decree was affirmed.

The case is stated by the court.

Messrs. J. M. Woolworth and J. M. Carlisle, for appellants:

The answer shows a valid attachment lien, perfected by judgment. All the proceedings were had before this suit was brought, and in entire ignorance, on Morton's part, of Brown's claims. Morton is in the same position as a bona fide purchaser, without notice.

Carter v. Champion, 8 Conn., 549; *Kent v. Plummer*, 7 Me., 484; *Porter v. Bank of Rutland*, 19 Vt., 410; *Jones v. Jones*, 16 Ill., 118; *Martin v. Dryden*, 1 Gilm., 188.

The deed was made Aug. 10, 1857. The first word of complaint was uttered when the bill was filed, which was Sept. 7, 1860, three years afterwards.

No reason is shown for this profound silence and protracted delay, when it was Brown's duty to speak out. The deed, never only voidable, must be deemed affirmed by this silence.

1 Para. Cont., 323; *Doolittle v. McCullough*, 7 Ohio St., 299.

No case of duress has been made out in proof.

The threats were not such as would excite, in a man of ordinary courage, fear that life would be taken.

1 Bl. Com., 181.

Messrs. Reddick and Briggs, for appellee:

A deed obtained while the grantor is under duress is void and will be set aside.

See 1 Para. Cont., 319; Willard, Eq., 208; *Brown v. Peck*, 2 Wis., 261; 5 Hill, 154; 15 Johns., 154; 2 Wend., 243; 6 Mass., 506; 3 N. H., 508.

It may be claimed that Morton's judgment is a lien upon the land, from the fact that the legal title to the same was standing in the name of Pierce at the time the judgment was made. But the law is otherwise.

The general lien of a judgment creditor upon the lands of his debtor, is subject to all equities which existed against said lands in favor of third person, at the time of the recovery of the judgment.

Buchan v. Sumner, 2 Barb. Ch., 165; *Ells v. Touley*, 1 Paige, 280; *White v. Carpenter*, 2 Paige, 217; *Kiersted v. Avery*, 4 Paige, 9; 6 Barb., 19; 11 Barb., 490.

Morton loaned his money to Pierce in Aug., 1857, about the time the deed was by Pierce coerced from Brown, and the record shows that Brown was then in the actual possession of the land and has been ever since.

Morton stands charged with notice.

See 7 WALL.

See 2 Johns. Ch., 88; 3 Paige, 421; 2 Paige, 800.

Mr. Justice Clifford delivered the opinion of the court:

Representations of the complainant were, that on the 10th of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the preemption laws of the United States, and thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first named respondent was at that time a member of an unlawful association in that Territory, called the Omaha Claim Club, and that, he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of preemption to the land in question, and told the complainant that if he entered the land under his preemption claim, he must agree to deed the same to him; and added, that unless he did so, he (the said respondent) and his associates would take his life; and the complainant further alleged that the same respondent, accompanied, as before, by certain other members of that association, came again to his house on the day he perfected his preemption claim, and repeated those threats of personal violence, and did other acts to intimidate him, and induce him to believe that they would carry out their threats if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation and through fear of his life, and without any consideration; and he prayed the court that the conveyance might be decreed to be inoperative and void, and that the grantees might be required to reconvey the same to the complainant.

Two other persons were made respondents, as claiming some interest in the land in controversy. Pierce, the principal respondent, and Weston, one of the other respondents, were non-residents, and were served by publication pursuant to the rules of the court and the law of the jurisdiction. They never appeared, and failing to plead, answer or demur, and due proof of publication in the manner prescribed by law having been filed in court, a decree was rendered as to them, that the bill of complaint be taken as confessed. *Nations v. Johnson*, 24 How., 201 [65 U. S., XVI., 630].

Morton, the other respondent, appeared and filed an answer, in which he alleged that the principal respondent, on the 28th of August, 1857, and for a long time before, was the owner in fee of the premises; that he was informed, and believed, that the complainant entered upon the land as the tenant of the principal respondent, and that he was prosecuting this suit in violation of the just rights of all the respondents; that the principal respondent wanting to borrow money, he, the respondent before the court, loaned him a large sum, and accepted bills of exchange for the payment of the same,

drawn to the order of the borrower of the money, and which were indorsed by the drawer, that the bills of exchange not having been paid when they became due, he brought suit against the drawer and indorser, and recovered judgment against him for \$3,100; that the judgment so recovered is in full force and unsatisfied, and that the same is a lien on the premises described in the bill of complaint.

No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired a complete title to the land under the preemption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information nor belief upon the subject.

Authorities are not wanting to the effect that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids, are admitted; but the better opinion is the other way, as the sixty-first rule adopted by this court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed and taken to be sufficient. *Young v. Grundy*, 6 Cranch, 51; *Brooks v. Byam*, 1 Story, C. C., 297.

Material allegations in the bill of complaint ought to be answered and admitted or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject, if he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the respondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact. *Warfield v. Gambrill*, 1 Gill & J., 503.

Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defense, and the well known omissions and defects of such an answer may have some tendency to prove the allegations of the bill of complaint, but they are not such an admission of the same as will constitute a sufficient foundation for a decree upon the merits. *Young v. Grundy*, 6 Cranch, 51; *Parkman v. Welch*, 19 Pick., 234.

Proper remedy for a complainant, in such a case, is to except to the answer for insufficiency within the period prescribed by the sixty-first rule; but if he does not avail himself of that right, the answer is deemed sufficient to prevent the bill from being taken *pro confesso*, as it may be if no answer is filed. *Hardeman v. Harris*, 7 How., 726; *Stockton v. Ford*, 11 How., 232; 1 Dan. Ch. Pr., 786; *Langdon v. Goddard*, 8 Story, C. C., 13.

Attention is called to the fact, that no replication was filed to the answer; but the suggestion comes too late, as the respondent proceeded to final hearing in the court below without interposing any such objection.

More formal defects in the proceedings, not objected to in the court of original jurisdiction, cannot be assigned in an appellate tribunal as error to reverse either a judgment at law or decree in equity.

Legal effect of a replication is, that it puts in issue all the matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged. 1 Barb. Ch. Pr., 249; *Mills v. Pittman*, 1 Paige, Ch., 490; *Peirce v. West*, 1 Pet. C. C., 351; Story, Eq. Pl., 878; Cooper, Eq. Pl., 329.

Undenied as the answer is by any replication, it must have its fair scope as an admission, but the court is not authorized to supply anything not expressed in it, beyond what is reasonably implied from the language employed. Proofs were taken by the complainant, and they show, to the entire satisfaction of the court, that all the matters alleged in the bill of complaint, and not denied in the answer, are true, and the conclusion of the court below was, that the complainant acquired a complete title to the land under his preemption claim, and that the deed from him to the principal respondent was procured in the manner and by the means alleged in the bill of complaint.

Nothing is exhibited in the record to support any different conclusion, nor to warrant any different decree, unless it be found in one or the other of the first two defenses set up in the answer.

First defense is, that the principal respondent, on the 28th of August, 1857, and long before that time, was the owner in fee of the premises; but neither that part of the answer, nor any other, denied that the complainant acquired a complete title to the land, as alleged in the bill of complaint, nor set up any defense in avoidance of those allegations, nor made any attempt to present any defense against the direct charge, that the deed under which the respondent claimed title was procured from the complainant through threats of personal violence and by means of duress. Indefinite as the allegation of title is, the answer must be construed as referring to the title under the deed in controversy, as it is not pretended that the respondent ever had any other, and, if viewed in that light, it is in no respect inconsistent with the conclusion adopted by the Supreme Court of the Territory.

Such an indefinite allegation cannot be considered as presenting any sufficient answer, either to the alleged title of the complainant or to the charge made in the bill of complaint.

Briefly stated, the second defense set up in the answer is, that the respondent was informed and believed that the complainant entered upon the land as a tenant; but the time when the supposed entry was made is not alleged, nor are the circumstances attending the entry set forth; nor is any reason assigned why the allegations were not made more definite; nor is there any fact or circumstance alleged which shows or tends to show that there was any prior owner to the land, except the United States; nor that the respondent ever pretended to have any other title to the same than that derived from the complainant.

Viewed in any light, those allegations must

be regarded as evasive and insufficient; and they are not helped by the omission of the complainant to file the general replication. Those parts of the answer being laid out of the case as insufficient to constitute a defense, the conclusion is inevitable that the title to the land was in the complainant as alleged, and that he parted with it through threats of personal violence and by duress, and without any consideration.

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. Chit. Cont., 217; 2 Greenl. Ev., 283.

Text writers usually divide the subject into two classes, namely: duress *per minas* and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts to the present time. 2 Inst., 482; 2 Roll. Abr., 124.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received. *Richardson v. Duncan*, 3 N. H., 580; *Watkins v. Baird*, 6 Mass., 511; *Strong v. Grannis*, 26 Barb., 134.

Second class, duress *per minas*, as defined at common law, is where the party enters into a contract (1) For fear of loss of life; (2) For fear of loss of limb; (3) For fear of mayhem; (4) For fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits. 3 Bac. Abr., Duress, 252.

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text writers have adopted the rule, that it is only where the threats uttered excite

fear of death, or of great bodily harm, or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy. *Skeate v. Beale*, 11 Ad. & E., 983; *Atlee v. Backhouse*, 3 Mees. & W., 642; *Shep. Touch.*, 6; 1 Pars. Cont., 398; *Smith v. Monteith*, 13 M. & W., 488.

On the other hand, there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance. *Pohay v. Ferguson*, 5 Hill, 158; *Central Bank v. Copeland*, 18 Md., 817; *Eadie v. Skimmon*, 26 N. Y., 12; 1 Story, Eq. Jur. (9th ed.), 289; *Harmony v. Bingham*, 12 N. Y., 99; S. C., 1 Duer, 239; *Fleetwood v. N. Y.*, 2 Sandf., 475; *Tutt v. Ide*, 3 Blatchf., 250; *Asley v. Reynolds*, 2 Str., 915; *Brown v. Peck*, 2 Wis., 277; *Oates v. Hudson*, 5 Eng. L. & E., 469.

But the case under consideration presents no question for decision which requires the court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy. 2 Greenl. Ev., 283; 1 Bl. Com., 131.

Next question which arises in the case is, whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee.

Before proceeding to examine this question, it will be useful to advert briefly to the material facts exhibited in the record.

Title was acquired by the complainant under the preemption laws of the United States, and on the same day the principal respondent, through threats to take his life, if he refused, compelled him to convey the same to that respondent, and the record shows that the respondent before the court, within the same month, loaned the money to the grantee in that deed, for which he recovered judgment, although the grantor was then in possession of the land, and has remained in possession of the same to the present time.

The judgment is founded upon the bills of exchange received for that loan. Judgments were not liens at common law, but several of the States had passed laws to that effect before the judicial system of the United States was organized, and the decisions of this court have established the doctrine that Congress, in adopting the processes of the States, also adopted the modes of process prevailing at that date in the courts of the several States, in respect to the lien of judgments within the limits of their respective jurisdictions. *Williams v. Benedict* 8 How., 111; *Ward v. Chamberlain*, 2 Black, 438 (67 U. S., XVII., 324); *Bayard v. Lombard*, 9 How., 580; *Riggs v. Johnson Co.*, 6 Wall., 166 (73 U. S., XVII., 768).

Different regulations, however, prevailed in

different States, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or *mesne* process, created any preference in favor of the creditor until the execution was issued, and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself. *Conard v. Atlantic Ins. Co.*, 1 Pet., 448; *Massingill v. Downs*, 7 How., 767.

Such judgments and decrees were made liens by the Process Acts in the federal districts where they have that effect under the State laws, and Congress has since provided that they shall cease to have that operation in the same manner, and at the same periods, in the respective federal districts, as like processes do when issued from the state courts. Federal judgments and decrees are liens, therefore, in all cases, and to the same extent, as similar judgments and decrees are, when rendered in the courts of the State.

Express decision of this court is, that the lien of a judgment constitutes no property in the land; that it is merely a general lien securing a preference over subsequently acquired interests in the property; but the settled rule in chancery is, that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands or in the proceeds thereof.

Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. *Drake, Attach.*, sec. 223.

Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. *Howe*, Petitioner, 1 Paige, Ch., 128; *Ellis v. Tousley*, 1 Paige, 283; *White v. Carpenter*, 2 Paige, 219; *Buchan v. Sumner*, 2 Barb. Ch., 181; *Lounsbury v. Purdy*, 11 Barb., 494; *Keirsted v. Avery*, 4 Paige, Ch., 15.

Guided by these considerations, the Court of Chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. *Averill v. Loucks*, 6 Barb., 27.

Objection is also made, that the affidavit showing that the defendants were non-residents was not in due form, and that the order of notice and the publication of the same, were insufficient to give the court jurisdiction; but the proposition is not supported by the record, and must be overruled.

Decree affirmed.

Cited—12 Wall., 156, 157; 14 Wall., 332; 16 Wall., 432; 17 Wall., 74; 4 Dill., 316; 8 McCrary, 93; 4 Hughes, 245; 41 Am. Rep., 671 (17 W. Va., 276); 81 O. St., 178.

C. S. SILVER, Administrator *de bonis non*, etc., of FINICE CARUTHERS, Deceased, *Plff.* in *Err.*,
v.

R. J. LADD AND ANDREW J. KNOTT.

(See S. C., 7 Wall., 219-228.)

Unmarried female may take lands under Donation Act—person residing in house bisected by line of two sections—chancery practice.

An unmarried female may take lands under the Donation Act.

It is of no importance that she was old and incapable of the manual labor necessary to cultivating ground, as it can be done for her by others.

A person residing in a house which is bisected by the line dividing two quarter sections, will be held to reside on either of them.

In contests in equity for lands held under the United States, the chancery practice is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose.

[No. 77.]

Argued Feb. 4, 1869. Decided Feb. 15, 1869.

IN ERROR to the Supreme Court of the State of Oregon.

The case is stated by the court.

Messrs. Mitchell R. Mallory, Dolph and J. S. Smith, for plaintiffs in error:

Section 8 of the supplementary Act reads as follows:

"Each widow now residing in Oregon Territory, and such others as shall locate in said Territory, whose husband, had he lived, would have been entitled to a claim under the provisions of the Act to which this is an amendment, shall be entitled, under the provisions and requirements of said Act, to the said quantity of land that she would have been but for the death of her husband." The language used is capable of two constructions.

It evidently intends to provide for widows whose husbands never took a claim, never did actually become entitled to anything, personally, under this Act; and as coming into the Territory without settling on a claim gave no right whatever to the husband (see secs. 4 and 5), it seems unreasonable to say that section 8 only applies to those widows whose husbands actually arrived in the Territory.

By section 5, which provides for future emigration, donation was made to males and married women only, and in several respects a different plan was adopted and a different classification was made from that applied to settlers and occupants then here, and those on the way and likely to arrive on or before the first day of December, 1830.

It seems impossible to doubt that these various contingencies, which ordinary foresight would anticipate, were provided for in this Act. The omission of the word "male" in the 4th section, and the careful use and repetition of it in the 5th section, evinces a designed and intentional discrimination.

It is deserving of attention, that this change of phraseology is in that part of the section that especially discriminates between and designates the qualifications of donees, in regard to age, race and other particulars.

The use and omission of the word "male" has immediate and direct connection with the specification and classification of persons en-

titled to take any land. The phrase "single man," by its position points to quantity of land, rather than the classification of persons, being introductory of the subject of marriage.

It will be difficult to find a single authority for totally disregarding this marked change in phraseology. But there is abundant authority to justify reading "person" for "man."

The qualifications mentioned in section 4 are repeated in section 5, with the addition of the word "male," and with a further limitation of persons by leaving out "American half-breed Indians." The age limit is also changed from eighteen to twenty-one years.

It is difficult to avoid the conclusion that the difference in the phraseology of the two sections was intentional, and the word "male" was inserted in section 5, and omitted in section 4, for a purpose.

If a single woman could not take land under section 4, there would be no occasion for or meaning in the first proviso of section 5, immediately following the subject of husband and wife; for by no way could a man take two claims under the Act.

The words "he" and "man" are used frequently in Acts of Congress, to denote both males and females, especially in many prohibitory and penal sections.

The naturalization laws, enacted by the same power, and being like this a general grant or voluntarily concession of favors, used the words "he," "him" and "man" constantly, to denote and include both men and women; and by the literal reading of section 7, the woman must prove that "he has behaved as a man of good moral character." No one has supposed that this phraseology applied to males exclusively. Under that law a woman may be naturalized. *Mick v. Mick*, 10 Wend., 379.

"Naturalizing the husband does not naturalize the wife; she must receive that favor on her own application. *Sutiff v. Forgey*, 1 Cow., 97.

The use of the phrase "single man" in both sections can be explained without involving the matter in absurdity; but using the word "male" in one section and omitting it in the other, must be construed as making a distinction, "or the Legislation is accused of varying the terms of the law without an intention. Such a conclusion is not tenable if any other meaning is possible." Sedg. Stat., 249; 14 B. Mon., 266.

The statute should be construed liberally, because it is a public and not a private statute. Sedg. Stat., 33.

Affirmative, as distinguishing from negative. Sedg. Stat., 38.

Remedial and not penal. Sedg. Stat., 41; Bl. Com., 59.

Meers, Edward Lander, T. J. Coffey, and J. Hubley Ashton, for the defendants in error:

Elizabeth Thomas was not included within the description of the class of settlers or occupants entitled to take public lands under the Act of Congress of Sept. 27, 1850.

It is the duty of a court to ascertain the meaning of the Legislature from the words used in the statute, and the subject-matter to which it relates. *Brewer v. Blougher*, 14 Pet., 178.

The word "man" must have the same See 7 WALL.

meaning when it is used in the same section, with reference to the same particular subject in the same sentence and connection. If it is a generic term and includes woman as well as man, then it must be a generic term when qualified in the same sentence by the adjective "single," as well as when qualified by the adjective "married."

With the word "man," as a generic term, the clause and the context would read as follows: "That there should be and hereby is granted to every white settler or occupant of the public lands, American half-breed Indians included, etc., if a single man (or woman), and if a married man (or woman), or if he (or she) shall become married within one year from Dec. 1, 1850, the quantity of one section or six hundred and forty acres, one half to himself (or herself), and the other half to his wife, to be held by her in her own right."

This reading is absurd on its face, and yet it must follow the use of the word "man" as a generic term, or else the same word must in the same immediate connection have the same meaning.

Statutes must be construed to give effect and meaning to all the words. *U. S. v. Bassett*, 2 Story, 359.

The construction of the 8th section, that the words "white settler" included that all women over the age of eighteen years, and citizens, could take lands after the performance of the conditions, would render the provisions of section 5 useless and unmeaning.

To give this general construction to the words "white settler or occupant," so as to include women as well as men, and by such a construction to provide in the general clause for a whole class of persons for a specially qualified portion of whom special provision is made by the Act, would do away completely with that old maxim of the law *Expressio unius exclusio alterius*.

A widow residing in Oregon, or locating there before Dec. 1, 1855, to be a beneficiary under the 8th section of the Act of 1853, must be the widow of the husband who had settled upon lands and died before the passage of the Act of 27th September, 1850.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Oregon.

The plaintiff in error was complainant in a chancery suit in the state courts, claiming a right to land in Oregon, under the Act of Congress of September 27, 1850, commonly called the Donation Law (9 U. S. St., 496), and those courts decided the suit against him, upon a construction of that law adverse to his claim.

The plaintiff derives his right from Elizabeth Thomas, to whom the register, the receiver of the proper land office, had issued a donation certificate of the date of May 17, 1861, declaring her to have made the proof which entitled her to a patent for the land in controversy, under that Act. This certificate was set aside by the Commissioner of the Land Office, June 25, 1862, on the ground that Elizabeth Thomas was not the head of a family. On appeal to the Secretary of the Interior, the action of the commissioner was affirmed, on the ground that

she was not a settler on the land. The Supreme Court of Oregon, whose judgment we are now to review, held the certificate void, because she was not such a person as could take lands under the Act, being an unmarried female.

Elizabeth Thomas was an aged widow, living in the same house with her son, an unmarried man, and she had been a widow for more than twenty years when the settlement was made under which she received the certificate already mentioned. Her son also received a certificate of settlement for a piece of land adjoining that claimed by his mother, and the line dividing these two parcels of land ran through the center of the building in which they both lived. Cultivation was made on both tracts, one being claimed by the mother and the other by the son. There is no controversy about the tract claimed by the son.

If, for any of these reasons, the action of the commissioner can be sustained, then the judgment of the Supreme Court of Oregon dismissing plaintiff's bill must be affirmed. If it cannot, then the patents issued to the defendants after the certificate of Elizabeth Thomas was wrongfully set aside, must inure to the benefit of plaintiff, representing her equitable title. *Lindsey v. Hawes*, 2 Black, 554 [67 U. S., XVII., 265]; *Garland v. Wynn*, 20 How., 8 [61 U. S., XV., 802]; *Minnesota v. Bachelder* 1 Wall., 109 [68 U. S., XVII., 551].

It is upon the application of these facts of this case to the part of section 4 of the Act of 1850 which follows that the questions of construction already mentioned arise.

"Section 4. There shall be and hereby is granted to every white settler or occupant of the public land, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law of his intention to become a citizen, or who shall make such declaration on or before the first day of December, 1851, now residing in said Territory, or who shall become a resident on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this Act, the quantity of one half section, or 320 acres of land, if a single man, and if a married man, the quantity of one section, or 640 acres, one half to himself, and the other half to his wife, to be held in her own right, and the Surveyor-General shall designate the part inuring to the husband and that to the wife, and enter the same on the record of his office." As there is nothing in this Act which requires the settler to be the head of the family, that question may be dismissed without further consideration.

In reference to the question of actual settlement and residence on the land, we have only to refer to the case of *Lindsey v. Hawes*, where this precise question is raised, and where it is said that a person residing in a house which is bisected by the line dividing two quarter sections, will be held to reside on both and, consequently, on either of them, to which he may assert a claim. Nor is any importance to be attached to the fact that Mrs. Thomas was old and incapable of the manual labor necessary to cultivating ground. If it was done for her

by hired servants, or by her son without compensation, it is equally available to her. In reference to this question and to the one next to be considered—namely: the right of unmarried women to the benefits of this statute—we may apply, with added force, the language used in *Lindsey v. Hawes*, that it concerns a construction of one of the most benevolent statutes of the government, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. In addition to this it may be said that the section of this statute which we are now considering was passed for the purpose of rewarding in a liberal manner a meritorious class of persons, who had taken possession of that country and held it for the United States, under circumstances of great danger and discouragement. These circumstances and the policy of this Act are fully stated in the case of *Stark v. Starra*, decided at our last term. 6 Wall., 402 [73 U. S., XVIII., 925].

Anything, therefore, which savors of narrowness or illiberality in defining the class, among those residing in the Territory in those early days, and partaking of the hardships which the Act was intended to reward, who shall be entitled to its benefits, is at variance with the manifest purpose of Congress.

With these views we approach the last and most difficult question in the case, namely: whether Mrs. Thomas is excluded from the benefit of this Act because she was an unmarried woman.

The affirmation of this proposition is based upon that clause of the 4th section we have quoted *verbatim*, which, in prescribing the quantity of land to be given to each actual settler, says it shall be "one half section, or three hundred and twenty acres, if a single man, and if a married man," six hundred and forty acres. We admit the philological criticism that the words "single man" and "married man," referring to the conjugal relation of the sexes, do not ordinarily include females. And no doubt it is on this critical use of the words that the decision of the Oregon court is mainly founded.

But, conceding to it all the force it may justly claim, we are of opinion that it does not give the true meaning of the Act, according to the intent of its framers, for the following reasons:

1. The language of the statute is, that there is hereby granted to "every white settler or occupant of the public lands, above the age of eighteen years," etc. This is intended to be the description of the class of persons who may take, and if not otherwise restricted, will clearly include all women of that age as well as men.

2. It is only in prescribing the quantity of land to be taken, that the restrictive words are used, and even then the words used are capable of being construed generically, so as to include both sexes. In the case of a married man it is clear that it does include his wife.

3. The evident intention to give to women as well as men, is shown by the provision, that, of the six hundred and forty acres granted to married men, one half shall go to their wives, and be set apart to them by the Surveyor-General, and shall be held in their own right. Can there be any reason why a married woman,

who has the care and protection of a husband, and who is incapable of making a separate settlement and cultivation, shall have land given to her own use, while the unprotected female, above the age of eighteen years, who makes her own settlement and cultivation, shall be excluded?

4. But a comparison of the manifest purpose of Congress and the language used by it, in section 4 of this statute, with those of section 5, will afford grounds for rejecting the interpretation claimed by defendants, which are almost conclusive.

The first of these sections applies, as we have already said, to that meritorious class who were then residing in the Territory, or should become residents by the first of December thereafter. It extends to persons not citizens of the United States, to persons only eighteen years old, and it gives to each a half section of land. The 5th section makes a donation of half this amount, and is restricted to citizens of the United States, or those who have declared their intention to become citizens, and to persons over twenty-one years of age. But what is most expressive in regard to the matter under discussion is, that the very first line of that section, in which the class of donees is described, uses the words "white male citizens of the United States."

Now, when we reflect on the class of persons intended to be rewarded in the 4th section, and see that words were used which included half-breeds, foreigners, infants over eighteen, and which provided expressly for both sexes when married, and used words capable of that construction in cases of unmarried persons, and observe that in the next section, where they intend to be more restrictive, in reference to quantity of land, to age of donees, citizenship, etc., they use apt words to express this restriction, and then use the words "white males" in reference to sex, we are forced to the conclusion that they did not intend, in section 4, the same limitation in regard to sex, which they so clearly expressed in section 5. The contrast in the language used, in regard to the sex of the donees in the two sections, is sustained throughout by the other contrasts in age and character of the donees, and in quantity of land granted.

The certificate of Mrs. Thomas was, therefore, properly issued by the register and receiver, and conferred upon her the equitable right to the land in controversy, and the decree of the Supreme Court of Oregon must be reversed.

But the language of the prayer of this bill for relief, and some remarks in the brief of counsel, call for comment on the proper decree to be rendered on the return of the case to that court.

The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may be well doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, inured in equity

to the benefit of plaintiff; and a court of chancery gives effect to this equity, according to its forms, in several ways. *Jackson v. Lawton*, 10 Johns., 24; *Boggs v. Mining Co.*, 14 Cal., 363, 364. The most usual mode under the chancery practice, unaffected by statute, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose. In some of the States it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree, and additional relief may be granted by giving possession of the land to plaintiff, quieting his title as against defendants, and enjoining them from asserting theirs.

The prayer for general relief in the bill in this case is sufficient to justify any or all these modes of relief, and the case is remanded to the Supreme Court of Oregon for that purpose.

Cited—13 Wall., 86; 2 Sawy., 441; 4 Sawy., 317; 6 Sawy., 151, 408.

FREDERICK BRONSON, Executor of the last Will and Testament of ARTHUR BRONSON, Deceased, *Ptff. in Err.*,

v.

PETER RODES.

(See S. C., 7 Wall., 229-258.)

Statutes relating to coinage and legal tender—contract to pay dollars in gold, effect of—how satisfied—judgments for coined dollars.

Statutes regulating coinage and relating to legal tender considered.

A contract to pay a certain number of dollars in gold and silver coins, is an agreement to deliver a certain weight of standard gold and silver coins, made legal tender by statute.

Such contract cannot be satisfied by a tender of United States notes.

Payment must be made according to the terms of the contract.

Express contracts to pay coined dollars can only be satisfied by the payment of coined dollars.

When contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars.

[No. 89.]

Submitted Jan. 6, 1868. Continued March 2, 1868, to next term for argument at the bar, with leave to Atty. Gen. to appear for United States. Argued Dec. 10, 1868. Decided Feb. 15, 1869.

IN ERROR to the Court of Appeals of the State of New York.

The case is stated by the court.

The report of this case in the New York Court of Appeals may be found in 34 N. Y., 649. The original edition gives only the opinion of the court, per Smith, J. The edition of Mr. Brightley also gives the dissenting opinion

NOTE.—Obligation payable in gold and silver or in specie.

Contracts by their terms expressly payable in "gold or silver dollars" or "in specie", can only be satisfied by payment in coin. The Legal Tender Acts do not apply to them. *Treblcock v. Wilson*, 79 U. S. (12 Wall.), 687; *Lick v. Faulkner*, 25 Cal., 404; *Higgins v. B. R. & A. W. & M. Co.*, 27 Cal., 158; *Phillips v. Dugan*, 21 Ohio, N. S., 466; *Smith v. Wood*, 37 Tex., 620.

If a creditor, entitled to payment in coin, receives currency without objection, it is a payment of so

of Leonard, *J.* The report of the case in the New York Supreme Court may be found in 45 Barb., 618, *Kimpton v. Bronson*, with which case *Rodes v. Bronson* was decided.

Messrs. J. J. Townsend, W. D. White, and Clarkson N. Potter, for plaintiff in error:

I. The true construction of the contract is, that it is an agreement for the repayment of the loan in the currency selected by the parties and designated as the medium of payment.

1. The language used is similar to that used by the government in its gold obligations; also to the language of the enactments which regulated treasury payments and receipts prior to 1862.

2. The designation of a particular kind of currency is not unmeaning, because governments have frequently coined their credit, and our government has the power of doing so.

3. It is not in principle like a chattel note, by which the promisor, for his convenience simply, is relieved upon converting the specified commodity into money; the trouble of doing which is assumed by the promisee.

4. It is not in principle like a note for \$100 payable in cloth at fifty cents per yard; the effect of which contract is a stipulation that the promisor shall have the benefit of a falling market.

5. It is a loan on bond and mortgage; one of the methods of investment recommended by law to the appellant for the preservation of the capital of the estate intrusted to him.

6. The parties to the contract, for their mutual advantage, selected as a medium of payment the most perfect known standard of value.

7. They followed the common practice of men in making contracts of long duration, and employed the ordinary safeguards used heretofore when money of different relative values has been in circulation. *Faw v. Marsteller*, 2 Cranch, 10; *Jackson v. Schultz*, 18 Johns., 174.

II. The court will give effect to the contract according to its import, unless it work intolerable injustice to a party; or unless the well being of the State forbid; or unless the court is powerless.

III. So far from working intolerable injustice to a party, it is equal and fair.

many dollars. *Tyer v. U. S.*, 5 Ct. of Cl., 509; *Gilman v. County of Douglas*, 6 Nev., 27.

Where mortgages were given to secure the payment of a note for one thousand pounds sterling, the intention was held to be that payment should be in gold coin only, and that the contracts were adequately expressed to that end. *The Edith*, 5 Ben., 144.

Though an undertaking to pay in gold may be implied and be as obligatory as if in express words, the implication must be from the words of the contract and not from the expectation of the parties, *Maryland v. R. R. Co.*, 89 U. S. (22 Wall.), 106.

Accepting legal tender for treasury notes and surrendering the notes, though under protest, is a waiver of all claim for gold, or difference between gold and legal tender notes. *Savage v. U. S.*, 92 U. S., 382.

A bond, principal payable in currency and interest in gold, is a legal instrument, and payment of interest in gold may be enforced. *Pollard v. City of Pleasant Hill*, 8 Dill., 186.

If a debtor tender gold or silver coin on a contract, payable in currency without any agreement as to the rate at which it is to be taken, he cannot afterwards require it to be applied otherwise than dollar for dollar. *Bush v. Baldrey*, 11 Allen, 367.

Under a covenant in a lease to pay rent of six pence sterling per acre "in current money of the

If there be any preponderance of advantage, it is with the party who incurs the obligation.

IV. Public policy does not forbid the enforcement of the contract. On the contrary, sound policy requires it.

To justify annulling a contract, it must—1. Contravene a clear intent of the government. 2. It must do so to the detriment of the public interest.

I. This contract does not contravene a clear intent of the government.

A. The Act of Feb. 25, 1862, does not, in express terms, say that gold and notes shall be equivalent.

B. The language of the Act, on the contrary, recognizes the difference of value.

C. It cannot be inferred from the general language used, that the government intended to make them equivalent.

(a) From the nature of the subject:

Value is not utility, it is purchasing power.

Value existed prior to the invention of money.

It is independent of price, and the idea of a general rise of values is absurd.

The value of things which cannot be indefinitely produced, depends on demand and supply.

The value of things which can be indefinitely produced, depends on cost of production; as to those things, demand and supply merely cause perturbations of value above or below the natural level.

If the amount of money in circulation be excessive, prices rise at home; prices abroad remaining the same, imports are stimulated, exports repressed, and the currency is depleted.

Governments, in time, coined their credit. Suppose the volume of currency is increased one half by the issue of convertible paper money; by the operation of the same general causes, one half of the gold in circulation flows abroad. If an issue of convertible money is made to the extent of all the circulation required, all the gold flows abroad. If an issue of inconvertible paper money is made within the extreme limit just stated, the same results follow precisely—imports are stimulated and exports repressed, until the currency regains its required volume.

If the issues of inconvertible paper money be

State of New York, equal in value to money of Great Britain" the lessor is not absolutely entitled to payment in gold or silver, but must accept U. S. legal tender notes provided the number of dollars offered is equal in value to the amount due in money of Great Britain. *Stranaghan v. Youmans*, 65 Barb., 392.

A promissory note executed subsequent to the passage of the Legal Tender Act of 1862, payable in American gold, is not discharged by a tender of U. S. treasury note. *McGoov v. Shirk*, 54 Ill., 408; S. C., 5 Am. Rep., 122.

A promissory note payable in "gold coin or the equivalent thereof in United States legal tender notes," is completely discharged by a payment in legal tender notes, dollar for dollar. *Killough v. Alford*, 32 Tex., 457; S. C., 5 Am. Rep., 249. See *Wood v. Bullens*, 6 Allen, 618; *Wilson v. Morgan*, 1 Abb. Pr. N. S., 174; S. C., 30 How. Pr., 386; *Kimpton v. Bronson*, 45 Barb., 618; *Murray v. Gale*, 5 Abb. Pr. N. S., 236; S. C., 52 Barb., 427; 47 Barb., 484; 33 How., 90.

When parties designate a currency which is not illegal, in a bill or contract, it is the right of the creditor to have awarded to him such measure of damages as will constitute payment in the currency intended. *Bank of Prince Edwards Island v. Trumbull*, 63 Barb., 459; S. C., 35 How. Pr., 8; 4 Abb. Pr. N. S., 365.

continued indefinitely, prices rise at home, including the price of ore and bullion, which are convertible, each into the other. Neither exports nor imports have stimulus nor repression. There being no outlet for the surplus currency, the depreciation of paper money will continue, so long as the supply of currency exceeds the quantity required for the purposes of traffic in the markets of the country.

These results follow if the credit of the government at home be the best conceivable.

Therefore, from the nature of the subject, it appears government did not intend that gold and notes should be equivalent.

(b) The Acts of Congress also establish satisfactorily, that it cannot be inferred from the language of the Act of Feb. 25, 1862, that the government intended to make them equivalent.

(c) The practice of the government establishes satisfactorily the same conclusion.

(d) The innate sense that it is right to be honest, urges everyone to the same conclusion.

G. It cannot be inferred from the use of the particular term "debt" that if an obligation to pay coin be "debt," Congress intended to make paper and coin equivalent.

The idea of debt is older than money.

Paper money, by the operation of the Act, may be tendered to satisfy a debt of \$100, simply, and as well a debt of wheat, coal or gold coin.

The idea of the value of paper money is not necessarily involved in the idea of its capability of being used as a tender or instrument of satisfaction.

If the debt be one hundred measures of wheat or oil, or one hundred dollars in gold, the amount must be definitely ascertained to be canceled by a payment of legal tender notes.

We do not deny that treasury notes are a lawful tender for all debts, whether they arise out of engagements to deliver coin or to deliver cotton, or out of any other engagements or liabilities of any possible kind; but the question—What is the amount of the debt, and when and how is such amount definitely ascertained, so as to become liable to be canceled by a tender or compulsory payment?—must be determined before such payment or tender can be effectually made.

II. If the government intended to declare gold and notes equivalent, nevertheless this contract is not detrimental to the public interest.

a. Because they are not in fact equivalent.

b. Because stipulating for payment in gold rather than notes, does not impair the efficiency of notes as a tender, nor will contracts in this form be universally made to the exclusion of currency contracts.

c. It does not impair the credit of the government. That rests on the intelligence, sense of justice, and resources of the people.

d. The people are not so ignorant as to believe that the discrimination affects the credit of the government. There exists no popular ignorance which, by being alarmed at the recognition of the fact, might work a real injury to the credit of the government. If there were an error widespread and dangerous, it is to the courts we should look, not to perpetuate, but to dispel it.

See 7 WALL.

There have been many decisions in the courts in actions upon private contracts, containing clauses similar to that in the contracts under discussion, and although the decisions are conflicting, the greater part of them, and those which appear to us best considered, are in accordance with our positions. *Thompson v. Riggs*, see 5 Wall., 868 (72 U. S., XVIII., 704), on App. The Supreme Court of the District of Columbia decided that on a deposit of coin in bank, expressly to be repaid in coin, the broker could not discharge his obligation by an offer of legal tender notes instead of coin.

In *Carpenter v. Atherton*, 4 Am. Law Reg. N. S., 325, in California, a decision was made in exact accordance with that in (*Thompson v. Riggs*, *supra*). See Mr. Redfield's note, in the same vol., at p. 185.

In the case of *The Nova Scotia Tel. Co. v. The Am. Tel. Co.*, 4 Am. Law Reg., N. S. 865, in the Supreme Court of Nova Scotia, the U. S. legal tender notes were held not sufficient to discharge a rent payable in "dollars and cents of the United States currency." Able opinions were delivered by all the judges—all concurring in the same conclusion.

The U. S. Circuit Court in Philadelphia, Mr. Justice Grier presiding, in *The Phila. & Reading R. R. Co. v. Moulson*, decided to the same effect.

In Kentucky, *Chancellor Purtle* decided "that the maker of a note, in 1863, promising to pay in gold, must pay at maturity the actual gold coin, or its equivalent in treasury notes."

This principle has since been affirmed by the Court of Appeals of Kentucky, one judge dissenting.

Luling v. Atlantic Mut. Ins. Co., 30 How., Pr., 69.

The Commissioner of Internal Revenue has made the following decision:

If, under the terms of a will, the legatee can demand of the executor the delivery of gold, he cannot be held to receive it as a legacy of money merely, for in such case the executor would be discharged by a payment in currency. It must, therefore, be treated as a specific legacy, the clear value in currency of which, at the time the legatee received it, would be taxable.

Two cases in the United States Supreme Court, which arose under the charter of the State Bank of Arkansas, involved the same principle, and were decided the same way.

Trigg v. Drew, 10 How., 218; *Woodruff v. Trapnall*, 10 How., 190.

Murray v. Harrison, 47 Barb., 484, is cited as an illustration of the extraordinary confusion which results from an application of the law, as expounded by the Court of Appeals. *Thompson v. Riggs*, *supra*.

It was observed in this case that proof was entirely wanting, that the words which were written against the several deposits in the pass-book referred to, were written for any such purpose as was supposed by the plaintiffs.

It is stated that "when the banker specially agrees to pay in bullion or coin, he must do so or answer in damages for its value;" at page 680, that "it is not pretended that the evidence showed a special deposit or any special contract." *Thayer v. Hedges*, 28 Ind., 141.

This case illustrates the tendency to ignore

the intention with which contracts are made payable in coin.

The contract was a note for the payment of \$500 in gold. The maker of the note evidently intended "gold coin." The court, however, imputed to him another motive; that is, a preference for a chattel as a medium of payment, using the language "the contract was not for \$500 in gold coin but in gold." Gold in ingots or dust from the mine would have satisfied the contract in our opinion, and on failure to deliver it, the measure of damages under this contract is \$500, with interest from the date, etc." *Lane v. Gluckauf*, 28 Cal., 288.

This case is in harmony with the views of the plaintiff in error.

Appel v. Woltman, 38 Mo., 194; *Riddlebarger v. McDaniel*, 38 Mo., 142; *Reese v. Stearns*, 29 Cal., 273.

These cases are selected as presenting most distinctly the fallacy which it is the object of the foregoing arguments to expose.

It is in this form: "These notes are lawful money, and a legal tender on the payment of private debts; it results as a logical necessity, that in judgment of law a given number of dollars of one kind of lawful money is the equivalent of the same number of dollars of another kind of lawful money of the same United States."

Mr. Sherman S. Rogers, for defendant in error:

This is a case of debt; it possesses all the elements of debt.

1. A loan of money. 2. The sum is definite and certain. 3. It is expressly agreed to be repaid. 4. The payment is to be made in dollars, lawful money. 5. The number of dollars is specified. 6. It is to be repaid with interest.

The defendant Rodes was indebted, as he had assumed the payment of the bond and mortgage.

See *Matter of Denny*, 2 Hill, 220; *Newell v. People*, 7 N. Y., 124; *Bouv. Law Dic.*, tit. Debt; *Andrus v. Murray*, 9 Abb. Pr., 8; *Rodman v. Munson*, 13 Barb., 188.

The statute provides that greenbacks shall be legal tender in payment of all debts, public and private; this, then, being a debt, can be paid in these notes.

If this is not so, full effect cannot be given to the Act.

This question has been decided in the courts of last resort in six States—New York, Massachusetts, Pennsylvania, Connecticut, Michigan and Iowa, and no court of last resort has decided the other way, so far as I can learn.

See *Metropolitan Bank v. Van Dyck*, 27 N. Y., 458; *Wilson v. Morgan*, 30 How. Pr., 386; *Rodes v. Bronson*, 34 N. Y., 649; *Shoenberger v. Watts*, 1 Am. L. Reg., N. S., 558; *Reynolds v. Bank of Indiana*, 1 Am. L. Reg., N. S., 669; *Wood v. Bullens*, 6 Allen, 516; *Schollenberger v. Brinton*, 3 Am. L. Reg., N. S., 591; *Buchegger v. Schulte*, 5 Am. L. Reg., N. S., 95; *Warnbold v. Schlicting*, 16 Ia., 244; 6 Duvergier, N., 174; *Bouv. Law Dic.*, tit. Currency; *Pong v. De Lindsay*, 1 Dyer, 83 a; *Davies*, 28; *Barrington v. Potter*, 1 Dyer, 81, B, 67.

Admitting this to be an agreement to pay in specific articles, the damages would still be \$1,507.

Pinney v. Gleason, 5 Wend., 393, and *Fletcher* 144

v. Derrickson, 8 Bosw., 181, and *Brooks v. Hubbard*, 3 Conn., 58.

No effect shall be given to the clause providing that the debt should be paid in gold and silver coin, lawful money, etc., for the reasons:

1. The sentences "gold or silver coin, lawful money of the United States," and "lawful money of the United States" at the time of making the contract were synonymous; gold and silver only were legal tender at that time."

2. The contract is made with reference to the existing laws, and whatever the law implies is the same as though it were incorporated in it, and you can no more contradict the legal effect than the express terms of a contract.

Bank of Albion v. Smith, 27 Barb., 489; *Norton v. Coons*, 6 N. Y., 33; *Buchegger v. Schulte*, 5 Am. L. Reg., N. S., 95.

The law declares greenbacks to be of equal value with gold and silver for the payment of debts, and we have to go to the different Stock Boards of the country to find that they are of different value, and at these same Boards the gold dollars issued at various times from the United States Mint, have different values, and no one could be found who would claim that they were not legal tender; and should the courts attempt to be governed in their judgment in such cases, by the prices of gold at the different Stock Boards, which of the many Boards would they select as their guide? The value of gold was different at the same time at these various Boards; and shall they take its value at the time the clerk of the court commences or completes the entry of the judgment? for the history of the proceedings of these various Boards shows that the value of gold is constantly fluctuating.

If it should be held that this was a contract to pay 1,400 gold or silver dollars as such, then we contend that the damages for a breach of the contract must be ascertained by valuing the gold and silver when the money, by the terms of the bond and mortgage, fell due. This was in 1857, at which time there is no proof that gold and silver were above par.

Meason v. Philips, Add., 346; *Edgar v. Boies*, 11 Serg. & R., 445.

Mr. W. M. Evarts, *Atty-Gen.*, for the United States.

Mr. Chief Justice Chase delivered the opinion of the court:

This case comes before us upon a writ of error to the Supreme Court of New York.

The facts shown by the record may be briefly stated.

In December, 1851, one Christian Metz, having borrowed of Frederick Bronson, executor of Arthur Bronson, \$1,400, executed his bond for the repayment to Bronson of the principal sum borrowed on the 18th day of January, 1857, in gold and silver coin, lawful money of the United States, with interest also in coin until such repayment, at the yearly rate of seven per cent.

To secure these payments according to the bond, at such place as Bronson might appoint, or in default of such appointment at the Merchants' Bank of New York, Metz executed a mortgage upon certain real property, which

was afterwards conveyed to Rodés, who assumed to pay the mortgage debt, and did, in fact, pay the interest until and including the first day of January, 1864.

Subsequently, in January, 1865, there having been no demand of payment, nor any appointment of a place of payment by Bronson, Rodés tendered to him United States notes to the amount of \$1,507, a sum nominally equal to the principal and interest due upon the bond and mortgage.

At that time one dollar in coin was equivalent in market value to \$2.25 in United States notes.

This tender was refused, whereupon Rodés deposited the United States notes in the Merchants' Bank to the credit of Bronson, and filed his bill in equity, praying that the mortgaged premises might be relieved from the lien of the mortgage, and that Bronson might be compelled to execute and deliver to him an acknowledgment of the full satisfaction and discharge of the mortgage debt.

The bill was dismissed by the Supreme Court, sitting in Erie County; but on appeal to the Supreme Court in General Term, the decree of dismissal was reversed, and a decree was entered adjudging that the mortgage had been satisfied by the tender, and directing Bronson to satisfy the same of record; and this decree was affirmed by the Court of Appeals.

The question which we have to consider, therefore, is this:

Was Bronson bound by law to accept from Rodés United States notes equal in nominal amount to the sum due him as full performance and satisfaction of a contract which stipulated for the payment of that sum in gold and silver coin, lawful money of the United States?

It is not pretended that any real payment and satisfaction of an obligation to pay fifteen hundred and seven coined dollars can be made by the tender of paper money worth in the market only six hundred and seventy coined dollars. The question is: does the law compel the acceptance of such a tender for such a debt?

It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties.

We must, therefore, inquire what was the intent and understanding of Frederick Bronson and Christian Metz when they entered into the contract under consideration in December, 1851.

And this inquiry will be assisted by reference to the circumstances under which the contract was made.

Bronson was an executor, charged as a trustee with the administration of an estate. Metz was a borrower from the estate. It was the clear duty of the former to take security for the full repayment of the money loaned to the latter.

The currency of the country, at that time, consisted mainly of the circulating notes of state banks, convertible, under the laws of the States, into coin on demand. This convertibility, though far from perfect, together with the Acts of Congress which required the use of coin for all receipts and disbursements of the National Government, insured the presence of some coin in the general circulation; but the business of the people was transacted almost

entirely through the medium of bank notes. The state banks had recently emerged from a condition of great depreciation and discredit, the effects of which were still widely felt, and the recurrence of a like condition was not unreasonably apprehended by many. This apprehension was, in fact, realized by the general suspension of coin payments, which took place in 1857, shortly after the bond of Metz became due.

It is not to be doubted, then, that it was to guard against the possibility of loss to the estate, through an attempt to force the acceptance of a fluctuating and perhaps irredeemable currency in payment, that the express stipulation for payment in gold and silver coin was put into the bond. There was no necessity in law for such a stipulation, for at that time no money, except gold or silver, had been made a legal tender. The bond, without any stipulation to that effect, would have been legally payable only in coin. The terms of the contract must have been selected, therefore, to fix definitely the contract between the parties, and to guard against any possible claim that payment, in the ordinary currency, ought to be accepted.

The intent of the parties is, therefore, clear. Whatever might be the forms or the fluctuations of the note currency, this contract was not to be affected by them. It was to be paid, at all events, in coined lawful money.

We have just adverted to the fact that the legal obligation of payment in coin was perfect without express stipulation. It will be useful to consider somewhat further the precise import in law of the phrase "dollars payable in gold and silver coin, lawful money of the United States."

To form a correct judgment on this point, it will be necessary to look into the statutes regulating coinage. It would be instructive, doubtless, to review the history of coinage in the United States, and the succession of statutes by which the weight, purity, forms and impressions of the gold and silver coins have been regulated; but it will be sufficient for our purpose if we examine three only; the Acts of April 2, 1792, 1 Stat. at L., 246; of January 18, 1837, 5 Stat. at L., 186, and March 3, 1849, 9 Stat. at L., 397.

The Act of 1792 established a mint for the purpose of a national coinage. It was the result of very careful and thorough investigations of the whole subject, in which Jefferson and Hamilton took the greatest parts; and its general principles have controlled all subsequent legislation. It provided that the gold of coinage, or standard gold, should consist of eleven parts fine and one part alloy, which alloy was to be of silver and copper in convenient proportions, not exceeding one half silver; and that the silver of coinage should consist of fourteen hundred and eighty-five parts fine, and one hundred and seventy-nine parts of an alloy wholly of copper.

The same Act established the dollar as the money unit, and required that it should contain four hundred and sixteen grains of standard silver. It provided further for the coinage of half dollars, quarter dollars, dimes and half dimes, also of standard silver, and weighing respectively a half, a quarter, a tenth, and a twentieth of the weight of the dollar. Pro-

vision was also made for a gold coinage, consisting of eagles, half eagles, and quarter eagles, containing, respectively, two hundred and ninety, one hundred and thirty-five, and sixty-seven and a half grains of standard gold, and being of the value, respectively, of ten dollars, five dollars, and two and a half dollars.

These coins were made a lawful tender in all payments according to their respective weights of silver or gold; if of full weight, at their declared values; and if of less, at proportional values. And this regulation as to tender remained in full force until 1837.

The rule prescribing the composition of alloy has never been changed; but the proportion of alloy to fine gold and silver, and the absolute weight of coins, have undergone some alteration, partly with a view to the better adjustment of the gold and silver circulations to each other, and partly for the convenience of commerce.

The only change of sufficient importance to require notice, was that made by the Act of 1837. 5 Stat. at L., 137. That Act directed that standard gold, and standard silver also, should thenceforth consist of nine parts pure and one part alloy: that the weight of standard gold in the eagle should be two hundred and fifty-eight grains, and in the half eagle and quarter eagle, respectively, one half and one quarter of that weight precisely; and that the weight of standard silver should be in the dollar four hundred twelve and a half grains, and in the half dollar, quarter dollar, dimes, and half dimes, exactly one half, one quarter, one tenth, and one twentieth of that weight.

The Act of 1849 (9 Stat. at L., 397) authorized the coinage of gold double eagles and gold dollars conformably in all respects to the established standards and, therefore, of the weights respectively of five hundred and sixteen grains and twenty-five and eight tenths of a grain.

The methods and machinery of coinage had been so improved before the Act of 1837 was passed, that unavoidable deviations from the prescribed weight became almost inappreciable; and the most stringent regulations were enforced to secure the utmost attainable exactness, both in weight and purity of metal.

In single coins the greatest deviation tolerated in the gold coins was half a grain in the double eagle, eagle, or half eagle, and a quarter of a grain in the quarter eagle or gold dollar (9 Stat. at L., 398), and in the silver coins, a grain and a half in the dollar and half dollar, and a grain in the quarter dollar, and half a grain in the dime and half dime. 15 Stat. at L., 140.

In 1849 the limit of deviation in weighing large numbers of coins on delivery by the chief coiner to the treasurer, and by the treasurer to depositors, was still further narrowed.

With these and other precautions against the emission of any piece inferior in weight or purity to the prescribed standard, it was thought safe to make the gold and silver coins of the United States legal tender in all payments according to their nominal or declared values. This was done by the Act of 1837. Some regulations as to the tender, for small loans, of coins of less weight and purity, have been made; but no other provision than that made in 1837, making coined money a legal

tender in all payments, now exists upon the statute books.

The design of all this minuteness and strictness in the regulation of coinage is easily seen. It indicates the intention of the Legislature to give a sure guaranty to the people that the coins made current in payments contain the precise weight of gold or silver of the precise degree of purity declared by the statute. It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of values; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them.

The propositions just stated are believed to be incontestable. If they are so in fact, the inquiry concerning the legal import of the phrase "dollars payable in gold and silver coin, lawful money of the United States," may be answered without much difficulty. Every such dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint of the United States and, therefore, declared to be legal tender in payments. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number.

Payment of money is delivery by the debtor to the creditor of the amount due. A contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, as we think, in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales; while in the case of coin it may be ascertained by count.

We cannot suppose that it was intended by the provisions of the Currency Acts to enforce satisfaction of either contract by the tender of depreciated currency of any description equivalent only in nominal amount to the real value of the bullion or of the coined dollars. Our conclusion, therefore, upon this part of the case is, that the bond under consideration was, in legal import, precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful.

Arguments and illustrations of much force and value in support of this conclusion might be drawn from the possible case of the repeal of the legal tender laws relating to coin, and the consequent reduction of coined money to

the legal condition of bullion, and also from the actual condition of partial demonetization to which gold and silver money was reduced by the introduction into circulation of the United States notes and national bank currency; but we think it unnecessary to pursue this branch of the discussion further.

Nor do we think it necessary now to examine the question whether the clause of the Currency Acts, making the United States notes a legal tender, are warranted by the Constitution.

But we will proceed to inquire whether, upon the assumption that those clauses are so warranted, and upon the further assumption that engagements to pay coined dollars may be regarded as ordinary contracts to pay money rather than as contracts to deliver certain weights of standard gold, it can be maintained that a contract to pay coined money may be satisfied by a tender of United States notes.

Is this a performance of the contract within the true intent of the Acts?

It must be observed that the laws for the coinage of gold and silver have never been repealed or modified. They remain on the statute book in full force. And the emission of gold and silver coins from the mint continues; the actual coinage during the last fiscal year having exceeded, according to the report of the director of the mint, nineteen millions of dollars.

Nor have those provisions of law which make these coins a legal tender in all payments been repealed or modified.

It follows that there were two descriptions of money in use at the time the tender under consideration was made, both authorized by law, and both made legal tender in payments.

The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was, as we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it, in fact, convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be the actual equivalents of each other, nor was there anything in the Currency Acts purporting to make them such. How far they were, at that time, from being actual equivalents has been already stated.

If, then, no express provision to the contrary be found in the Acts of Congress, it is a just if not a necessary inference, from the fact that both descriptions of money were issued by the same government; that contracts to pay in either were equally sanctioned by law. It is, indeed, difficult to see how any question can be made on this point. Doubt concerning it can only spring from that confusion of ideas which always attends the introduction of varying and uncertain measures of value into circulation as money.

The several statutes relating to money and legal tender must be construed together. Let it be supposed then that the statutes providing for the coinage of gold and silver dollars are found among the statutes of the same Congress which enacted the laws for the fabrication and issue of note dollars, and the Coinage and Note Acts, respectively, make coined dollars and

note dollars legal tender in all payments, as they actually do. Coined dollars are now worth more than note dollars; but it is not impossible that note dollars, actually convertible into coin at the chief commercial centers, receivable everywhere, for all public dues, and made, moreover, a legal tender, everywhere, for all debts, may become, at some points, worth more than coined dollars. What reason can be assigned now for saying that a contract to pay coined dollars must be satisfied by the tender of an equal number of note dollars, which will not be equally valid then, for saying that a contract to pay note dollars must be satisfied by the tender of an equal number of coined dollars?

It is not easy to see how difficulties of this sort can be avoided, except by the admission that the tender must be according to the terms of the contract.

But we are not left to gather the intent of these Currency Acts from mere comparison with the Coinage Acts. The Currency Acts themselves provide for payments in coin. Duties on imports must be paid in coin, and interest on the public debt, in the absence of other express provisions, must also be paid in coin. And it hardly requires argument to prove that these positive requirements cannot be fulfilled if contracts between individuals to pay coin dollars can be satisfied to pay their nominal equivalent in note dollars. The merchant, who is to pay duties in coin, must contract for the coin which he requires; the bank which receives the coin on deposit, contracts to repay coin on demand; the messenger who is sent to the bank or the custom-house contracts to pay or deliver the coin according to his instructions. These are all contracts, either express or implied, to pay coin. Is it not plain that duties cannot be paid in coin if these contracts cannot be enforced?

An instructive illustration may be derived from another provision of the same Acts. It is expressly provided that all dues to the government, except for duties on imports, may be paid in United States notes. If, then, the government, needing more coin than can be collected from duties, contracts with some bank or individual for the needed amount, to be paid at a certain day, can this contract for coin be performed by the tender of an equal amount in note dollars? Assuredly it may if the note dollars are a legal tender to the government of all dues except duties on imports. And yet, a construction which will support such a tender will defeat a very important intent of the Act.

Another illustration, not less instructive, may be found in the contracts of the government with depositors of bullion at the mint to pay them the ascertained value of their deposits in coin. These are demands against the government other than for interest on the public debt; and the letter of the Acts certainly makes United States notes payable for all demands against the government except such interest. But can any such construction of the Act be maintained? Can judicial sanction be given to the proposition that the government may discharge its obligation to the depositors of bullion by tendering them a number of note dollars equal to the number of gold or silver dollars which it has contracted by law to pay?

But we need not pursue the subject further. It seems to us clear, beyond controversy, that the

Act must receive the reasonable construction, not only warranted, but required by the comparison of its provisions with the provisions of other Acts, and with each other; and that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not "debts" which may be satisfied by the tender of United States notes.

It follows that the tender under consideration was not sufficient in law, and that the decree directing satisfaction of the mortgage was erroneous.

Some difficulty has been felt in regard to the judgments proper to be entered upon contracts for the payment of coin. The difficulty arises from the supposition that damages can be assessed only in one description of money. But the Act of 1792 provides that "the money of account of the United States shall be expressed in dollars, dimes, cents and mills, and that all accounts in the public offices, and all proceedings in the courts of the United States, shall be kept and had in conformity to these regulations."

This regulation is part of the first Coinage Act, and doubtless has reference to the coins provided for by it. But it is a general regulation, and relates to all accounts and all judicial proceedings. When, therefore, two descriptions of money are sanctioned by law, both expressed in dollars and both made current in payments, it is necessary, in order to avoid ambiguity and prevent a failure of justice, to regard this regulation as applicable alike to both. When, therefore, contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgment may be entered generally, without such specification.

We have already adopted this rule as to judgments for duties by affirming a judgment of the Circuit Court for the District of California, *Cheung-Kee v. U. S.*, 8 Wall., 530 (70 U. S., XVIII., 72) in favor of the United States, for \$1,388.10, payable in gold and silver coin, and judgments for express contracts between individuals for the payment of coin may be entered in like manner.

It results that the decrees of the Court of Appeals of New York must be reversed, and the cause remanded to that court for further proceedings.

Mr. Justice Davis, concurring in the result, said:

I assent to the result which a majority of the court have arrived at, that an express contract to pay coin of the United States, made before the Act of February 25, 1863, commonly called the Legal Tender Act, is not within the clause of that Act which makes treasury notes a legal tender in payment of debts; but I think it proper to guard against all possibility of misapprehension by stating that if there be any reasoning in the opinion of the majority which can be applicable to any other class of contracts, it does not receive my assent.

Mr. Justice Swayne said:

I concur in the conclusion announced by the

Chief Justice. My opinion proceeds entirely upon the language of the contract and the construction of the statutes. The question of the constitutional power of Congress, in my judgment, does not arise in the case.

Mr. Justice Miller, dissenting:

I do not agree to the judgment of the court in this case, and shall, without apology, make a very brief statement of my reasons for believing that the judgment of the Court of Appeals of New York should be affirmed. The opinion just read correctly states that the contract in this case, made before the passage of the Act or Acts, commonly called the Legal Tender Acts, was an agreement to pay \$1,400 "in gold and silver coin, lawful money of the United States." And I agree that it was the intention of both parties to this contract that it should be paid in coin. I go a step further than this, and agree that the legal effect of the contract, as the law stood when it was made, was that it should be paid in coin, and could be paid in nothing else. This was the conjoint effect of the contract of the parties and the law under which that contract was made.

But I do not agree that in this respect the contract under consideration differed, either in the intention of the parties, or in its legal effect, from a contract to pay \$1,400 without any further description of the dollars to be paid.

The only dollars which, by the laws then in force, or which ever had been in force since the adoption of the Federal Constitution, could have been lawfully tendered in payment of any contract simply for dollars, were gold and silver.

These were the "lawful money of the United States" mentioned in the contract, and the special reference to them gave no effect to that contract beyond what the law gave.

The contract, then, did not differ, in its legal obligation, from any other contract payable in dollars. Much weight is attached in the opinion to the special intent of the parties in using the words gold and silver coin, but as I have shown that the intent thus manifested is only what the law would have implied if those words had not been used, I cannot see their importance in distinguishing this contract from others which omit these words. Certainly every man who at that day received a note payable in dollars, expected and had a right to expect to be paid "in gold and silver coin, lawful money of the United States," if he chose to demand it. There was, therefore, no difference between the intention of the parties to such a contract, and an ordinary contract for the payment of money, so far as the right of the payee to exact coin is concerned. If I am asked why these words were used in this case, I answer, that they were used out of abundant caution by some one not familiar with the want of power in the States to make legal tender laws. It is very well known that under the system of state banks, which furnished almost exclusively the currency in use for a great many years prior to the issue of the legal tender notes by the United States, there was a difference between the value of that currency and gold, even while the bank notes were promptly redeemed in gold. And it was doubtless to exclude any possible assertion of the right to pay this contract in such bank-notes, that the words gold and silver coin were used, and not with

any reference to a possible change in the laws of legal tender established by the United States, which had never, during the sixty years that the government had been administered under the present Constitution, declared anything else to be a legal tender or lawful money but gold and silver coin.

But if I correctly apprehend the scope of the opinion delivered by the *Chief Justice*, the effort to prove for this contract a special intent of payment in gold, is only for the purpose of bringing it within the principle there asserted, both by express words and by strong implication, that all contracts must be paid according to the intention of the parties making them. I think I am not mistaken in my recollection that it is broadly stated that it is the business of courts of justice to enforce contracts as they are intended by the parties, and that the tender must be according to the intent of the contract.

Now, if the argument used to show the intent of the parties to the contract is of any value in this connection, it is plain that such intent must enter into, and form a controlling element, in the judgment of the court, in construing the Legal Tender Act.

I shall not here consume time by any attempt to show that the contract in this case is a debt, or that when Congress said that the notes it was about to issue should be received as a legal tender in payment for all private debts, it intended that which these words appropriately convey. To assume that Congress did not intend by that Act to authorize a payment by a medium differing from that which the parties intended by the contract is in contradiction to the express language of the statute, to the sense in which it was acted on by the people, who paid and received those notes in discharge of contracts for incalculable millions of dollars, where gold dollars alone had been in contemplation of the parties, and to the decisions of the highest courts of fifteen States in the Union, being all that have passed upon the subject.

As I have no doubt that it was intended by those Acts to make the notes of the United States to which they applied a legal tender for all private debts then due, or which might become due on contracts then in existence, without regard to the intent of the parties on that point, I must dissent from the judgment of the court, and from the opinion on which it is founded.

Cited—7 Wall., 81, 259, 262; 8 Wall., 444, 607, 608; 11 Wall., 380; 12 Wall., 624, 605, 609; 14 Wall., 263, 270; 17 Wall., 672; 95 U. S., 906; 96 U. S., 624, 625; 3 Ben., 406; 5 Ben., 146; 8 Dill., 194; 1 Savy., 81; 8 Bank. Rep., 168; 56 Ill., 359, 388; 54 Ind., 384; 64 Pa., 259; 61 N. Y., 591; 5 Am. Rep., 124 (64 Ill., 411); 5 Am. Rep., 220 (2 Tex., 457); 16 Am. Rep., 418 (62 Mo., 190); 104 Mass., 523, 521; 105 Mass., 334; 21 O. St., 470; 56 Ill., 486.

THOMAS C. BUTLER, *Plff. in Err.*,
v.

BENJAMIN F. HORWITZ.

(See S. C., 7 Wall., 258-262.)

Contract to pay in coin—effect of—damages in coin—currency laws.

A contract to pay a certain sum in gold and silver coin is a contract to deliver a certain weight of gold and silver to be ascertained by count.

Damages upon such contracts must be assessed in coin, and judgment rendered accordingly.

See 7 WALL.

Effect of the currency laws on such contracts considered.

[No. 70.]

Submitted Feb. 3, 1869. Decided Mar. 1, 1869.

IN ERROR to the Court of Common Pleas of the State of Maryland.

This action was commenced in a Justice Court of Maryland by the present defendant in error, where judgment was rendered *pro forma* for the defendant. The case was appealed to the court of common pleas by the plaintiff. That court being the highest state court having jurisdiction of an appeal from a justice court, the original defendant sued out this writ of error, judgment having been rendered against him in the common pleas.

The case is fully stated in the opinion of the court.

Mr. John Randolph Quinn, for plaintiff in error:

To coin money is an act of sovereignty, original or derivative. When, in the exercise of that power, a nation issues money, whether coin valuable intrinsically or notes valuable relatively, based on the credit of the nation, either kind is of equal denominational value in every court of law in the nation. And the contracts of citizens must be measured by whichever kind the policy of the government from time to time requires and issues. When the lease was made, the money of the nation was of a certain kind; it is of that kind no longer, but of a kind competent to the nation to issue, and the contract must yield to the policy of the law making power.

Buchegger v. Shultz, 18 Mich., 420; *Shoenberger v. Watts*, 1 Am. Law Reg. (N. S.), 558.

What Congress declares to be money for a specific purpose, is the money obligatory on the citizen to use for such purpose; and though Congress may have the power to discriminate between different kinds of money in the interest of public policy, individuals have not; courts have not. As to them, all money is legally identical, and discriminating contracts made by individuals should meet no favor.

Carpentier v. Atherton, 25 Cal., 564.

A contract to pay in gold dollars is not a bullion or merchandise contract, but a contract for money, and is therefore payable in lawful money.

Shoenberger v. Watts, *supra*; *Metr. Bk. v. Van Dyck and Meyer v. Roosevelt*, 27 N. Y., 400; *Buchegger v. Shultz*, *supra*; *Schollenberger v. Brinton*, 52 Pa., 9; *Mervine v. Sailor*, 52 Pa., 18; *Davis v. Burton*, 52 Pa., 22; *Kroener v. Colhoun*, 52 Pa., 24; *Sandford v. Hays*, 52 Pa., 26; *Graham v. Marshall*, 52 Pa., 28; *Laughlin v. Harvey*, 52 Pa., 30.

An agreement that at a certain time gold was at a premium, cannot be entertained by a court to justify its discrimination.

Wood v. Bullens, 6 Allen, 516; *Carpentier v. Atherton*, 25 Cal., 575; *Warniboid v. Schlicting*, 16 Ia., 243; *Trouman v. Gowing*, 16 Ia., 415; *Hintrager v. Bates*, 18 Ia., 174.

Mr. Benjamin J. Horwitz, in person.

Mr. Chief Justice Chase delivered the opinion of the court:

The principles which determined the case of *Bronson v. Rodes* [*ante*, 141] will govern our judgment in this case.

The record shows a suit for breach of a covenant for payment of rent contained in a lease of certain premises in the City of Baltimore, made in 1791, for ninety-nine years, renewable forever upon an "Annual rent of fifteen pounds current money of Maryland, payable in English golden guineas, weighing five pennyweights and six grains, at thirty-five shillings each, and other gold and silver at their present weights, and rates established by Act of Assembly."

The obvious intent of the contract was to secure payment of a certain rent in gold and silver, and thereby avoid the fluctuations to which the currency of the country, in the days which preceded and followed the establishment of our independence, had been subject, and also all future fluctuations incident to arbitrary or uncertain measures of value, whether introduced by law or usage.

It was agreed in the court below that the rent due upon the lease, reduced to current gold and silver coin, was, on the first day of January, 1866, \$40; and judgment was rendered on the 27th June, 1866, for \$59.71.

This judgment was rendered as the legal result of two propositions: (1) That the covenant in the lease required the delivery of a certain amount of gold and silver in payment of rent; and (2) That damages for non-performance must be assessed in the legal tender currency.

The first of these propositions is, in our judgment, correct; the second is, we think, erroneous.

It is not necessary to go at length into the grounds of this conclusion. We will only state briefly the general propositions on which it rests; some of which have been already stated more fully in *Bronson v. Rodes*.

A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count. Damages for non-performance of such a contract may be recovered at law as for non-performance of a contract to deliver bullion or other commodity. But whether the contract be for the delivery or payment of coin or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment, by a law made in pursuance of the Constitution of the United States.

It was not necessary in the case of *Bronson v. Rodes*, nor is it necessary now, to decide the question, whether the Acts making United States notes legal tender are warranted by the Constitution. We express no opinion on that point; but assume, for the present, constitutionality of those Acts. Proceeding upon this assumption, we find two descriptions of lawful money in use under Acts of Congress, in either of which damages for non-performance of contracts, whether made before or since the passage of the Currency Acts, may be properly assessed, in the absence of any different understanding or agreement between parties. But the obvious intent, in contracts for payment or delivery of coin or bullion, to provide against fluctuations in the medium of payment, warrants the inference that it was the understanding of the parties that such contracts should be satisfied, whether before or after judgment, only by tender of coin, while the absence of any ex-

press stipulation, as to description, in contracts for payment in money, generally warrants the opposite inference of an understanding between parties that such contracts may be satisfied, before or after judgment, by the tender of any lawful money.

This inference as to contracts, made previous to the passage of the Acts making United States notes a legal tender, is strengthened by the consideration that those Acts not only do not prohibit, but, by strong implications, sanction contracts made since their passage for payment of coin; and consequently, taken in connection with the provision of the Act of 1792, concerning money of account, require that damages upon such contracts be assessed in coin, and judgment rendered accordingly; leaving the assessment of damages for breach of other contracts to be made, and judgments rendered in lawful money. It would be unreasonable to suppose that the Legislature intended a different rule as to contracts prior to the enactment of the currency laws, from that sanctioned by them in respect to contracts since. We are of the opinion, therefore, that under the existing laws, of which, in respect to legal tender, the constitutionality is, we repeat, in this case, assumed, damages may be properly assessed and judgments rendered, so as to give full effect to the intention of parties as to the medium of payment. When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly.

It follows that in the case before us the judgment was erroneously entered. The damages should have been assessed at the sum agreed to be due, with interest, in gold and silver coin, and judgment should have been entered in coin for that amount, with costs.

The judgment of the Court of Common Pleas must, therefore, be reversed, and the cause remanded for further proceedings.

Mr. Justice Miller, dissenting:

I believe the judgment of the court below was right, because I understand the original contract to have been an agreement to pay in English guineas, as a commodity, and their value was, therefore, properly computed in the legal tender notes which by law would satisfy the judgment.

I cannot agree to the opinion, for the reasons given in my dissent in the case of *Bronson v. Rodes*.

Cited—7 Wall., 81; 8 Wall., 445, 607; 11 Wall., 380; 12 Wall., 624; 14 Wall., 263, 370; 2 Wood, 614; 3 Ben., 498; 5 Ben., 146; 54 Ind., 384; 56 Ill., 496; 58 Ill., 360, 388; 16 Minn., 139; 5 Am. Rep., 124 (54 Ill., 411); 6 Am. Rep., 710 (45 Ala., 587); 8 Am. Rep., 60 (31 Ohio, 466); 16 Am. Rep., 418 (63 Me., 160); 26 O. St., 343; 104 Mass., 193, 521; 105 Mass., 314.

EDWIN C. LITCHFIELD, *Plf. in Err.*,
v.

THE DUBUQUE AND PACIFIC R. R. CO.

(See S. C., 7 Wall., 270-272)

Effect of mandamus to court below—judgment in pursuance of new title acquired since suit begun, how asserted.

In an action to recover land, a *mandamus* issued from this court to the court below to enter a judgment in favor of defendant, does not authorize a judgment that defendant hath right to the lands claimed.

The judgment entered pursuant to the *mandamus* should have been simply in favor of the defendant upon the issue joined and for the costs.

If, since the commencement of his suit, the plaintiff has acquired a title to the land sued, for that title can be asserted only in a new action.

[No. 71.]

Argued Feb. 3, 1869. Decided Feb. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

This action was brought in the District Court of the United States for the District of Iowa, Northern Division, by the plaintiff in error, to recover certain lands. Judgment was rendered in that court for the plaintiff, but subsequently reversed by this court. Thereafter a motion was made by the plaintiff in the said district court for a new trial, and was granted by that court. The case having been subsequently transferred to the circuit court, a writ of *mandamus* was issued from this court to said circuit court, in accordance with which, by a decree of the said circuit court, the order for a new trial made by the district court was vacated. Thereupon the plaintiff sued out this writ of error.

The case is further stated by the court.
Mr. E. C. Litchfield, in person, plaintiff in error.

Mr. Jas. Grant, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The record shows this state of facts: Litchfield, the plaintiff in error, brought an action to recover the land described in his declaration, averring that he claimed and was entitled to possession. It set up no title in itself. The defendant, the Railroad Company, denied the allegation of his right of possession. The case went to trial upon the issue so made, and a judgment was rendered in favor of the plaintiff. The Railroad Company brought the case into this court by a writ of error. The judgment was reversed, and a mandate was sent to the court whence the cause came, commanding it "to enter judgment for the defendant below." That court accordingly entered judgment as follows:

"It is, therefore, ordered and adjudged that the plaintiff has no title to the lands in dispute, and that the plaintiff pay all costs taxed at \$——, and that execution issue therefor."

This was done at the October Term, 1861, of that court.

At the same term the court, on the motion of Litchfield, set aside the judgment so entered and granted him a new trial. At the October Term, 1863, on his motion, the suit was dismissed and a judgment was rendered against him for costs. At the December Term, 1863, of this court, a writ of *mandamus* was issued, whereby the court below was commanded to vacate the order granting a new trial, and to enter a judgment in favor of the Railroad Company, according to the mandate sent down upon the reversal of the judgment. The circuit court, at the October Term, 1864, did accordingly vacate the order granting a new trial. The entry, after doing this, proceeds as follows:

"And it is further considered and adjudged,

that the said defendant, the said Dubuque and Pacific Railroad Company, hath right to the lands claimed in the declaration—that is to say, section one (1) in township eighty eight north, in range twenty-nine (29) west of the fifth principal meridian, and lying in the northern division of the State of Iowa, and to the possession thereof, and that the said defendant recover of the plaintiff the costs in this cause accrued, taxed at \$——, and have execution therefor."

Litchfield excepts to this judgment, and insists:

That the right of the Railroad Company to the land in controversy was never in issue, and never decided;

That the second judgment, in so far as it determines that the Company had such right, is erroneous, and unwarranted by the mandate and by the writ of *mandamus* from this court;

And that it should have been like the first judgment, that the plaintiff had no title to the land, etc.

We think these objections well taken, and that the judgment entered pursuant to the *mandamus* should have been like the prior one, simply in favor of the defendant upon the issue joined and for the costs. This proceeding is the proper one to correct the error complained of. *Martin v. Hunter's Lessee*, 1 Wheat., 354. There can be no doubt of the power of the court to vacate the order of dismissal, and to reinstate the case, independently of the order contained in the writ of *mandamus*. *Ex parte Bradstreet*, 7 Pet., 648; *Litch v. Martin*, 10 West. Law Jour., 495; *Atkins v. Chilson*, 11 Met., 110. If there could otherwise be any doubt upon the subject, the command of the writ is conclusive as to the proceedings had in conformity to it.

If, since the commencement of this suit, the plaintiff has acquired a title to the land, as he insists, that title can be asserted only in a new action. *McCool v. Smith*, 1 Black, 459 [66 U. S., XVII, 218]. After the decision by this court, the court below had no power but to enter a judgment according to the mandate, and to carry that judgment into execution. This was the end of the case. *Ex parte Dubuque & Pacific R. R. Co.*, 1 Wall. 78 [68 U. S., XVII, 515].

The judgment before us is reversed. The cause will be remanded to the Circuit Court, with directions to enter a judgment in conformity to this opinion.

JACOB LABER, Piff. in Err.,

v.

TUNIS COOPER.

(See S. C., 7 Wall., 565-571.)

Irregularity cured by verdict—objection not made in court below—exception necessary—instructions to jury, when may be refused—motion for new trial, not reviewable.

The irregularity that there is no replication to a plea, is cured by the trial and verdict.

Where an objection was not made in the court below, it cannot be made here.

In order to make an objection to evidence available, it is necessary that an exception should be distinctly taken, and placed upon the record.

It is not error for a court to refuse to give the instructions asked for, even if correct in point of

law, provided those given cover the entire case and submit it properly to the jury.

The overruling of a motion for a new trial cannot be made the subject of review by this court.

[No. 82.]

Argued Feb. 4, 1869. Decided Feb. 15, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. The action was brought on a promissory note against the maker.

The defense was that it was given to a railroad company in exchange for its stock and that, at the time it was given, the company agreed in writing with defendant that in consideration that he assigned to the company his right to any dividends on the stock, the company would save him harmless from the payment of interest and from any loss whatever from his subscription to the stock, and that the plaintiff, who was the assignee of the company, took with knowledge of this agreement; that the note was obtained by fraudulent representations; that the plaintiff knew of those representations and of their uptruth at the time he took the note; and that plaintiff was not a *bona fide* holder, for value, of the note.

The court below charged the jury that the plaintiff was a *bona fide* holder of the note, and could recover if he did not know that there was any false or fraudulent representations made at the time or previous to its execution, and which caused its execution, and if he did not know of the contract or agreement given by the railroad company at the time it was executed, and if he paid value for it.

The plaintiff recovered, and defendant brought writ of error to this court.

The case is further stated by the court.

Mr. M. H. Carpenter, for plaintiff in error.

Messrs. L. Janin, and Lewis Umlauf, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

In this case the bill of exceptions furnishes the same ground of complaint, which was remarked upon in *Lincoln v. Clafin* [ante, 106], heretofore decided at this term. In the case before us, it fills a hundred and twenty-seven printed pages. The points arising for our consideration could have been better presented in a very small part of this space. Such a mass of unnecessary matter has a tendency to involve what is really important in obscurity and confusion. Its presence is a violation of the 4th Rule of this court. Its examination consumes our time, increases our labor, and can subserve no useful purpose. The subject was so fully considered in the case referred to, that we deem it unnecessary to pursue it further upon this occasion.

Winnowing away the chaff, we find the questions left for our examination neither numerous nor difficult of solution.

The declaration contains two counts upon a promissory note, made by Labor to the Racine and Milwaukee Railroad Company, or order, for \$3,700, dated the 8th of May, 1856, payable five years from the 10th of May, in that year, with interest at the rate of ten per cent. per annum, payable annually, on the 10th of May; principle and interest payable at the of-

fice of the company, in the City of Racine, in the State of Wisconsin, and indorsed by the payee, by H. S. Durand, its president, to the plaintiff. The declaration contains also the common counts.

The defendant pleaded the general issue, and three special pleas.

The first special plea avers that the note and a mortgage securing its payment were given to the railroad company for thirty-seven shares of its capital stock; that there was no consideration for the note; that it was obtained from the defendant by false and fraudulent representations; and that these facts were known to the plaintiff when the note came into his possession. The second special plea denies the indorsement of the note to the plaintiff, as averred in the first count. The third special plea is to the same effect, as to the indorsement averred in the second count. All the special pleas conclude with a verification.

To the first of the special pleas, the plaintiff replied denying the knowledge of the alleged false and fraudulent representations, before and at the time of the indorsement and transfer of the note. To the second and third special pleas, no replications were filed.

The cause proceeded to trial. The record shows that a large mass of testimony was given by the defendant relating to both the defenses set up by the special pleas. A prayer for instructions was submitted by the defendant. The court refused to give them, but charged the jury fully upon the whole case. Both the subjects presented by the special pleas were fully discussed. Indeed, they were the only grounds of the controversy between the parties. The case was tried, in all respects, as if the pleadings had been formal and perfect. The jury found for the plaintiff. The language of the verdict is: "We, the jury, find the issue for the plaintiff, and assess his damages," etc. The defendant moved for a new trial. The motion was overruled, and judgment entered upon the verdict. The defendant excepted to the refusal to charge as prayed, to twelve passages in the charge as given, and to the overruling of his motion for a new trial.

1. It is objected, as an error, that no replication was put in to the pleas denying the indorsement of the note.

The plea of the general issue would have made it incumbent upon the plaintiff to prove the indorsement as averred in the declaration, but that the Statute of Illinois, adopted by the circuit court as a rule of practice, dispenses with such proof, unless the fact is denied by the defendant under oath. The oath of the defendant was affixed to both the pleas, raising the question. As they only denied what the plaintiff had alleged, contained no new matter, and no special traverse, they should have concluded to the country, and not to the court. The defect was one of form, and could have been reached by a special demurrer. The trial proceeded as if they had concluded to the country, and a *similiter* had been added by the plaintiff. To the objection now taken, there are several answers. The irregularity is cured by the trial and verdict. *Coan v. Whitmore*, 12 Johns., 853; *Bradley v. Usher, Breese*, 14; *Stons v. Van Currier*, 2 Vt., 115; *Sullivan v. Dollins*, 18 Ill., 88; *Coutch v. Barton*, 1 Morris, 854. The

objection comes too late; not having been made in the court below, it cannot be made here. It is within the 32d section of the Judiciary Act of 1789, which forbids a judgment to be reversed for any want of form in the proceedings, except such as shall have been specially pointed out by demurrer.

II. It is said that, conceding the issues intended to be made by the defendant were in fact submitted to the jury, the verdict does not respond to them; but that it finds "the issue"—but one—and not designating which one, for the plaintiff.

It was competent for the court to amend the verdict by changing the term "issue" from the singular to the plural. This would have removed the ground of the objection. A verdict, unless it be a special one, is always amendable by the notes of the judge. 1 Chit. Pl., 411; *Roulin v. McDowell*, 1 Bay, 490; *Norris v. Durham*, 9 Cow., 151; *Sayre v. Jewett*, 12 Wend., 135; *Paul v. Harden*, 9 Serg. & R., 28. The proper amendment would, doubtless, have been made below if the attention of the court had been called to the subject. Like the preceding objection, it is made here too late, and is within the Act of Congress referred to, upon the subject of jeofails.

III. Upon looking through the testimony of Demand, as set out in the bill of exceptions, it appears that the admission of a part of it was objected to by the defendant, but it does not appear that the objection was overruled, and exception taken. It only appears that the testimony was admitted after the objection was made. *Non constat*, but that the objection was waived, or the decision acquiesced in. In order to make such a point available, it is necessary that an exception should be distinctly taken, and placed upon the record.

IV. It was not error for the court to refuse to give the instructions asked for by the defendant, even if correct in point of law, provided those given covered the entire case, and submitted it properly to the jury. The defenses of false and fraudulent representations to the defendant, and of the non-indorsement of the note, involved mixed questions of law and fact. We think the law was properly stated by the judge, and the facts fairly submitted to the jury. The charge was full and able. It would throw no new light upon any legal principle and could be productive of no benefit, to examine in detail each of the numerous passages taken from the charge, and made the subject of exception. It is sufficient to say that, after a careful examination of all of them, in the light of the context of the charge, and of the evidence, as it was before the jury, we have found nothing which we deem erroneous.

V. An exception to the overruling of the motion for a new trial is found in the record, but is not adverted to in the argument submitted for the plaintiff in error. Such a decision cannot be made the subject of review by this court.

The judgment below is affirmed.

Aff.—1 Biss., 539.

Cited—8 Wall., 430; 20 Wall., 137; 93 U. S., 295; 97 U. S., 382, 605; 99 U. S., 371; 104 U. S., 77; 55 Ind., 50; 102 Mass., 600.

See 7 WALL.

Ex parte THE STATE OF VIRGINIA, *Petr.*

Decision on motion withheld until decision of another question.

Where there is a division of opinion between a district and a circuit judge, as to allowance of a writ of *habeas corpus*, decision on motion for a writ of prohibition against proceeding further under the writ withheld until after a decision upon the division of opinion.

[No. 11. Original.]

Argued Feb. 12, 1869. Decided Feb. 15, 1869.

PETITION for a writ of prohibition.

This case arose upon a petition filed on Jan. 29, 1869, by the State of Virginia, in this court, for a writ of prohibition to be directed to the Honorable John C. Underwood, the Judge of the District Court of the United States for the Eastern District of Virginia, prohibiting him from any further proceedings or action in the cases of *Sally Anderson*, *Cesar Griffin* and *James Jeter Phillips* before him under writs of *habeas corpus*. On the filing of said petition, the court set a day for the hearing of the same, and granted a rule on the said judge to prevent any further proceedings in either of said cases, until the further order of this court.

Messrs. J. H. Bradley, and James Lyons, for petitioner.

Mr. Chief Justice Chase delivered the opinion of the court:

The Chief Justice, who holds by allotment the Circuit Court for the District of Virginia, has informed the court that before the pending motion for prohibition was made, he signified to the district judge his dissent from the opinion expressed by him in favor of the allowance of the writs of *habeas corpus* complained of in the petition; and that he has advised the district judge now holding the circuit court, to direct that this division of opinion in respect to the motion for the writ now pending in the case of *Jeter Phillips*, be certified to this court.

There is nothing in the provisional order, staying further proceedings by the district judge, which can be properly construed as prohibiting this course; and it is expected that the certificate will be filed at an early day.

On the first Friday thereafter the court will hear argument upon it, and in the meantime the decision of this court on the motion for a writ of prohibition, now pending, will be withheld.

The clerk will advise counsel accordingly, and will certify this direction to the District Judge for the District of Virginia.

A. L. MARSHALL AND C. S. SILVER, Administrators, etc., of FINICE CARUTHERS, Deceased, *Piffs. in Err.*,

v.

ROBERT J. LADD.

An equitable title, no defense in ejectment—error of state court in construing state statute, not reviewable—the remedy of one holding equitable title is in equity, to compel conveyance and possession.

In ejectment the legal title must prevail, and an equitable title is no defense.

Error in state court in construing state statute cannot be reviewed in this court.

In equity the remedy of one holding an equitable title is, to compel the holder of the legal title to convey, and a decree of possession or, after such conveyance, an action of ejectment founded on the title so acquired.

[No. 78.]

Argued Feb. 4, 1869. Decided Feb. 15, 1869.

IN ERROR to the Supreme Court of the State of Oregon.

The case is stated by the court.

Messrs. Mitchell, Dolph and Smith, and R. Mallory, for appellants.

Messrs. Edward Lander, T. J. Coffey, and J. Hubley Ashton, for appellees:

"That the patent carries the fee and is the best title known to a court of law, and that that is the settled doctrine of this court," is too plain to be questioned;

Hooper v. Scheimer, 23 How., 249 (64 U. S., XVI., 454); *Wilcox v. Jackson*, 18 Pet., 498; *Bagnell v. Broderick*, 13 Pet., 450;

And is conclusive evidence of title.

Reichert v. Felps, 6 Wall., 165 (78 U. S., XVIII., 850).

The certificate of the register and receiver is no defense to this action.

1. An equitable title is no defense at law.

Bagnell v. Broderick, 13 Pet., 450; *Wilcox v. Jackson*, 18 Pet., 516.

2. Nor does it appear in this case that the patent relied upon was issued without authority of law, and is void by reason of the land not being subject to entry and grant.

Minter v. Crommelin, 18 How., 87 (59 U. S., XV., 279).

3. An equitable defense cannot be set up under the practice in the courts of the State of Oregon.

This decision of the Supreme Court in the case at bar, approving the ruling of the court below, is decisive on this point and shows what the practice is in Oregon.

This court will follow the decision of state tribunals on local statute laws of the States, and especially those concerning land.

Polk v. Wendal, 9 Cranch, 87; *Dundas v. Bowler*, 8 McLean, 397; *Harpending v. Dutch Church*, 16 Pet., 455; *O'Brien v. Perry*, 1 Black, 139 (66 U. S., XVII., 117).

Mr. Justice Miller delivered the opinion of the court:

In this case an action of ejectment was brought, by one of the defendants in the suit just decided, against the plaintiff in that suit and his tenant, Marshall, for a part of the land included in the certificate to Mrs. Thomas, the validity of which we have affirmed.

In this case Ladd, the plaintiff, introduced his patent from the United States, and the defendants introduced the certificate of location to Mrs. Thomas, and relied on that and on the facts which went to show that it was rightfully issued, to defeat the recovery under Ladd's patent.

The court refused several instructions prayed by defendants, based on that defense, and told the jury that the legal title which passed from the United States to the plaintiff, must prevail over the claim to hold possession under the certificate.

In this the court was undoubtedly correct. It is of the essence of the action of ejectment that the legal title must prevail, and neither party can set up, in that proceeding facts which go to show that, equitably, the other party is the rightful owner of the property. It is the peculiar province of a court of equity to restrain the assertion of a legal title wrongfully held, or to compel its transfer to the person rightfully entitled to it.

We need not here decide whether certain statutes of Oregon, intended to give to settlements made under the donation law the effect of a legal title, were applicable to a case where a patent had issued, or were properly construed by the Oregon court. Any error of that court in construing the statute of the State, cannot be reviewed here.

The remedy of plaintiff in error is to compel a conveyance of the title from Ladd, and with it a decree for possession, or an action of ejectment founded on the title so acquired.

The judgment of the Supreme Court of Oregon is affirmed.

EMILIE J. MOULDER, *Plff. in Err.*,

v.

DOUGLAS F. FORREST.

Writ of error defective for want of test—not amendable.

A writ of error, without the test required by Act of 1789, is insufficient.

The writ cannot be amended in this court.

[No. 371.]

Argued Feb. 5, 1869. Decided Feb. 15, 1869.

IN ERROR to the Supreme Court of the District of Columbia.

This action was brought in the court below, by the defendant in error, to recover possession of certain lands. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

On motion to dismiss.

Messrs. J. M. Carlisle and Nath'l Wilson, for defendant in error.

Mr. W. S. Cox, for plaintiff in error.

Mr. Chief Justice Chase delivered the opinion of the court:

The motion to dismiss the writ of error for want of the test required by the Process Act of 1789 (1 Stat. at L., 93) must be allowed.

The defect in the test was doubtless occasioned by an oversight of the clerk below; but a majority of the court is of the opinion that the writ cannot be amended here without departure from its established practice. *Ins. Co. v. Mordecai*, 21 How., 195 [62 U. S. XVI., 94]; *Porter v. Foley*, 21 How., 393 [62 U. S. XVI., 154].

ADOLPHUS DURANT, *Appt.*,

v.

THE ESSEX COMPANY.

(See S. C., 7 Wall., 107-113)

A judgment dismissing a bill, when a bar—judgment by divided court, conclusive.

Where decree, dismissing a bill, was an adjudication

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tion of the merits of the controversy it constitutes a bar to any further litigation of the same subject between the same parties.

A decree of that kind, unless made upon some other ground which does not go to the merits, is a final determination.

A judgment rendered by a divided court is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.

[No. 79.]

Argued Feb. 10, 1869. Decided Feb. 22, 1869.

APPPEAL from the Circuit Court of the United States for the District of Massachusetts.

The bill filed in this case in the court below, by the complainant, Durant, seeks to hold the defendant, the Essex Company, liable for certain real estate, originally the property of the complainant, to which they had acquired title under such circumstances of fraud as made the said Company amenable to the remedial jurisdiction of the United States Circuit Court, acting as a court of equity.

The plaintiff's case is, that, Oct. 11, 1847, he filed his bill in chancery in the Circuit Court of the United States for the District of Massachusetts, in which, at the May Term, 1855, he was declared by said court entitled to relief, and a decree was made in his favor as to some of the defendants. Deeming the relief inadequate, the plaintiff declined to accept it. Upon this refusal being ascertained by the presiding judge, he reversed his former decree, and ordered the bill to be dismissed. From this decree the plaintiff appealed to the Supreme Court of the United States. His case was heard here at the December Term, 1857, and thereupon it was decreed as follows: "It is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby affirmed with costs by a divided court."

The bill in the case now pending here was filed Apr. 6, 1865.

The bill assumes that the decree of this court, rendered in the previous case by a divided court, was no valid decree in law and, consequently, that the plaintiff is not concluded by the adjudication in that case.

The defendant, among other things, pleaded that the former suit and decree in this court were a bar to the present bill, and this was so determined by the court below, and the bill was dismissed.

Messrs. C. Cushing, and W. W. Boyce, for appellants:

The great question in this case is, whether the decree of the circuit court, affirmed here by a divided court, is such a valid decree as to constitute a bar to the present suit.

We submit that the decree of the Supreme Court rendered by a divided court is no valid decree.

We admit that the practice of the Supreme Court is in favor of the validity of such decree. We admit, also, that cases of the highest courts in England, including the House of Lords, can be found in consonance with the practice of this court.

It is also true, that many cases are to be found in the English books, holding that no judgment or decree can be rendered by a divided court.

Proctor's case, 12 Co., Rep. 118; *Vin. Abr.*, art. Court, 1; 3 Com. Dig., 283, letter D, tit. Courts; 2 Tidd, Pr., 890; 3 Co. Com., sec. 489, See 7 WALL.

p. 476 Stat. 15, E. 3. ch. 5, Stat. 1; *Deane v. Clayton*, 7 Taunt., 489; *Thornby v. Fleetwood*, 1 Str., 384; *Boulton v. Bull*, 2 H. Bl., 500; *Peacock v. Bell*, 1 Saund., 69; *Outram v. Morewood*, 3 East, 358; *Atkins v. Drake*, 1 McC. & Y., 214; *Van Dyck v. Van Beuren*, 2 Cal., 103; *Godard v. Coffin*, Davies, 881; Ram, Legal Judgment, sec. 18, p. 11.

Our argument against the validity of decrees of the Supreme Court of the United States, rendered by a divided court, may be comprehensively stated thus:

As the Constitution vests appellate jurisdiction in the Supreme Court, under such regulations as Congress shall make, and as Congress, by the Act of March 8, 1803, authorizing appeals, provides that "The said Supreme Court shall be, and hereby is, authorized and required to receive, hear and determine such appeals" (2 Stat. at L., 244), the court cannot determine a cause except by the judgment of a majority of the judges hearing it; and, therefore, a decree by a divided court has no legal validity, and is the same thing in law as no decree.

1. This court, upon appeal, must determine such appeal. A decree by a divided court is not a compliance with the Acts of Congress.

2. A decree by a divided court is an abdication of the appellate power and, in effect, imparts the power to the circuit court.

3. The reason given by the court why a decree by a divided court has the effect of affirming the decree below, as stated by *Chief Justice Taney*, in *Brown v. Aspley*, 14 How., 28, is as follows: "The motion is to reverse. If that fails, the judgment or decree necessarily stands, and must, therefore, be affirmed." This, it is respectfully submitted, is founded in error. The Constitution and the Act of Congress regulating appeals, transfer the case here on appeal for a hearing, and neither in fact or in law is any motion made here to reverse.

Messrs. B. R. Curtis, J. J. Storrow, and E. Merwin, for appellees:

It may be conjectured that the complainant will attempt to found an argument upon the allegation in his bill that, upon the appeal from the decree of this court, the Supreme Court of the United States was divided upon the question whether the decree should be reversed or not, and, therefore, in accordance with the usage and practice of said court, ordered that the decree of this court should be affirmed with costs.

It is a sufficient answer that precisely this question was raised in the Supreme Judicial Court of Massachusetts, by the complainant, and that it was then adjudged that, notwithstanding said alleged fact, said decree was a bar to the maintenance of any further controversy between these parties respecting this land. And no ground is or can be alleged or pretended to avoid the effect of this adjudication upon this issue. *Durant v. Essex Co.*, 8 Allen, 103.

The decree of the circuit court upon the coming down of the mandate, is also conclusive upon him.

The point is untenable even if open.

Durant v. Essex Co., 8 Allen, 103; *Wash. Bridge Co. v. Stewart*, 3 How., 424; *The Antelope*, 10 Wheat., 66; *Etting v. Bank of U. S.*, 11 Wheat., 59; *Silliman v. H. R. Bridge Co.*, 1 Black, 584 (66 U. S., XVII., 84).

It is not the decree of this court, but of the

circuit court, that is a bar. That decree affected six respondents: as to the Essex Company, it simply dismissed the bill with costs; as to the three others, it gave certain pecuniary relief, and ordered that relief to be computed upon principles which were much controverted by the parties. All these questions were open upon the appeal; if this record shows that there was some division of opinion, it does not show upon what points, or that it was concerning the rights of these respondents, the only matters now in question. The judgment and order of the court are expressed in the mandate; and they are, that the decree below be affirmed. The court was not divided upon the question of entering this judgment and issuing this order. (This court does not enter a final decree in the cause, except upon reversal.)

Act 1789, ch. 20, sec. 24, U. S. Stat., 84.

Upon an affirmance, it declares that the decree of the circuit court shall stand affirmed, and sends down a mandate with that direction, as was done in this case. *Brown v. Aspden*, 14 How., 28.

Mr. Justice Field delivered the opinion of the court:

The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. *Walden v. Bodley*, 14 Pet., 156; *Hughes v. U. S.*, 4 Wall., 287 [71 U. S., XVIII., 826]; *Digelow v. Winsor*, 1 Gray, 301; *Foots v. Gibbs*, 1 Gray, 412.

Accordingly, it is the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification in a proper case will be corrected by this court on appeal. *Lindsay v. Lynch*, 2 Sch. & Lef., 10; *Woolam v. Hearn*, 7 Ves., 222; *Stevens v. Guppy*, 3 Russ., 185; *Sewall v. Eastern R. R. Co.*, 9 Cush., 13; *Miles v. Caldwell*, 2 Wall., 45 [69 U. S., XVII., 759]; *Cornel v. Banks*, 10 Wheat., 192; *Dandridge v. Washington*, 2 Pet., 878; *Peirce v. Elliott*, 6 Pet., 100; *Gaylord v. Kelshaw*, 1 Wall., 83 [68 U. S., XVII., 612]; *Barney v. Baltimore*, 6 Wall., 389 [71 U. S., XVIII., 829]; *Hobson v. McArthur*, 16 Pet., 195.

In the case in the circuit court we are not left to conjectures or to presumptions as to what was intended by the decree. The plea of the defendants avers that testimony was taken on both sides, and that the case was heard on its merits, and argued by counsel. And when the mandate of this court was fled, the complainant moved for leave to discontinue the suit, or that the bill be dismissed without

prejudice; but the motion was denied and the decree was affirmed.

There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.

It has long been the doctrine in this country and in England, where courts consist of several members, that no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made. If affirmative action is necessary for the further progress of the cause, the division operates as a stay of proceedings. If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force, to be carried into effect by the ordinary means.

Thus, in *Iveson v. Moore*, 1 Salk., 15, and 1 Ld. Raym., 495, a verdict was rendered for the plaintiff, and according to the practice prevailing in the English courts, a rule was entered for judgment *nisi*. Afterwards a rule was obtained that the judgment should be arrested *nisi*—that is, unless cause be shown against the arrest. On motion to discharge this latter rule the judges were equally divided, and no order could be made. But the court said, if "it had been divided on the first motion (that is, the motion against the judgment under the general rule), the plaintiff might have entered judgment; but now this rule (in arrest) must stand or be discharged, and discharged it cannot be, for the court is equally divided." The inability of the court, from the division, to take affirmative action, would have allowed the plaintiff to enter his judgment under the general rule if no order in arrest has been made; but that being made, the position of the parties was changed.

In *Chapman v. Lamphire*, 3 Mod., 155, the plaintiff obtained a verdict, upon which the usual rule was entered for judgment *nisi*, in accordance with the established practice. A motion was then made for the arrest of the judgment, and it is reported that "the judges were divided in opinion, two against two, and so the plaintiff had his judgment, there being no rule made to stay it, so that he had his judgment upon his general rule for judgment; but if it had been upon a demurrer or special verdict, then it would have been adjourned to the Exchequer Chamber."

By a law of England, passed as long ago as 14 Edward III., if the judges of the King's Bench, or Common Pleas, are equally divided, the case is to be adjourned to the Exchequer Chamber, and be there argued before all the justices of England. If these are equally divided, it is to be determined at the next Parliament by a prelate, two earls, and two barons, with the advice of the Lords Chancellor and Treasurer, the Judges, and other of the King's Council. Com. Dig., title Court, D. 5; Co. Litt., 71, 72.

In the case of the special verdict, affirmative

action would be required to enter judgment, which would be impossible from the division of the judges. But in the case of the demurrer, the effect of a division would depend, we think, upon the rules of practice established in such cases, for in the absence of a settled practice or general rule of court upon the subject, the judges disagreeing as to the demurrer might disagree also as to the effect of their inability to decide it, as was the fact in this court in the case between the Commonwealth of Virginia and West Virginia, argued upon demurrer to the bill at the last term.

In cases of appeal or writ of error in this court, the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment, or decree, be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

The Antelope, 10 Wheat., 66, and *Edging v. Bk. of the U. S.*, 11 Wheat., 59, are cases where the decisions of the court below, or some part of them, were affirmed upon a division of the judges, and a term seldom passes in which there are not several cases disposed of in this way. In *Brown v. Aspdon*, 14 How., 28, Chief Justice Taney observed that there was no difference between a decree in chancery and a judgment at law as to its affirmance on a division of the court. "In both cases," he said, "the motion is to reverse, and if that fails, the judgment, or decree, necessarily stands."

It is also the practice of the Exchequer Chamber in England to affirm the judgment of the court below, brought before it on a writ of error, when the judges are equally divided. Where a case is adjourned to that court, under the Statute of 14 Edward III., upon a division of the judges of the court below, the practice, as we have stated, is different. But on writs of error it is similar to that followed by this court. Such, also, is the practice of the House of Lords when sitting as a court of appeals. It is said that this practice depends upon the manner in which the Lords put the question which is always in this form: Shall this judgment or decree be reversed? But that is the question in all appellate courts, and the particular manner in which the question is stated, cannot change the rule of law on the subject.

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered

upon the concurrence of all the judges upon every question involved in the case.

Judgment affirmed.

Cited—91 U. S., 532; 101 U. S., 555; 102 U. S., 676; 3 Sawy., 658; 82 N. Y., 561; 37 Wis., 313.

WILLIAM O. BROWN, *Appt.*,
v.

JAMES R. SLANSON, Claimant of the Bark
A. P. NICHOLS;

AND

THE PHOENIX INSURANCE COMPANY,
Appt.,
v.

JAMES R. SLANSON, Claimant, etc.

(See S. C., "*The Nichols*," 7 Wall., 656-666.)

Rule of navigation, of sailing vessels meeting—meeting end on, what is—when rule has no application—nearly end on, meaning of—variation—mistakes in moments of peril, effect of.

If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both should be put to port, so that each may pass on the port side of the other.

Sailing ships are meeting end on when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity.

Where vessels approaching are yet so distant from each other, and where the lines of approach, though parallel, are so far apart, as not to involve risk of collision, that rule of navigation has no application to the case.

The phrase "nearly end on," includes cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel and so near to each other as to involve risk of collision.

Where the variation from opposite directions, or from parallel lines did not exceed half a point by the compass, it is within the rule.

Mistakes committed in moments of peril and excitement, when produced by the mismanagement of those in charge of the other vessel, do not relieve the vessel causing the collision from the payment of full damages to the injured vessel.

[No. 78, 74.]

Argued Feb. 4, 1869. Decided Feb. 22, 1869.

APPEALS from the Circuit Court of the United States for the Northern District of New York.

The libels in this case were filed in the District Court of the United States for the Northern District of New York, by the appellants, to recover damages resulting from a collision. The court found for the libelants and entered decrees allowing Brown \$17,101.27, and the Insurance Company \$9,978.46. The court below having reversed these decrees on appeals, the libelants took appeals to this court.

A further statement appeared in the opinion of the court.

Mr. George B. Hibbard, for appellants:

1. The appellants claim (in accordance with the decision of the district court) that the case must be governed by articles 12 and 18 of the Act of Congress, to prevent collisions, and not by art. 11, as was decided by the circuit court. 13 Stat. at L., 60.

NOTE.—Collision, rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557.

Upon authority it is virtually established that the 11th article did not apply when the vessels were so far apart as these were when they made each other.

The Monticello, 17 How., 152 (58 U. S., XV., 68); *The N. Y. & L. U. S. M. S. Co. v. Rumball*, 21 How., 872 (62 U. S., XVI., 144).

2. As the case must be governed by articles 12 and 18, it of necessity follows that *The Brown* was under no obligation to port—she must take the proper steps to keep out of the way, and *The Nichols* must keep her course, so that *The Brown* could keep out of the way; and to enable *The Brown* to do this, she could either port or starboard, as the district court has decided.

3. The counsel for *The Nichols*, upon the trial, insisted that the burden of proof was on *The Brown* to show that the collision was the fault of *The Nichols*. This may be so up to the point of showing *The Nichols'* change of course. But when that important, most fatal fault is shown, then upon the same reasoning the burden changes place. It is incumbent on *The Nichols* to show that the collision would have happened had she not committed this fault. This cannot be shown. It was the very fault that produced the collision.

Lowndes, Col., 88; *The Lion*, 1 Sprague, 40; *The Anita*, Newberry, 492.

4. But, should it be determined that the decision of the circuit court is right and article 11 of the Act of Congress governs the case, it follows beyond all possible question that the damages should be divided.

Mr. John Ganson, for appellee:

The libelants must show affirmatively that the collision is not attributable to any departure from the ordinary rules of navigation. They must also show that the intention to pass was manifested early to the approaching vessel, by a distinct and marked change of course, so that those in charge of the approaching vessel should not be thrown into doubt as to the intention, and would have ample time to maneuver their own vessel with deliberation and safety.

If the change is made under such circumstances as not to allow ample time for thoughtful action on the part of those in command of approaching vessels, and a collision occurs even from an injudicious order, the vessel making the change must suffer the consequences.

N. Y., etc., v. Rumball, 21 How., 872 (62 U. S., XVI., 144); *The Genesee Chief*, 12 How., 461; *The Northern Indiana*, 8 Blatchf. C. C., 100; *The Ottawa*, 3 Wall., 268 (70 U. S., XVIII., 165); *Bentley v. Coyne*, 4 Wall., 509 (71 U. S., XVIII., 457).

Mr. Justice Clifford delivered the opinion of the court:

Controversies growing out of collisions between ships on navigable waters are, in general, of easy solution in cases where the facts are agreed, or where there is no material conflict in the testimony of the witnesses. Few cases, however, find their way into the tribunals of justice where the witnesses examined in the case concur either as to which vessel was in fault, or as to the circumstances attending the collision. On the contrary, such investigations are almost always complicated and embarrassed

with conflicting testimony, and sometimes to such an extent that it is exceedingly difficult to form any satisfactory conclusion upon the merits.

Some of the causes which promote such contrariety of recollection are, that the moment when the collision occurs is necessarily one of alarm and, frequently, of consternation; and also because the disaster is seldom witnessed with much care by any person other than those on board the respective vessels, and all experience shows that they are quite too apt to see fault in the navigation of the other vessel, more readily than in that vessel to which they belong. Where such conflict exists the inquiry is very perplexing, and the difficulty can only be overcome in a satisfactory manner by a critical analysis of the testimony, and a careful comparison of the respective conflicting statements of the witnesses with the undisputed or well established facts and circumstances developed in the testimony.

Decrees of an entirely opposite character were rendered in this case in the district and circuit courts, obviously on account of differences of opinion produced by the conflicting character of the testimony, and the appellants now set up a theory different from either of those adopted in the courts below, and it must be admitted that it finds some support in the evidence exhibited in the transcript.

In the investigation of such a case the first step is to ascertain the facts material to the issue involved in the pleadings, but in accomplishing that purpose, in this case, it is not deemed necessary to enter much into the details of the testimony, as any such discussion would not benefit the parties nor anyone else not possessed of the entire record. Views of the district court were that *The Nichols* was in fault, but the circuit court was of a different opinion, and reversed the decree and dismissed the libel. Appeal was taken by the libellant from that decree of the circuit court to this court. Succinctly stated, the material facts of the case, as they appear to the court, are as follows:

Heavily laden with coal and iron, the schooner *William O. Brown* was bound up Lake Erie, on a voyage from Buffalo to Chicago. Her course was west by north, and when the collision occurred she was about half way between Little's Point and Bar Point, and about one and a half miles from the Canada shore. Statement as to the voyage of the bark *A. P. Nichols* is, that she came out from Detroit River early in the evening before the collision, and that she was bound down the lake to Buffalo laden with a full cargo of corn. Undisputed fact is, that she was heading east by south, half south, and that she, as well as the schooner, had competent lookouts properly stationed on the vessel. Both vessels also showed good lights, as required by law, and they were well manned and equipped. Prior to their arrival at the place where the collision occurred, they had met with no difficulty, and they had fair weather and a good breeze from the north east, not exceeding six or seven knots, and the speed of the respective vessels was about six miles an hour. Parties agree that the time and place of the collision is truly alleged in the libel, and there is neither fact nor circumstance

in the case to warrant the conclusion that it was the result of any other cause than faulty navigation. Inexcusable as the disaster was, the principal question is, which vessel was in fault? When the vessels came together they had sufficient sea room, and they were both under full sail. The schooner had the wind free, and on her starboard side, but the bark was close hauled, with the wind on her port side. They were on lines which diverged not more than half a point, and which, in an event, if they continued their respective courses, would bring them into collision. Obligated to change their course or collide, the true inquiry is, what should have been done? Clear weight of the evidence is, that each vessel was seen from the deck of the other, about the same time, when they were some two or three miles apart, and as they were approaching each other from nearly opposite directions, it is quite clear, under the regulations enacted by Congress, that the helms of both should have been put to port, so that each might have passed on the port side of the other, unless the distance between them, at that precise time, was so great as not to involve risk of collision. Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. *Mail Steamship Co. v. Rumball*, 21 How., 384 [62 U. S., XVI., 148]; *The Ericsson*, Swab. Adm., 38; *Lowndes*, Collision, 24.

When the two vessels made each other it was the mate's watch on board *The Nichols*, and he had command of her deck. His first order to the man at the wheel was to keep her off a little, so as to give the vessel ahead a good full; but as the vessels advanced, seeing that there was danger of collision, he gave the order to put the helm "hard up and keep her right off," which, under the circumstances, was equivalent to the order to port the helm, as the helmsman stands on the weather side of the wheel and, consequently, the effect of the order "hard up," when executed, was to bring the helm to port, and turn the prow of the vessel to the leeward.

Before remarking further as to the movements of the bark, it becomes necessary to ascertain what was done on board the schooner, as she was approaching from nearly the opposite direction, at about the same speed. Her master admits that he saw both side lights of the other vessel at the same time, and he testifies that he immediately ordered the helm of his vessel to be put to starboard. Plain effect of that order, when executed, was to turn the prow of the vessel to the leeward, instead of hugging the wind closer, as she should have done, to avoid a collision.

Article eleven of the regulations enacted by Congress provides that if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Sailing ships are meeting end on within the meaning of that provision when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other

that the necessity for precaution to prevent such a disaster begins, which cannot be precisely defined, as it must always depend, to a certain extent, upon the state of the navigation and the circumstances surrounding the occasion.

Where vessels approaching are yet so distant from each other, or where the lines of approach, though parallel, are so far apart as not to involve risk of collision, that rule of navigation has no application to the case.

Much greater difficulty will arise in any attempt to define, with technical accuracy, the phrase "nearly end on," as the language itself is in terms somewhat indefinite. Such attempts have been made in the English Admiralty Court but without much practical success. "Nearly end on," as the phrase is employed in that article, may doubtless be construed to include cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision; but the application of the rule must also be considered as subject to the same limitations and qualifications as the preceding phrase in the same article. Decided cases may be found in the English admiralty reports where the attempt is made to define, with precision, how great the variation may be from opposite directions, or from parallel lines, and the case still be within the eleventh article; but the present case does not necessarily involve that inquiry, as the variation, in any view of the evidence, did not exceed half a point by the compass, which is clearly insufficient to take the case out of the operation of that article. *Holt's Rule of the Road*, pp. 64, 70, 154.

Argument for the appellant is, that the distance between the two vessels was so great when the helm of the schooner was put to starboard that it cannot be considered as a fault and such, it seems, was the opinion of the district judge; but the proposition, in view of the circumstances, cannot be sustained, as it was in the night time, and the combined speed of the two vessels was at least twelve miles an hour, and none of the witnesses pretend that more than ten or fifteen minutes elapsed after the second order of the master of the schooner was given, to put the helm hard up, before the collision took place.

Strong doubts are entertained whether the effect of the first mistake made by the schooner would have caused a collision if she had then kept her course; but the second order to put the helm hard up, was fatal as the schooner then fell off even faster than the bark, and the collision became inevitable. Particular description of the effect of that movement need not be given, except to say that it brought the schooner directly across the bows of the bark. Confirmation of this view is derived from the conceded fact, that the schooner was struck by the stem of the bark on her starboard quarter. The effect of the blow was that she sunk and, with her cargo, became a total loss.

Remaining proposition of the appellant is, that the bark is also in fault, because her helm, just before the collision occurred, was put to starboard; but it is clear that the error, if it was one in that emergency, was produced by the impending peril, which is justly chargeable to those having the control and management of the other vessel. Mistakes committed in such moments of peril and excitement, when produced by the

mismanagement of those in charge of the other vessel, are not of a character to relieve the vessel causing the collision from the payment of full damages to the injured vessel.

Appeal was taken to this court at the same time from the decree of the court below, in the case of *Phenix Ins. Co. v. Slanson, claimant, etc.*, and the two cases were argued here together, as the parties conceded that they depend upon the same facts. All the testimony was taken in the first case, and the stipulation of the parties is, that it should be regarded as also taken in the other, and that both cases should be heard at the same time. Libelants in this case were insurers of the cargo, and having paid the loss to the owner, they claimed that they were subrogated to his rights and interests, and that, by reason thereof, they had a lien upon the bark for the amount which they paid to the owner of the cargo. Evidently the appeal is disposed of by the opinion in the other case.

Decrees affirmed.

Cited—23 Wall., 75; 91 U. S., 204; 1 Bro., 233, 307, 322; 3 Ben., 345, 455, 456; 4 Ben., 219; 4 Cliff., 587; 2 Flipp., 345; 5 Hughes, 304.

THE COUNTY OF LEE, *Plff. in Err.*,

v.
EVANS ROGERS.

(See S. C., 7 Wall., 161-188).

Gelpcke v. Dubuque, affirmed—effect of Iowa Act on bonds.

This court affirms its decision in *Gelpcke v. Dubuque* [XVII., 519], in regard to bonds issued to railroad companies.

By the Iowa Act of Jan. 19, 1857, irregularities in such bonds were cured, and the bonds already issued were declared valid.

[*Mr. Justice MILLER* did not sit in this cause.]

[No. 413.]

Submitted Feb. 11, 1869. Decided Mar. 1, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below by the defendant in error, upon certain bonds issued by the County of Lee, Iowa. The action was removed to the Circuit Court for the Northern District of Illinois. A motion to remand the case having been denied, and judgment given for the plaintiff, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. Geo. W. McCrary, J. M. Casey, and Francis Semple, for plaintiffs in error:

1. The County is not liable on these coupons, for the reason that there was no legal power in the County to subscribe for such stock, and the utter want of authority to issue said bonds.

2. Prior to the date of the bonds and interest coupons, certain suits were instituted in the District Court of Lee County, Iowa, assailing the validity of such bonds if issued, and claiming that the county judge, who was then the fiscal agent of the County, should be enjoined from issuing such bonds.

The courts of the State adjudged such bonds to be null and void, and the collection of the same was perpetually enjoined.

We would most respectfully invite the atten-

NOTE.—Municipal bonds, how affected by change of ruling of highest court of State, or by change in constitution. See note to Mitchell v. Burlington, 71 U. S., XVIII., 350.

tion of the court to the statutes and judicial decisions of our Supreme Court in regard to the emit power of the County to subscribe stock and bonds to aid in the construction of railroads.

Sec. 114 of the Code of Iowa, 1851; *Stokes v. Scott Co.*, 10 Ia., 166, and cases there cited; *State v. Wapello Co.*, 13 Ia., 389; *Myers v. Johnson Co.*, 14 Ia., 47; *McMillan v. Boyles*, 14 Ia., 107; *Rook v. Wallace*, 14 Ia., 598; *Smith v. Henry Co.*, 15 Ia., 385; *Ten Eyck v. Mayor of Keokuk*, 15 Ia., 486.

Messrs. Jas. Grant and F. A. Dick, for defendants in error.

(See, also, arguments in the following case.)

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The case is this: A suit was brought by Rogers against the County upon several bonds issued by it to the Keokuk, Mount Pleasant and Muscatine R. R. Co., to collect the interest or coupons annexed.

The defense set up is, that the judge, the fiscal agent of the County, who had issued the bond, possessed no authority; that a bill had been filed by McMillan and others against him, on the 1st October, 1856, in a state court, before any bonds were issued; and such proceedings were had that he was enjoined on account of irregularities in the preliminary proceedings, at the December Term, 1856; that soon afterwards, in January, 1857, the Legislature passed an Act confirming and legalizing these proceedings; that a second bill was filed by the same party on the 26th February, 1859, a year after this Act of the Legislature, for the purpose of having the Act declared void, and also the bond, which in the meantime had been issued; and such proceedings were had that a decree was rendered, declaring both the Act and the bonds valid and binding. This was on the 22d June, 1858.

A third bill was filed, which was a bill of review of the previous case on the 28th July, 1860, two years after the previous decree, and such proceedings were had that, on the 18th October, 1862, a decree was rendered declaring the Act of the Legislature, and the bond, void and of no effect.

The above is the substance of the answer and amended answer, as explained by the exhibits annexed to them, and presents the case upon which the rights of the parties must be determined, as the plaintiff demurred to the answer.

The defense is placed, by the learned counsel for the defendant, in his brief, upon two grounds:

I. That the County is not liable, on the bonds or coupons, for the reason there was no power in the County to subscribe for the stock, to the Railroad Company, or to issue the bonds; that they are void, as against the Constitution and Laws of the State.

II. That prior to the date of the bonds and coupons, certain suits were instituted, in the District Court of Lee County, impeaching the validity of the bonds, if issued, and charging that they would constitute no indebtedness against the County, and claiming that the

county judge, who was the fiscal agent of the County, should be enjoined from issuing the bonds; that an injunction was granted, and that the bonds were issued, *lis pendens*, and put on the market, with full notice of the pendency of the suit; that this suit was continuously and successfully prosecuted, and the courts of the State had adjudged the bonds to be null and void, and the collection of the same perpetually enjoined.

I. As to the power of authority of the County to subscribe for railroad stock, and to issue bonds therefor

Much the largest portion of the brief of the counsel is devoted to a very able discussion of this question. But, after the decision of this court in the case of *Gelpcke v. Dubuque*, 1 Wall., 176-223 [68 U. S. XVII., 520-581], and the series of cases following it, we must decline a re-examination of the question. We regret the difference of opinion on the subject of these bonds, between this court and the courts of the State of Iowa; but it involves a principle and rule of property, in our opinion, so just and so essential to the protection of the rights of the *bona fide* holder of this class of securities, that, however much we may respect the judgment of those differing from us, we cannot give up our own. That difference, as we understand it, consists in this: this court held, in *Gelpcke v. Dubuque*, that bonds, issued by counties, cities or towns in Iowa, to railroad companies, for stock in said companies, and which said bodies, at the time the bonds were issued, were held, by the settled adjudications of the highest courts of the State, to possess full power, under its Constitution and Laws, to issue the same, are ever after valid and binding upon the body issuing them, in the hands of a *bona fide* holder. Since these bonds were issued, and in the hands of *bona fide* holders for value, the courts of Iowa have reversed their previous decisions, and now hold that these bodies possess no such power under the Constitution and Laws of the State, and hence they are void, even in the hands of the *bona fide* holder. The learned and elaborate argument of the counsel for the plaintiff in error, in this case, is devoted to the support of these more recent decisions, and the earnestness and care with which he has discussed the question, which series of cases shall prevail, leave no doubt of the sincerity of his conviction. But, for the reasons stated, we must respectfully decline following him.

II. The second ground of defense involves the question of notice to the plaintiff below, or, in other words, the effect of the *lis pendens*, as claimed by the counsel. In order to examine this branch of the defense understandingly, it will be necessary to recur, for a few moments, to the facts as they appear in the answer.

The first suit, by *McMillen v. Boyles Co. Judge*, was commenced by petition or bill, October, 1856, and terminated in a decree to enjoin the defendant, December Term thereafter.

The opinion of the Supreme Court, in this case, is in the record. It is also reported in 3 Iowa 311. The court held, the election, by the voters in the county, under the direction of the county judge, to have been irregular in several particulars, as not being in conformity to the Act providing for a submis-

sion of the question of subscribing for the stock and issuing the bonds. At this time it does not appear that any stock had been subscribed for or bonds issued. The question was presented, in this case, and pressed by counsel for the petitioner, whether or not the County possessed competent power to issue the bonds under the Constitution and Laws of the State.

Judge Stockton, who delivered the opinion, as it respects this question, observed: "We do not deem it expedient or necessary, at the present time, to enter into an examination of the other questions presented and discussed by counsel. Their inherent importance, and the great interest felt in their decision by a large portion of the people of the State, admonish us of the patient study and deliberation with which their investigation must be attended. Another reason," he observes, "which has had its weight with us, is, it is understood that the questions raised have been pressed upon, and decided by, the former members of this court, in the case of *Dubuque Co. v. D. & P. R. R. Co.*"

Soon after this decision, the Legislature being in session, an Act was passed to cure the defects in the proceedings before the county judge, in the submission of the question to the voters, which became a law on the 29th January, 1857. This Act is very comprehensive. After confirming the proceedings in the 1st section, it declares that "the subscriptions made by said County, etc., and the bonds of said counties, etc., issued in pursuance of said votes and subscription, or hereafter to be issued, are hereby declared to be legal and valid; and that all such bonds issued, and hereafter to be issued, in pursuance of such votes and subscriptions shall be a valid lien upon the taxable property of said County, etc."

The 2d section is equally emphatic. It provides, [that "the county judge, etc., or other proper authorities of said County, etc., shall levy and collect a tax to meet the payment of the principal and interest of such bonds; and the counties, etc., shall not be allowed to plead in any suit brought to recover the principal or interest of such bonds, that the same are usurious, irregular, or invalid, in consequence of the informalities cured by this Act."

The 3d section re-affirms the validity of all bonds theretofore issued by the County, and the subscriptions to the railroads, notwithstanding any informalities or irregularities in the submission of the question to the vote of the people.

A second suit was brought by petition or bill, by *McMillen* and others, against the judge of the County, on the 26th February, 1858, to enjoin him from levying a tax, and to have the confirmatory law declared to be unconstitutional, and the bonds void. This suit was commenced more than a year after the passage of the Act; and such proceedings were had therein, that the District Court of the County of Lee dismissed it; and, on appeal, this decree was affirmed on the 22d June, 1858. The opinion of the court is in the record, and is also reported in 6 Ia., 391. The opinion was delivered by Chief Justice Wright. He observes, "The power of a county to take stock in a company organized for the purpose of constructing a railroad, or other public improvement, through

the same, has been recognized by a majority of this court in the following cases." He then refers to *Dubuque Co. v. D. & P. R. R. Co.*, 4 Greenl., 1; *Leech v. Bissel Co. Judge and Clapp v. Cedar Co.*, 5 Ia., 15, and *Ring v. Johnson*, decided at the present term. 6 Ia., 265. He adds, "While I have never concurred in this ruling, and still deny the power, yet it may now, as I suppose, be regarded as settled." He then examines the question whether the Legislature had power to pass the Act of 29th January, 1857: and whether it had the effect of legalizing the vote taken in Lee County, and comes to the conclusion that the Legislature was perfectly competent to legalize and make valid the proceedings before the county judge.

This decision of the highest court of the State upon the power of the County to issue the bonds, of which those in question are a part, and also upon the power of the Legislature to confirm the irregularities committed in the preliminary steps to their issue, would seem to have put an end to any controversy concerning them. They have the sanction of both the legislative and judicial departments of the State. Higher authority could not be invoked in their favor. If the holders or purchasers cannot confide in these sanctions in parting with their money, they may well despair of any safety or security in their dealings in them.

Now, what is the answer to all this authority?

On the 28th July, 1860, two years after this judgment affirming the validity of the bonds, a petition or bill of review was filed in a district court for the purpose of obtaining a re-examination of the judgment; and such proceedings were had, that on the 18th October, 1862, the Supreme Court adjudged that the bonds and coupons, together with the vote of the County of Lee, by which it is claimed they were authorized, and the subscription to the stock of the railroad companies, and all other acts and things done in and about the premises by the county judge and his predecessors in office, and the levy of taxes, etc., are all unauthorized by law and utterly void; and that the Act of the Legislature curing or attempting to cure the irregularities in the vote of the County are also held to be null and void. This case is reported in 14 Ia., 107. It is due to the learned counsel for the plaintiff in error to say, that he does not put this branch of the defense on the ground that the last decision in the case should prevail over the prior one holding the bonds to be valid, after the legislative sanction; but puts it on this ground in his own words, namely: "That the court erred in sustaining to the demurrer to the answer and amended answer of defendant, in so far as they set up the pendency of a suit to cancel said bonds at the time of their issue, and at the time of plaintiff's purchase, and which suit being continuously prosecuted resulted in a decree declaring invalid the bonds."

Now, there are two answers to this ground of defense: first, the suit brought to enjoin the issuing of the bonds for irregularities in the vote of the County, and the judgment enjoining the judge was disposed of by the confirmatory Act of the Legislature. By that Act the irregularities were cured, and the bonds already issued or thereafter to be issued were declared

valid. After this Act notice was an element of no importance. The suit was at an end. The whole foundation on which it rested was removed. This was so regarded by the plaintiffs, for two years afterwards they brought a second suit to have the bonds declared void for want of power in the County to issue them; and also the Act of the Legislature for the want of power to confirm the irregularities in the vote. The decision in that case, however, as we have seen, was adverse to both these propositions.

In the second place, there was no pending litigation from the commencement of the first suit to the termination of the last, namely: from the 15th of October, 1856, to the 18th of October, 1862.

There were three distinct and independent suits, with an interval of one year between the first and second, and of two years between the second and third. The doctrine of *lis pendens*, therefore, has no application to the case.

This case was removed from the Circuit Court of the United States for the District of Iowa to the circuit for the Northern District of Missouri, under the Act of Congress of the 2d of February, 1839, and a question had been made whether this Act was not repealed by an Act passed March, 1863. As this is the principal question in another case between the same parties we shall dispose of it in that case. [See next following case].

The judgment below affirmed.

Cited—8 Wall., 585; 97 U. S., 104; 100 U. S., 523; 105 U. S., 295; 107 U. S., 34; 2 Wood, 512; 2 Abt. U. S., 90; 1 Dill., 528; 52 Ind., 567; 12 Am. Rep., 443 (7 Kan., 506); 36 Am. Rep., 648 (80 N. Y., 449).

THE BOARD OF SUPERVISORS OF LEE COUNTY, IOWA, *Plff. in Err.*,

THE UNITED STATES, *ex rel. EVANS ROGERS.*

(See S. C., 7 Wall., 175-181.)

Repugnancy between Acts of Congress—Marshal may levy tax to pay judgment against county.

There is no repugnancy between the two Acts of Feb. 23, 1839, in regard to the transfer of causes to another circuit, and that of March 3, 1863, as to a circuit being held by a judge of another circuit.

A Marshal may be appointed a commissioner to levy a tax in satisfaction of a judgment upon the taxable property of a county.

[No. 412.]

Submitted Feb. 11, 1869. Decided Mar. 1, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

A writ of *mandamus* in this case was sued out in the United States Circuit Court for the District of Iowa, to compel the Board of Supervisors of Lee Co., Iowa, to levy and collect a tax for the purpose of paying a certain judgment. The case was removed to the court below by the court, the judges being taxpayers of Lee County. A motion having been made

to remand, it was denied, and an order made appointing the United States Marshal for the District of Iowa as a commissioner to levy and collect such tax, and to satisfy the claim of the plaintiff. Whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. Geo. W. McCrary and D. F. Miller, for plaintiffs in error:

1. The court below erred in overruling the motion to remand this cause to the Circuit Court of the United States for the District of Iowa, at Des Moines.

The old practice was in accordance with the action of the Circuit Court for the District of Iowa, but we insist that the rule was changed by the Act of March 3, 1863, 12 Stat. at L., 753, ch. 93; Conkl. Tr., 84.

The circuit court erred in appointing a commissioner to levy and collect the necessary tax for the payment of plaintiffs' judgment.

1. There is no prayer in plaintiff's petition asking any such relief as this.

2. If a bill in chancery had been filed asking this very relief, it would have been denied, on the ground that there is an adequate remedy at law by *mandamus*. *Walkley v. Muscatine*, 6 Wall., 481 (78 U. S., XVIII., 930).

3. Under the laws of Iowa, taxes can only be levied and collected by the proper officers of the County. Rev. of 1860, ch. 45.

It is not the province of a court, in a case of *mandamus*, to appoint an officer and confer upon him power to act instead of the legally constituted official.

Messrs. Jas. Grant and F. A. Dick, for defendant in error:

There are two reasons, either conclusive, that the Act of Mar. 3, 1863, was not intended to repeal, and does not repeal, the Act of 1839.

The Act of 1839 relates to transfers from both judges, or the judge who tries the case, and relates solely to causes which disqualify them or him from sitting.

The Act of 1863 refers solely to the Judge of the Supreme Court who holds the circuit court, and authorizes him to call in another circuit judge, not only from disability to try the cause when he is interested, but for absence, accumulation of business, or any other cause; and the title of the Act is "To Give Greater Efficiency to the Judicial System."

Secondly. The Act of 1839 authorizes the transfer of the cause upon the application of either party, and the court must transfer the cause.

The Act of 1863 leaves the matter of inviting another judge to hold the circuit to the sole discretion of the Supreme Judge holding, or who is required to hold, the circuit.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

This is a suit by *mandamus*, on behalf of the relator, to compel the Board of Supervisors of the County of Lee, in the State of Iowa, to levy a tax upon the taxable property of the County, sufficient for the purpose of paying a

See 7 WALL.

judgment of \$11,552.81, recovered against it for interest upon certain bonds issued by said County, and for the payment of which interest, according to the laws of the State, the said tax was to be levied. Such proceedings were had in the cause that, on the 24th November, 1868, the court ordered that a writ be issued to the Marshal of the United States for the District of Iowa, commanding him to levy and collect the taxes named in the peremptory writ of *mandamus* and, when collected, to pay the said judgment. The order was entered upon the refusal of the Board of Supervisors to obey the *mandamus*, and in pursuance of the Statute of the State of Iowa in such case made and provided.

The cause was originally brought in the Circuit Court of the United States for the District of Iowa, and removed from that circuit to the Circuit Court for the Northern District of Illinois, under the Act of Congress of the 29th February, 1839. A motion was made to remand it on the ground that this Act had been repealed by the Act of March 3, 1863; which motion was denied.

The only questions made by the counsel for plaintiff in error are: 1. That the court below erred in overruling the motion to remand the cause to the Circuit Court of the United States for the District of Iowa; and, 2. In making an order for the appointment of the Marshal of the United States for the District of Iowa, as a commissioner to levy and collect a sufficient tax upon the property of Lee County to pay and satisfy the judgment of the plaintiff below.

1. The Act of 1839, sec. 8 (5 U. S. Stat., p. 329), provides that in all suits in any Circuit Court of the United States, in which it shall appear that both the judges, or the one who is solely competent to try the same, shall be in any way interested, or shall have been counsel, or connected with either party so as to render it improper to try the cause, it shall be the duty of such judge, or judges, on the application of either party, to cause the fact to be entered on the records of the court, and make an order that an authenticated copy thereof, with all the proceedings in the suit, shall be forthwith certified to the most convenient circuit court in the next adjacent State, or in the next adjacent circuit, which circuit court shall, upon such record and order being filed with the clerk, take cognizance thereof in the same manner as if such suit had been rightfully and originally commenced therein, and shall proceed to hear and determine the same; and the proper process for the due execution of the judgment or decree rendered therein, shall run into and be executed in the district where such judgment or decree was rendered; and, also, into the district from which such suit was removed.

The section of the Act of March 3, 1863 (12 U. S. Stat., p. 768), which, it is claimed, repeals this Act, provides that whenever the Judge of the Supreme Court for any circuit, from disability, absence, the accumulation of business in the circuit court in any district within his circuit, or from his having been counsel, or being interested in any cause pending, or from any other cause, shall deem it advisable that the circuit court should be holden by the judge of any other circuit, he may request, in writing, the judge of any other cir-

cuit to hold a court in such district during a time named in such request.

It will be observed that the two Acts are very different from each other in their general purpose, scope and intent.

The first provides only for the removal and trial of a suit in which the judges are disqualified to try the particular cause on account of interest, or having been counsel or connected with either party. The second Act is more general, and in the events named the judge is to be invited to hold the court for a given session or term, to be named. It is true that the reasons assigned in the section for calling on the judge, embrace two of those assigned in the Act of 1839 for the removal to an adjacent court, namely: interest, and having been counsel; but this enumeration is not of much importance in the interpretation of the Act, for after the enumeration it is added, or "from any other cause;" so that the judge would be authorized for a cause not enumerated to call in the judge to hold a session for any time specified, and during which he would no doubt be fully competent to try any cause coming even within the enumeration. The frame of the section, we think, shows that the main purpose of the provision was to procure a judge to hold a session or term of the court, and not to try a particular cause which the resident judge was incompetent to try. But the more decisive difference between the two Acts is, that the power conferred by the latter is permissive and discretionary, whereas the former is express and mandatory. The action of the judge in the latter Act depends upon the question whether or not he deems it advisable that the circuit judge of another circuit shall be called in; in the former it is made the duty of the judge, on the application of either party, to cause the fact to be entered in the records of the court, and to make the order of removal. In the latter Act it is also discretionary with the judge requested to hold this circuit. The condition of his own circuit may render it inexpedient, or his refusal unavoidable; in the former it is the duty of the circuit to which the cause is removed to take cognizance of the same and try it as if originally brought in that court. We are of opinion, therefore, that there is no necessary repugnancy between the two Acts, and although in some particulars the two provisions have reference to the same subject, and for the purpose of remedying a common inconvenience, there are no negative words in the latter Act, and to this extent the remedy may be well regarded as simply cumulative.

II. The next question is as to the appointment of the Marshal as a commissioner to levy the tax in satisfaction of the judgment.

This depends upon a provision of the Code of the State of Iowa. Section 3, 770, p. 666, provides: "The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the Act being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court, as the court or judge may order; and the court may

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render judgment for the amount of such expense and costs, and enforce payment thereof by execution."

This provision is found in a chapter regulating proceedings in the writ of *mandamus*; and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, fine and imprisonment. It is given by way of an alternative proceeding in execution of the peremptory writ in lieu of the attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the County, to pay the principal and interest of these bonds, was specially enjoined upon the Board of Supervisors by the Act of the Legislature that authorized their issue, and the appointment of the Marshal as a commissioner, in pursuance of the above section, is to provide for the performance of this duty where the Board has disobeyed or evaded the law of the State and the peremptory mandate of the court.

This section is but a modification of the law of England and of the New England States, which provides for the execution of a judgment recovered against a county, city or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people.

It is said that this practice, prescribed for the state courts of Iowa, has not been adopted by the United States circuit for that district, and hence that it is not competent for the court, in the present instance, to follow this mode of proceeding. But the answer is that the court having charge of the cause under the Act of 1839 is fully competent to adopt it in the particular case, as its power is the same over it as if it had been a suit originally brought in the court.

For the above reasons we think the judgment of the court below was right and should be affirmed.

Cited—19 Wall., 117, 118; 93 U. S., 264; 98 U. S., 398 4 Am. Rep., 166, 173 (28 Iowa, 88).

THE COUNTY OF WASHINGTON, *Ptf.*
in Err.,

v.

CLARK DURANT.

(See S. C., 7 Wall., 694.)

A cause cannot be brought into this court by agreement of parties.

An appeal allowed, or a writ of error served, is essential to the jurisdiction of this court.

[No. 105, of Dec. Term, 1865.]

Submitted Jan. 26, 1866. Decided Feb. 2, 1866.

IN ERROR to the District Court of the United States for the District of Iowa.

Mr. Chas. Mason, for plaintiff in error.

Mr. Jas. Grant, for defendant in error.

Mr. Chief Justice Chase delivered the opinion of the court:

This cause was submitted on a printed argu-

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ment for the defendant in error. Upon looking into the record, we find that it has been brought into this court by agreement of parties, and without the issuing or service of a writ of error. We think that an appeal allowed or a writ of error served, is essential to the exercise of appellate jurisdiction of this court.

The appeal in this case is, therefore, dismissed.

WILLIAM R. DUTTON, *Plff. in Err.*,

v.

JOHN G. PALAIRET, RICHARD T. PALAIRET AND JOHN G. BOOTY.

Contract payable in gold coin cannot be discharged in lawful money except by adding the premiums on gold.

Bronson v. Rodes, ante, 141, followed.

Upon a bond and mortgage payable in gold coin of the U. S. standard weight and fineness, the plaintiff is entitled to recover in lawful money of the U. S., to be calculated according to the market rate of premium for gold at the time of the breach of the contract.

[No. 184.]

Passed Nov. 3, 1869. Decided Nov. 8, 1869.

IN ERROR to the Supreme Court of the State of Pennsylvania.

This action was brought in the District Court for the City and County of Philadelphia, upon a bond and mortgage payable in "gold coin of the United States of the present standard weight and fineness." Upon the trial, the judge charged the jury that the plaintiffs were entitled to recover "in lawful money of the United States, to be calculated according to the market rate of premium for gold at the time of the breach of the contract, that is to say, at the rate of \$144 in lawful money for every \$100 in gold," to which charge the defendant excepted, and thereupon sued out a writ of error to the court below. That court having affirmed the judgment, the defendant sued out this writ of error.

Mr. David W. Sellers, for plaintiff in error.

No counsel appeared in this court for defendant in error.

Mr. Chief Justice Chase delivered the opinion of the court:

The same questions, substantially, are presented in this case as in the case of *Bronson v. Rodes* [*ante*, 141], heretofore decided at this term. The principles settled by that judgment require that the judgment of the Supreme Court of Pennsylvania be affirmed, and it is so ordered.

THE UNITED STATES, *Appt.*,

v.

THE SCHOONER DIANA AND CARGO.

(See S. C., 7 Wall., 354-361.)

When vessel may enter blockaded port—absolute necessity.

A vessel may be in such distress as to justify her in attempting to enter a blockaded port.

See 7 WALL.

The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt.

[No. 87.]

Argued Feb. 18, 1869. Decided Mar. 1, 1869.

APPEAL from the District Court of the United States for the Southern District of Florida.

The schooner *Diana* was captured Nov. 26, 1862, by the U. S. steamships, *Kittatinny* and *Henry James*, off Pass Cavallo, on the coast of Texas, and taken to Key West for adjudication as prize of war.

A libel in prize against the vessel and cargo was filed in the court below Dec. 17, 1862. On the 26th of the same month a claim was filed by the master of the vessel in behalf of John Cabada, of Campeachy, Mexico, the alleged owner of the schooner, and in behalf of Miguel Canno, a Spanish subject, residing at Campeachy, the alleged owner of the cargo. Feb. 6, 1863, a claim was filed by Idela Cabada, alleging his ownership of said vessel, and that the owner of the vessel had let her to one Miguel Canno on freight for a voyage from Campeachy to Matamoras, Mexico, in good faith.

Feb. 17, 1863, a decree of restitution was entered, from which decree the United States appealed.

Messrs. W. M. Evarts, Atty. Gen., J. Hubley Ashton, Asst. Atty. Gen., and N. Wilson, for appellant:

The position of the vessel at the time of the capture renders it grossly improbable that the intention of the master was an innocent one. Port Cavallo light, within three miles of which the capture was made, stands at the entrance of Matagorda Bay. The Town of Lavacca, Texas, is at the head of the bay. On her voyage from Campeachy the vessel passed Matamoras and went two hundred miles beyond, and away from her port of destination. Port Cavallo light is two hundred miles northeast of Matamoras.

If the vessel was in distress, her distress was, in all probability, occasioned by voluntary and intentional exposure, made for the purpose of receiving some injury that would cloak the real object of the voyage. The vessel measured but fifty-four tons, and a voyage across the Gulf in the month of November was a hazardous one. The first accident that happened, and which was a trifling one, being the breaking of the clamp of the hook of the foresail, was made the excuse for a deviation from her course when only three days out from Campeachy. Certainly the injuries the vessel suffered did not constitute that "absolute and unavoidable necessity which will justify a breach of blockade." 2 C. Rob., 124; 5 C. Rob., 27; 3 Wall., 223 (70 U. S., XVIII., 95).

(No counsel appeared in this court for appellee.)

Mr. Justice Field delivered the opinion of the court:

The schooner *Diana* was captured in November, 1862, off Cavallo, near the entrance

NOTE.—Blockade; what constitutes; right to; violation of; penalty for; termination of; inquiry at blockaded port; necessity may justify entry of such port. See note to Prize Cases, 67 U. S. (XVII.), 450.

of Matagorda Bay, on the coast of Texas. According to her papers, she was on a voyage from Campeachy, in Mexico, to Matamoras, at the mouth of the Rio Grande; but at the time of her capture she had been fourteen days at sea and had passed two hundred miles beyond her alleged port of destination. We have no doubt that she was then seeking to enter a blockaded port on the coast. The master states in his deposition that the vessel, if she had not been captured, would have first entered the nearest convenient port, and afterwards gone to Matamoras, and that for twenty-four hours previous to her capture he was steering the vessel toward the coast in hopes of making a harbor or a beach. One of the seamen testifies that the vessel was running along the coast for an entrance; that at the time of her capture she was only three miles from the lighthouse of Pass Cavallo point, and but for the capture would have entered the Port of Cavallo.

Nor do we doubt that it was the object of the voyage to trade with the enemy, and for that purpose that the owners of the vessel and cargo intended to violate the blockade. The excuse offered by the master for the position in which the vessel was found—that she had been injured by stress of weather, and he was approaching the coast with no other motive than that of seeking shelter to repair the damage—is inconsistent with various facts developed by the evidence.

In the first place, the papers of the vessel purport that she was consigned to one San Roman, at Matamoras, but the instructions from the owners of both vessel and cargo show that this consignment was colorable, and that the master was the real consignee. He was clothed with full authority to dispose of the goods on board, and to invest the proceeds in what is very mysteriously termed the article, which they had mentioned to him verbally. The article to which allusion is thus made was cotton, which it was, undoubtedly, the object of the voyage to procure.

In the second place, the articles which composed the cargo were as abundant and cheap at Matamoras as at Campeachy, whilst they were in great demand and of high price in the country occupied by the enemy.

In the third place, the vessel had on board, ostensibly as a passenger, but under a fictitious name, an Englishman, who was a pilot, and a resident of Lavacca, a town at the head of Matagorda Bay, for which the vessel was evidently directing her course when captured.

Besides these considerations, which are sufficient of themselves to justify the conclusion that a violation of the blockade was in the original intention of the owners of vessel and cargo before the vessel sailed from Campeachy, it was admitted by the master at the time of the capture that it was his purpose to run the blockade, and that he had before attempted, without success, to do so at St. Louis Pass. The Englishman on board, who joined the vessel at Campeachy, also stated that he was engaged to act as pilot of the vessel to enter Matagorda Bay, or any other convenient Port of Texas.

The blockade of the coast of Texas had been established long before the vessel sailed from Campeachy, and its existence was generally

known. It is proved that it was known to the owners and master of the captured vessel.

There is another circumstance which may be adverted to in this connection. The master of this vessel was also the master of *The Sea Witch*, which was captured off the coast of Texas for an attempt to violate the blockade, and was released on the ground, that whilst on a voyage from Matamoras to New Orleans she was driven out of her course by stress of weather and injuries received—an excuse similar to the one offered in this case.

6 Wall., 242 [73 U. S., XVIII., 786.]

This circumstance the court will take notice of, and it will justify a rigid scrutiny into the character of the exculpating testimony produced by the master in the present case. Such is the language of the adjudged cases.

The Juffrouw Elbrecht, 1 C. Rob., 127; *The Experiment*, 8 Wheat., 261.

The statement of the master as to the extent of injuries which the vessel had received is not supported by the log-book. The injuries which are shown by its entries were not of a very serious character—such as would endanger the safety of the vessel. Much less do the entries show the necessity of any deviation of the vessel from a direct course to Matamoras. The statement is, that she deviated from such course on the third day out from Campeachy, because the sea and wind were heavy, and the rigging of the vessel had been damaged. The log book shows that the damage was repaired the following morning, and on the next day that the wind was fair for sailing in a direct course to Matamoras, and so continued nearly all the time up to the capture.

It is undoubtedly true that a vessel may be in such distress as to justify her in attempting to enter a blockaded port. She may be out of provisions or water, or she may be in a leaking condition, and no other port be of easy access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. "Nothing less," says Sir William Scott, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offense. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretenses of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose.

The decrees of the court below must be reversed, and that court directed to enter a decree condemning the vessel and cargo as lawful prize; and it is so ordered.

WILLIAM SHEETS, *Appt.*,

v.

HENRY R. SELDEN, H. WOODRUFF AND
N. E. PAINE.

(See S. C., 7 Wall., 418-425.)

Ejectment for non-payment of rent, stayed by payment—other actions on covenants of lease—lease of surplus waters—reduction of rents on—ejectment for rent not stayed unless rent be tendered.

Where recovery was had in ejectment for the

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non-payment of the rents reserved in a lease, courts of law and equity, upon the rent due, with interest and costs, being paid, may stay the proceedings.

In actions on other covenants pertaining to leasehold estates, where the elements of fraud, accident and mistake are wanting and the measure of compensation is uncertain, equity will not interfere.

Where the lease of surplus waters provided but one remedy for a failure of water, which was an abatement for the rent in proportion to the deficiency, claims for offset, repairs, recoupment and damages will not be considered.

A reduction of the rents will not be decreed by a court of equity, after judgment at law for the rents.

Before an action can be brought to restrain ejectment for non-payment of rent, complainant must tender the amount of rent due, after deducting such amounts as the lease stipulates.

[No. 81.]

Argued Feb. 16, 1869. Decided Mar. 1, 1869.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The action of ejectment out of which this case grew, was before this court at the term of 1864, and is reported in 2 Wall., 177 (69 U. S., XVII., 823). The reader is referred to that report for a statement of the case prior to the commencement of this action in June, 1865.

This was a suit in equity, to enjoin the issuing of a *habere facias* on said judgment in ejectment, and for a redemption of said lands from the forfeiture incurred for non-payment of rent.

The bill alleges that after the commencement of the writ in ejectment, and while the same was pending, the appellant tendered to the appellees \$400 as in full for the particular rents for the non-payment of which the forfeitures were declared, and as in full for interest thereon and the costs of suit up to that time, and alleges that the same is brought into court for the appellees, if they will accept the same and waive the forfeiture; but it tenders nothing for rents subsequently or previously accrued. It seeks to avoid such a tender by claiming an equity to set-off against all rents a demand for damages on account of alleged breaches of certain supposed covenants expressed and implied, contained in the leases.

These breaches are for:

1. Inadequacy in the supply of water to the appellant's mills, when by the use of proper and reasonable efforts an adequate supply might have been furnished.

2. Inadequacy of supply, owing to the culpable negligence and gross carelessness of the appellees and their agents, in failing to repair breaches in the canal banks and to remove obstructions created by the growth of grass in the bottom and sides of the canal, etc., and the expense of repairs alleged to have been made by the appellant to render the supply adequate.

3. Not prohibiting lessees under subsequent leases from drawing off needed water from appellants' mill to supply their own.

The bill alleges an excuse for not paying the rents on the lease of 1840, executed to the appellant alone; but it expressly declines to redeem that lease from forfeiture if it should be ascertained, on an account taken, that the appellant owes rent thereon to the appellees.

The appellees demurred to the bill for want of equity.

The demurrer was sustained, but the court at the same time ordered that the appellant have leave to amend his bill, the court being of opin-

ion that the appellant was not entitled to be relieved from the consequences of his forfeiture, unless he should amend his bill so as to tender all the rent, with the interest that had accrued on both leases since the suit in ejectment was begun, and bring the same into court; and the court, by said order, found that there was due for rent, on the lease to Yandes and the appellant, from May 1, 1860, to May 1, 1866, including interest, \$4,494.50; and that there was due on the lease to the appellant, during the same period, with interest, the sum of \$2,347.25; and it was, therefore, ordered that the injunction should be dissolved, unless the appellant should so amend, tendering said sum and bringing the same into court by June 1, then next.

Afterwards, May 26, 1866, the appellant, by his counsel and solicitor, excepting to the opinion of the court sustaining the demurrer to the bill, informed the court that he declined to amend his bill so as to tender all the rent, with interest that had accrued on both leases, and bring the same into court, to wit: \$4,494.50, as computed and found by the court to be due for rent on the lease to Yandes and the appellant, from May 1, 1860, to May 1, 1866, including interest; and \$2,347.75, so as aforesaid computed and found to be due for rent, including interest, on the lease to the appellant.

Wherefore it was ordered and adjudged by the court, that the appellant's bill of complaint should be and was dismissed by the court for want of equity, and the injunction was dissolved at the costs of the appellant; to which rulings of the court the appellant at the time excepted, and prayed an appeal from the judgment and decree to the Supreme Court, which was granted.

Messrs. J. Morrison and L. Barbour, for appellant:

It was assumed on the other side in the court below, that the lessees could claim nothing by way of setoff, or recoupment, for any damages or injury sustained by them, consequent upon their failure to supply water, except an abatement of rents for such time as they might have been deprived of the specified supply, beyond one month in each year, however culpable the appellees might have been, in failing to furnish the stipulated supply.

The appellant does not admit the theory, unless it can be shown that the appellees had used some diligence to furnish the requisite supply. It is averred that the appellant was deprived by the culpable carelessness and gross negligence of the appellees.

And it is also averred that there was generally water in the canal, or that it could have been readily introduced into it from the feeder dam eight miles north of Indianapolis, by the use of proper and reasonable efforts, adequate and sufficient to supply the appellant's said mills, and all the other mills depending upon the canal for a supply.

If these averments would not entitle the appellant to damages against the appellees, as well as to an abatement of rents, then the latter would not be liable had they cut the canal banks and thereby deprived the appellant eleven months in the year.

The demise of the water power and the land is equivalent to a covenant that the water shall be supplied.

Sm. Landl. and Ten., 96; Com. Dig., Covenant, E.

It would only be carrying out the intention of the parties, to hold that the appellees were bound to use at least reasonable efforts to keep the canal in suitable repair, as a means and an indispensable means to the supplying of the water contracted for.

Messrs. T. A. Hendricks and A. G. Porter, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This is a case in equity. The appellant filed his bill to enjoin the execution of a judgment in ejectment. The defendants demurred and the demurrer was sustained.

The court gave leave to amend, upon terms which the appellant declined to accept. A decree was thereupon entered that the bill should be dismissed, and for costs. This appeal brings the case here for review.

With the leave to amend we have nothing to do. The terms imposed were within the discretion of the court, and are not open to examination in this proceeding.

The only question before us is, whether the circuit court erred in sustaining the demurrer and dismissing the case. The bill is very voluminous. We will consider the points to which our attention has been called, so far as is necessary to the proper determination of the rights of the parties.

The recovery was had in the action of ejectment, upon the ground of forfeiture for the non-payment of the rents reserved in two leases.

Both courts of law and of equity have power to give relief in cases of this kind. Courts of law give it upon motion, which may be made before or after judgment. If after judgment, it must be made before the execution is executed. The rent due, with interest and costs, must be paid. Upon this being done, a final stay of proceedings is ordered. *Tidd, Pr.*, 3 Am. ed., 1234; *Phillips v. Doelittle*, 8 Mod., 345; *Smith v. Parks*, 10 Mod., 333; *Atkins v. Chilson*, 11 Met., 115.

The first British Statute upon the subject was the 4th George II., ch. 28. The practice is now regulated by the 15 and 16 Victoria, ch. 76.

Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign. Lord Eldon limited the relief to cases where the lease required the payment of a specific sum of money. The

authorities going beyond this he held to be unsound, and declined to follow them. Speaking of *Wadman v. Calcraft*, 10 Ves., 68, he said the Master of the Rolls in that case held, "that, though against ejectment for non-payment of rent the court would relieve upon a principle long acknowledged in this court, but utterly without foundation, it would not relieve where the right of the landlord accrued, not by non-payment of rent, but by the non-performance of covenants which might be compensated in damages." *Hill v. Barclay*, 18 Ves., 688. Such is now the settled English rule upon the subject. 3 Story, Eq., secs. 1815, 1816; *Davis v. West*, 12 Ves., 475; *Reynolds v. Pitt*, 19 Ves., —; *Gregory v. Wilson*, 10 Eng. L. & E., 138; *Edson v. Lyon*, 3 Ves., 690; *Hill v. Barclay*, 16 Ves., 402. In *Bracebridge v. Buckley*, 2 Price, 300. Baron Wood, in a dissenting opinion, made an earnest and able assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country. 3 Story, Eq., secs. 1815, 1816, and notes.

Lord Redesdale held that where there were unsettled accounts between the landlord and tenant, which could not be properly taken at law, the payment or tender of money on account of the rent might be deferred until the rights of the parties were settled by the decree of the court, but that where the accounts were not of this character, equity would not intervene. *O'Mahony v. Dickson*, 2 Sch. & L., 400; *O'Connor v. Spaight*, 1 Idem, 305.

The recovery in ejectment is an important feature in the case before us. In Indiana the action is regulated by statute, and the judgment has the same conclusiveness and effect as common law judgments in other cases. The judgment against the appellant established the validity of the leases, that he was in possession, his obligation to pay the rents reserved, and that the installments demanded were due and unsatisfied. He is estopped from denying these facts, and from setting up anything in this case to the contrary.

In the case of *Trustees, W. & Erie Canal v. Brett*, 25 Ind., 410, the trustees had leased so much of the surplus water of the canal as might be necessary for the purposes specified. The right was reserved, upon paying for the mill to be built by the lessee, to resume the use of the water leased whenever it might be necessary for navigation, or whenever its use for hydraulic purposes should be found to interfere with the navigation of the canal. It was averred that the trustees had abandoned that part of the canal, and suffered it to go to decay, so that the water power was destroyed, and the plaintiff's mill rendered valueless. The court held that there was no implied covenant to keep the canal in repair, that the express provision for compensation in one case excluded the implication of such right in all others, and that the plaintiff was without remedy. This case, like the one under consideration, was decided upon a demurrer by the defendants.

The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. *Aspden v. Austin*, 5 Q. B. (N. S.), 671; *Pilkington v. Scott*, 15 M. & W., 657. A covenant is never implied that the lessor will make any repairs. *Pomfret v. Ricroft*, 1 Wms. Saund., 321, 322, n. 1; *Kellen-*

berger v. Foresman, 13 Ind., 475. The tenant cannot make repairs at the expense of the landlord, unless by special agreement. *Mumford v. Brown*, 6 Cow., 475. If a demised house be burned down by accident, the rent does not cease. The lessee continues liable as if the accident had not occurred. *Mofft v. Smith*, 4 N. Y., 126. If in such a case the landlord receives insurance money, the tenant has no equity to have it applied to rebuilding, or to restrain the landlord from suing for the rent until the structure is restored. *Leeds v. Chest-lam*, 1 Simons, 146; *Left v. Dennis*, 1 Ell. & Ell., 474.

Trustees, W. & Erie Canal v. Brett is an authority strikingly apposite in this case. In the leases set out in the bill, as in the lease in that case, the parties provided but one remedy for a failure of water. That is, an abatement of the rent in proportion to the extent and time of the deficiency. The contract gives none other. Beyond this it is silent upon the subject. This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them. The appellant is entitled to the remedy specified. *Repressum facit cessare tacitum*. Neither a court of equity nor a court of law can aid him to any greater extent.

This sweeps from the case the claims set up in the bill by the appellant for offset, repairs, recoupment, and damages, leaving to be considered only the claim for a reduction of the rents in the manner stipulated by the parties.

The appellant avers that he abandoned the premises covered by the second lease, that the appellees acquiesced, and that his title thus became vested in them by reverter. This is repelled by the verdict and judgment in the action of ejectment.

He insists that, according to the provision referred to in the leases, he is entitled to a reduction of the rents specifically demanded before the commencement of the action of ejectment. The plaintiffs could not have recovered without proving to the satisfaction of the jury that the exact amount demanded was due. Any failure in this respect would have been fatal to the action. Then was the time for the appellant to assert and prove this claim. He cannot do it now. The judgment is conclusive.

The bill claims reductions of the rents for failure of water from the 2d of October, 1857, when the title of the defendants accrued, down to the 1st of May, 1865, when the last installments, before the filing of the bill, became due, amounting in the aggregate to \$2,649. The rents, during the same period, amounted to a much larger sum. Conceding the appellant's demand to be correct, he should at least have tendered payment of the difference between these two amounts, and interest, before bringing his bill. In not alleging that he had done so the bill is fatally defective.

A case is not presented upon which a court of equity, according to the settled principles of its jurisprudence, is authorized to interpose. The spirit manifested by the appellant throughout the litigation between the parties, as disclosed by the bill, is not persuasive to such a tribunal See 7 WALL

to lend him its aid. We think the demurrer was well taken.

The decree of the Circuit Court is affirmed.

S. C.—2 Wall., 177.
Cited—15 Wall., 477; 49 Ind., 196; 2 Am. Rep., 431 (39 Cal., 153); 16 Am. Rep., 230 (44 Ind., 285); 51 Ind., 106.

THOMAS W. PIERCE, *Appt.*,

v.

THE UNITED STATES;

AND

THE DOVER FIVE CENT SAVINGS BANK, EDWIN D. MORGAN ET AL., AND THE BOATMENS' SAVINGS INSTITUTION, *Appts.*,

v.

THE UNITED STATES.

(See S. C., "*The Floyd Acceptances*," 7 Wall., 686-685.)

Commercial paper, proof of authority to make, when necessary—made by government officers—their authority—their acceptance not binding.

The protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued.

The purchaser of such paper purporting to bind the government must, at his peril, see that the officer had authority to bind the government.

The use of bills of exchange, by the officers of government in cases authorized by law, cannot establish a usage in cases not so authorized.

Usage is not a sufficient reliance as an authority for the acceptance of drafts by the Secretary of War.

There is no express authority to any officer of the government to draw or accept bills of exchange.

A bill of exchange to bind the government, is to be judged by the same rule as other contracts.

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power.

There can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, and such acceptances, cannot bind the government.

The acceptance of accommodation paper, by the Secretary of War for the benefit of the drawers was unauthorized.

If such acceptances were payments in advance of the service rendered and supplies furnished, they are expressly forbidden by law.

[No. 23, 259.]

Argued Jan. 23, 1869. Decided Mar. 1, 1869.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. C. Cushing, C. B. Goodrich, W. W. Boyce, and J. S. Black, for appellants:

The testimony of William H. Russell, one of the drawers and indorsers of the bills declared upon, so far as it had a tendency to defeat or impair the negotiable securities to which he had given credit by his signature as a party, was inadmissible and improperly received by the court below.

Bk. of U. S. v. Dunn, 6 Pet., 57; *Bk. of Metr. v. Jones*, 8 Pet., 12; *U. S. v. Lefler*, 11 Pet., 94; *Henderson v. Anderson*, 8 How., 73; *Saltmarsh v. Tuthill*, 13 How., 229.

NOTE.—*United States as party to bills and notes, rights and liabilities of.* See note to *U. S. v. Barker*, 25 U. S. (12 Wheat.), 559.

The instruments declared upon are bills of exchange; they are absolute upon their face for the payment of money, which is not dependent upon any contingency, nor upon the existence or sufficiency of a particular fund. They were accepted unconditionally. This proposition, it is submitted, cannot be resisted, if the United States as a sovereignty had the capacity to become a party to a bill of exchange. In considering the character of the instruments, the question of authority on the part of Floyd does not appertain to the discussion.

U. S. v. Bk. of Met., 15 Pet., 377; *Chit.*, Bills, 49, 6th ed.; *Mackleod v. Snes*, 2 Ld. Raym., 1481; *Knox Co. v. Aspinwall*, 21 How., 589 (62 U. S., XVI., 208); *Wells v. Brigham*, 6 Cush., 6; *Verner v. Nobleborough*, 2 Me., 121; *Kelley v. Brooklyn*, 4 Hill, 263; *Pierson v. Dunlop*, Cowp., 571; *Mackleod v. Snes*, 2 Str., 762; *Ellison v. Collingridge*, 9 Man. & S., 570.

The United States, as a sovereignty, has authority to enter into any and every contract which the trusts conferred, or the duties imposed upon them may require, unless expressly or by necessary intendment prohibited by the Constitution; and in the absence of a constitutional prohibition, may select the means by which their trusts and duties are to be performed. *U. S. v. Maurice*, 2 Brock., 109.

The contracts of the United States must be entered into by the instrumentality of individuals; the principal officers of the several Executive Departments, especially of the State, of the War and of the Navy, are to a large extent the representatives and agents of the President, and their acts are his acts. In exercising their authority and in performing the functions of their offices, under statutes, they do not act as agents in the ordinary sense of the term, but as principals under the law.

Burrill v. Nahant Bank, 2 Met., 163; *Dunston v. Imp. Gas Light Co.*, 3 B. & Ad., 125.

Whenever the United States becomes a party to a bill, it must be through the Executive branch of the Government.

If the Executive can use bills under any contingency, the state of facts upon which the authority may be exercised is conclusive, and cannot be controlled by any other branch of the government.

Cases in which it appears bills have been used by the government:

Dugan v. U. S., 8 Wheat., 172; *U. S. v. Bradley*, 10 Pet., 359; *U. S. v. Price*, 2 Wash., 460; *Bruce v. U. S.*, 17 How., 441 (58 U. S., XV., 181); *U. S. v. Jones*, 8 Pet., 377; *U. S. v. Buchanan*, 8 How., 85.

If the Executive branch of the Government, acting by the principal officers of one of the Executive Departments, had authority, in the execution of its trusts and duties, to accept bills of exchange under any circumstances, the petitioner is entitled to recover.

The acts of the Secretary of War are, in all matters appertaining to the War Department, the acts of the President, and are to be regarded and respected as such.

Lockington v. Smith, 1 Pet. (C. C.), 466; *Williams v. U. S.*, 1 How., 290; *Little v. Barreme*, 2 Cranch, 170; *Parker v. U. S.*, 1 Pet., 293; *U. S. v. Ellison*, 16 Pet., 302; *U. S. v. Gratiot*, 14 Pet., 537; *Wilcox v. Jackson*, 13

Pet., 498; *Rogers v. Burlington*, 3 Wall., 654 (70 U. S., XVIII., 79).

John B. Floyd, as Secretary, had authority to contract for supplies and transportation for the army. In the execution of the trusts imposed upon the department, it was competent for him to stipulate with a contractor to accept his drafts; to enter into an obligation to pay a sum certain to a contractor, at a time certain. It was competent for Floyd, after a contractor had upon notice supplied himself with the means of transportation which had been accepted by the government, and the trains were ready to start, to accept the drafts of the contractor to the amount of forty or fifty per cent. of the sum which would be due upon the completion of the transportation.

The Secretary had authority, under the Constitution (Const. art. 2, sec. 2), as the principal officer of an Executive Department, and under the Act by which the War Department was established (1789, Aug. 7, ch. 7, 1 Stat. at L., 50), as the representative of the President, to perform the duties enjoined upon or intrusted to him in relation to the army, its supplies and the transportation thereof, using such means and entering into such contracts in the execution of the trusts as he might consider fit and adequate to the purpose to be accomplished.

The Statutes of the United States applicable to the Executive Departments, and especially to the Army and Navy, clearly sustain the position which is taken as to the authority of the Secretary of War. It will appear from these statutes that the Secretary is not prohibited or restrained, in terms or by legal intendment, from the use of bills of exchange. 1 Stat. at L., 49, ch. 7; 1 Stat. at L., 279, ch. 37; 1 Stat. at L., 610, ch. 35, sec. 8; 2 Stat. at L., 535, 536, ch. 28; 2 Stat. at L., 816, ch. 48; 3 Stat. at L., 426, 427, ch. 61, sec. 7; 3 Stat. at L., 721, ch. 5; 4 Stat. at L., 860, ch. 42; 3 Stat. at L., 567, ch. 52, sec. 6; 11 Stat. at L., 266, 269, ch. 25, sec. 4, May 4, 1858; 12 Stat. at L., 91, ch. 305, sec. 8.

From these statutes it is clear that the authority of the Secretary of the War Department to contract may be derived from a special statute without an appropriation, or from an appropriation for a special purpose, or it may be and in many instances is, exercised under general provisions of law, which confer upon him the management of the business of the department.

The statutes do not prohibit the use of bills of exchange; they do not, expressly nor by implication, prescribe the terms nor conditions of the contracts which the Secretary may make; they do, however, confer upon him a large discretion, accompanied with a clear intent that no casualty or contingency shall be permitted to endanger such subsistence or transportation as the army may require. These provisions are not controlled by statutes which establish and define the Treasury of the United States, or by which the disbursement of the public money is regulated.

The Secretary of War, as the head or principal officer of one of the Executive Departments, has been held out by Congress as having authority to accept and to use bills of exchange in the execution of the trusts and duties imposed upon or confided to the department; his

exercise of the authority has been, by implication, clearly ratified and confirmed.

6 Stat. at L., 548, ch. 228; 4 Stat. at L., 755, ch. 27, sec. 2; 6 Stat. at L., 587, ch. 207; 6 Stat. at L., 622, ch. 13; 9 Stat. at L., 40, ch. 65; 11 Stat. at L., 159, 160, ch. 38; 11 Stat. at L., 408, ch. 75; 12 Stat. at L., Private Acts, 878, ch. 10; *Postmaster-Gen. v. Early*, 12 Wheat., 186; 6 Conn., 486; *Ware v. U. S.*, 4 Wall., 638 (71 U. S., XVIII., 898).

The authority of the Secretary to accept bills of exchange must be regarded as *res judicata*, and concluded by authority.

U. S. v. Bk. of Met., 15 Pet., 377; 9 Stat. at L., 690; Mar. 2, 1847.

Congress directed the payment, with interest, of similar drafts which were not before the court in the case cited.

6 Stat. at L., 848, Aug. 1, 1842, *Converse & Rees*; 9 Stat. at L., 153, ch. 84, sec. 4, Mar. 2, 1847, *Howland & Aspinwall*; 9 Stat. at L., 677, Aug. 10, 1846, *Abraham Horback*; 11 Stat. at L., 496, Feb. 10, 1857, *Joseph D. Beers*; *U. S. v. Bailey*, 9 Pet., 255; *U. S. v. Tingey*, 5 Pet., 127; *Dugan v. U. S.*, 3 Wheat., 172; *Tyler v. Hand*, 7 How., 578; *U. S. v. Bradley*, 10 Pet., 359, 360; *U. S. v. Tingey*, 5 Pet., 115; *U. S. v. Arredondo*, 6 Pet., 729; *Decatur v. Paulding*, 14 Pet., 515; *U. S. v. Linn*, 15 Pet., 314; *Brashear v. Mason*, 6 How., 102; *Cotton v. U. S.*, 11 How., 229; *Parks v. Ross*, 11 How., 874; *Neilson v. Lagow*, 12 How., 98; *U. S. v. Guthrie*, 17 How., 808, 804 (58 U. S., XV., 106); *U. S. v. Macdaniel*, 7 Pet., 14; *Hodgson v. Dexter*, 1 Cranch, 345; *U. S. v. Jones*, 8 Pet., 877; *U. S. v. Jones*, 18 How., 92 (59 U. S., XV., 274).

The authority of the Secretary to accept and to use bills of exchange, has from time to time been sustained by the law officers of the government.

3 Ops. of Attys-Gen., 595; *Hon. R. B. Taney*, Mar., 1832; 4th Vol. 90; *Hon. H. S. Legare*, Sept. 12, 1842, in which he refers to the case of *The U. S. v. Bk. of Met.*, 15 Pet., 377; 4th Vol. *Hon. John Nelson*, Dec. 26, 1848, 286, 287; 4th Vol. 299, Dec. 30, in which reference is made to the same case; 4th Vol. 507, *Hon. John Y. Mason*, July 20, Aug. 8, 1846, 518; 5th Vol. 218; *Hon. Reverdy Johnson*, Dec. 6th, 1849, 318; 8th Vol., 1, *Hon. Caleb Cushing*, July 10, 1856.

The statutes relied upon by the government and by the Court of Claims, are not applicable and cannot control the cases or principles upon which the petitioner rests his case.

Messrs. Wm. M. Evarts, Atty-Gen., E. P. Norton, and John J. Weed, for United States:

Our first inquiry is naturally as to the extent of the powers and the authority of the Secretary of War.

John B. Floyd, as Secretary of War, had no authority, in his official capacity, to accept the several instruments in writing, described in the several petitions of these appellants, and binding the United States for their payment.

The Secretary of War is a public agent. He can exercise no authority nor do any act unless the same be authorized by law.

1 Stat. at L., pp. 49, 50; *Parker v. U. S.*, 1 Pet., 296; *U. S. v. Macdaniel*, 7 Pet., 14; *Williams v. U. S.*, 1 How., 290; *Wilcox v. Jackson*, See 7 WALL.

13 Pet., 498; *Gidley v. Palmerston*, 3 Brod. & B., 185.

In the case of *Little v. Barreme*, 2 Cranch, 170, the court decided that the orders of the President, unless made within the scope of his lawful authority, afforded no protection to those who execute such orders. The President, therefore, not less than his secretaries, is limited and restricted by the Constitution and the laws made under it. Neither he nor any of his constitutional advisers have any authority to bind the United States except in accordance with law.

The fact that the Secretary of War is vested with discretion in the administration of those matters which the law confides to him, cannot enlarge nor extend his powers. His discretion extends only to the execution of the laws and regulations of Congress under which he is from time to time required to act.

Decatur v. Paulding, 14 Pet., 515; *U. S. v. Guthrie*, 17 How., 808 (53 U. S., XV., 106); *U. S. v. Eliason*, 16 Pet., 302.

In the argument of this case it is contended that both upon principle and by statute, the following propositions are established:

First. That the officers of the Government of the United States are merely agents, appointed by law to do certain acts and perform certain duties required by law, and that they have no powers beyond those specified in the law which creates their office and defines their powers and duties.

Second. That the Secretary of War is merely an officer appointed to superintend the equipment, subsistence, transportation and other necessary supplies for the Armies of the United States and the War Department. He has no power, by any law or regulation, to bind the government by the acceptance of bills of exchange in his official capacity.

Third. That no quartermaster nor other officer of the War Department can create any liability against the United States, except for articles of transportation, or supplies actually furnished to or used by the Army of the United States.

Fourth. That the Secretary of War can make no contract respecting the furnishing of supplies for his department, unless there be some law authorizing the same, or an appropriation adequate to its fulfillment.

Fifth. That the power of the Secretary of War, in respect to contracts that he may make in regard to the furnishing of supplies for his department, is exhausted when the contract which authorizes him to make has been made by him as the agent of the United States.

Sixth. That it is not within the scope of the powers conferred by law upon the Secretary of War, to provide the means by which the obligations of the government under contracts which he may make, shall be discharged.

Neither the statutes nor the authorities upon which the appellants rely sustain or establish the authority of the Secretary of War to make contracts on behalf of the Government of the United States, by the acceptance of drafts or bills of exchange drawn upon him in his official character.

The principle which may be extracted from the decisions which the counsel for the appellants have cited upon the questions of the authority of the Secretary of War to make contracts by bills of exchange, may be stated as follows:

First. That the decision of a matter committed by authority of law to any of the Executive Departments of the Government, is conclusive, so far as it involves the right of the executive head of a department to exercise discretion and judgment.

Second. That a writ of *mandamus* will not lie, to compel an executive officer to discharge his duty involving his right to exercise discretion.

Third. The United States being a body politic, may, through the instrumentality of its authorized agents, make such contracts as may be necessary, in the performance of duties committed by law to the Executive Departments.

Fourth. The power of agents of the government are determined by law, and their right to exercise discretion is limited to matters committed to them by law.

Fifth. The duties committed by law to the President, may be executed, under his authority, by heads of departments, as his agents.

Sixth. The clear intendment of the law is to prohibit the Secretary of War making contracts by bills of exchange, by which the government shall be bound.

Seventh. Bonds executed by agents of the government for the faithful performance of their duties, although not such as prescribed by statute, may be enforced, if the voluntary obligations and contracts of the persons executing them.

Eighth. That in any and all cases where the authority of the head of an Executive Department to accept the bills of exchange has been recognized, there has been some special circumstance existing or duty enjoined by which such exercise of power might be justified.

The authority of the Secretary of War to accept bills of exchange, is not established from the proof of any usage of either the Executive Departments of the Government to make use of bills of exchange in the transaction of the ordinary business in their several departments.

The usage upon which much reliance is placed by the appellant in this case cannot be maintained, because if it were, it would be in contravention of law. The powers of the Secretary of War are to be determined by statute, rather than by custom or usage. We may resort to custom to determine the manner in which these powers shall be exercised or duties performed, but not for the purpose of ascertaining the expense or source of the authority itself. Usage can neither extend nor limit the powers which the law confers.

Strong v. Bliss, 6 Met., 398; *Frith v. Barker*, 2 Johns., 334; *Dunham v. Dey*, 18 Johns., 44; *N. Y. F. Ins. Co. v. Ely*, 2 Cow., 707; *Brown v. Jackson*, 2 Wash. (C. C.), 25; *Money v. Leach*, 8 Burr., 1787; *Donnell v. Columbian Ins. Co.*, 2 Sumn., 877.

The instruments described in the several petitions of the appellants in the Court of Claims, and upon which they there relied to recover judgment against the United States, are not bills of exchange, and the law merchant has no application to them. They are not assignable; nor does the fact of their assignment confer upon the appellants the right to maintain an action upon them in their own name.

Story, Bills, sec. 46, 121; 8 Kent, Com., 76. It is submitted, therefore, that from these au-

thorities the following propositions are established:

First. That these bills purported to be drawn upon no other funds than that created by the contracts of the drawers with the government.

Second. That their payment was contingent upon the existence of a particular fund, appropriated by Congress for that purpose.

Third. That were the fund exhausted they could not be paid, because they were drawn, not upon the personal credit of the drawers, but upon the moneys which it was expected would become due to them upon contracts not yet performed by them, and upon which the government was not liable to make any payment to them, except as specified in their contracts.

The appellants had sufficient notice of the character of these drafts or bills of exchange, to require them to make inquiry in regard to them.

These principles are fully recognized in the following cases:

State v. Hastings, 10 Wis., 581; *Com. v. Fowler*, 10 Mass., 290; *Murray v. Carothers*, 1 Met. (Ky.), 71.

The facts, appearing upon the face of these instruments, and of which persons purchasing them were bound to take notice, were:

First. That they were accepted by the Secretary of War in his official character. They were, therefore, bound to inquire whether such acceptances were authorized by law.

Second. That they were made payable at a place where the Secretary could not lawfully have any funds deposited on account of the Government of the United States, with which to pay them.

Third. That they were based upon contracts which had been made under the direction of the Secretary of War, for the purpose of meeting the necessities of his department. The persons purchasing these bills, therefore, were bound to inquire whether the contracts on account of which these instruments were drawn had, at the time of their acceptance, been performed, because if they had not been performed, the Secretary of War was prohibited by the Act of Jan. 31, 1838 (Stat. at L., 23), from making any advances to these contractors in favor of whom these acceptances were made.

The evidence offered on behalf of the United States was admissible to show the character of these bills and the circumstances under which they were issued.

Mr. Justice Miller delivered the opinion of the court:

The above named cases are appeals from the Court of Claims. The first is before us in a separate record, and is No. 23 of the docket of the term.

The other three, although distinct claims with separate pleadings, are certified to us as one record with one finding of facts for them all; and they constitute case No. 259 of the docket. They are alike in every respect except the names of the plaintiffs and the amounts claimed. The case of *Perez* differs from the others in some respects; but we shall endeavor to present the considerations which must determine the judgment of the court in all the cases in one opinion.

They are demands against the United States, founded upon instruments claimed to be bills of exchange drawn by Russell, Majors & Wad-

dell, of John B. Floyd, Secretary of War, and accepted by him in that capacity, purchased by plaintiffs before maturity, for a valuable consideration and, as they allege, without notice of any defense to them. The following copy of one of these bills will answer for all, as there is no difference in their verbal structure which is material to the consideration of the matters in issue:

"\$5,000. Washington, November, 28, 1859.

Ten months after date, for value received, pay to our own order, at the Bank of the Republic, New York City, five thousand dollars, and charge to account of our contract for supplies for the Army in Utah.

Russell, Majors & Waddell.

Hon. John B. Floyd,

Secretary of War.

Indorsement: Russell, Majors & Waddell.

E. L. Acceptance: War Department, November 28, 1859. Accepted. John B. Floyd, Secretary of War."

Mr. Pierce, in his petition, relies on the facts that the signature of John B. Floyd, to these acceptances, is genuine, and that he was at the time of the acceptance Secretary of War, as sufficient to establish his claim. He avers that Floyd, as Secretary of War, had authority to accept the drafts, and that by his acceptance the United States became bound. It is evident that he means by this merely to assert, as a principle of law, that, by virtue of his office, the Secretary had such authority, and not that there existed, in this case, special facts which gave such authority; for he mentions no such facts in his petition, and when the solicitors for the defendant undertook to show under what circumstances the bills were issued and accepted, he objected to the evidence. Its admission is one of the alleged errors on which he brings the case to this court.

Both Mr. Pierce and his counsel, therefore, claim to recover on the doctrine that when a party produces an instrument in the form of a bill of exchange, which he has purchased before its maturity, drawn on the Secretary of War, and accepted by him, he has established a claim against the government which admits of no inquiry into the circumstances under which the acceptance was made.

The other defendants, also, in their original petitions, assert and rely upon the same principle; but they have also filed amended petitions, in which they set forth facts connected with the acceptance of the Secretary, which they deem sufficient to establish his right or authority to do so. Most of the facts, found under the issues made by these amended petitions, were also found under the general issue in *Pierce's* case, notwithstanding his objection; so that, if they avail the other plaintiffs, they will also support his claim.

It will be convenient, therefore, to consider, first, the proposition on which he rests his case, which, if found to be sound, disposes of all the cases in favor of plaintiff.

One of the main elements of that proposition, much and eloquently urged upon our attention, seems to be too well established by the decisions of this court to admit now of serious controversy. It must be taken as settled, that when the United States becomes a party to what is called commercial paper—by which is meant

that class of paper which is transferable by indorsement or delivery, and between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper.

Conceding, then, for the sake of argument, that the instruments under consideration are, in form, bills of that character, and that the signature of Floyd is genuine, and that he was at the time Secretary of War, there remains but one question to be considered essential to plaintiffs' right to recover, and that concerns the authority of the Secretary to accept the bills on behalf of the Government.

It is not to be denied, that in the extensive and varied fiscal operations of the Government, bills of exchange are found to be valuable instruments, of which it has the right to avail itself whenever they may be necessary. In the transfer of immense sums of money from one part of the country to another, and in the payment of dues at distant points, where they should properly be paid, it uses, as it ought to use, this time honored mode of effecting these purposes.

In the case of such paper, issued by an individual, when we make ourselves sure of his signature, we are sure that he is bound, because the right to make such paper belongs to all men. But the Government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers confided to them.

An individual may, instead of signing with his own hand the notes and bills which he issues or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the Government. Whenever negotiable paper is found in the market purporting to bind the Government, it must necessarily be by the signature of an officer of the Government and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the Government.

When this inquiry arises, where are we to look for the authority of the officer?

The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must re-

sart in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the Acts of Congress.

The counsel for claimants, not altogether rejecting this view of the matter, maintain that the power is derived—

1. From the true construction of the Constitution and Acts of Congress.

2. From the decisions of the Supreme Court of the United States; by which is probably meant only the authoritative construction of the Constitution and laws.

3. From the usage of the government in similar cases.

We will examine these several alleged sources of the power in the reverse order to that here stated.

1. As regards usage, it must occur at once that if there are instances in which the use of bills of exchange by the officers of government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, cannot establish a usage in cases not so authorized. It may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever by its frequency be made to stand as a just foundation for the very authority which is thus assumed.

It is to be observed in this connection, that the Court of Claims finds as a fact, in *Pierce's* case, that "the evidence fails to establish any usage or practice in the different departments of the government, by virtue of which the Secretary of War was authorized to accept, in behalf of the United States, the bills in suit;" and so far as that case is concerned this inquiry might close there.

But in the finding of facts which the same court makes in the other three cases, it is said, "That it is and has been the practice of the heads of departments, to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered." The usage here found is limited to specified classes of cases, and if authorized by law, can be no evidence of a usage in cases not so authorized. It cannot be held to support the allegation of a usage so general as to apply to any case in which the head of the department may see proper to use it.

We make the further observation in this connection, that while it is readily to be seen that the exigencies of the business of the departments may require drafts to be drawn by them, and may justify drafts being drawn on them, which they ought to and do pay when presented, there can be no occasion for an acceptance, by any department or officer, of a draft drawn on either of them.

We do not think, therefore, that usage is a

sufficient reliance as an authority for the acceptance of these drafts.

2. *The U. S. v. Bank of the Metropolis*, 15 Pet. 877, is the case mainly relied on as establishing the doctrine contended for by plaintiffs, and is confidently asserted to be conclusive of the cases under consideration, unless overruled.

That case undoubtedly did decide, that when an officer of the government, authorized to do so, accepted a draft in behalf of the United States or one of the departments, the validity of the instrument could not be disputed in the hands of an innocent holder. We have already stated this as the established doctrine of this court. And that proposition was the principal, if not the only one, controverted in that case. An attentive examination of it will show that the authority of the officers to accept was not raised by counsel or considered by the court.

The Bank of the Metropolis being sued for certain balances in favor of the United States, pleaded as a set-off a draft drawn by Edwin Porter on Richard C. Mason, Treasurer of the Postoffice Department, at ninety days, and accepted by him as Treasurer; and also four drafts at ninety days, drawn by James Reeside on Amos Kendall, Postmaster-General, and "accepted on condition that his contracts be complied with."

It does not appear to have been controverted that Mason had authority to accept the draft of Porter, by either the counsel for the government or the bank; and the court seem to have treated it as conceded.

The opinion of the court, after stating the facts, opens with the declaration that, "when the United States, by its authorized officer, becomes a party to negotiable paper, they have all the rights, and incur all the responsibilities of individuals who are parties to such instruments." And further on it is said, that "an unconditional acceptance was tendered to it (the bank) for discount; * * * all it had to look to was the genuineness of the acceptance, and the authority of the officer to give it." If this language has any significance, it is that the authority of the officer, like the genuineness of the signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government.

Only a small part of that elaborate opinion is devoted to Porter's draft, and to the questions involved in it, and the remainder of it is occupied in discussing the effect of the condition annexed to the acceptance of Reeside's draft on its commercial character, and to determining what is implied in that condition.

It seems, therefore, quite clear that no consideration whatever was given by the court to what constituted an authority to draw or accept bills of exchange: but that it was impliedly held to be a matter always open to inquiry when the draft was attempted to be enforced against the government. Nor are we aware of any case in this court in which the rule for determining that authority has been laid down.

Recurring, then, to the written law as the exclusive source of such authority, we may confidently assert that there is no express authority to any officer of the government to draw or accept bills of exchange.

Our statute books are filled with Acts authorizing the making of contracts with the govern-

ment through its various officers and departments but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law.

Does the contract, called a bill of exchange, stand on any different footing? It is true, that when once made, by a person having authority to make it, in any given case, it is not open to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness, and good faith which attended its origin, or any of its subsequent transfers; but, in reference to the authority of the officer who makes it, to bind the government, it is to be judged by the same rule as other contracts.

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance, is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing of a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government.

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual.

If A authorizes B to buy horses for him, and to draw on him for the purchase money, B cannot buy land and bind A, by drawing on him for the price. Such a doctrine would enable a man, in private life, to whom a well defined and limited authority was given, to ruin the principal who had conferred it. So it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit. No government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper.

In accordance with these views, we are of opinion, that as there can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government.

An examination of the facts found by the Court of Claims confirms the views already stated.

It appears that Russell, Waddell & Majors, the drawers of the bills, had contracts for sup-

plies and transportation, to be furnished to the Army, in Utah, during the period that these acceptances were given. That by these contracts they were to be paid either by the quartermaster at St. Louis, or by his drafts on his Assistant Treasurer in New York. In all the contracts except one, these payments were to be made on the final delivery of the supplies in Utah; but in one contract there was an agreement that partial payments should be made when the trains were started. In all cases such payments were to be made upon certificates of the proper quartermaster.

The performance of these contracts required a very large outlay of money, and Russell & Co., finding it difficult to advance this and wait for its return until they were entitled to receive payment under their contract, made an arrangement with the Secretary of War, under which these acceptances were given. The arrangement was that they should draw time drafts on him, payable to their own order at the Bank of the Republic in New York, which should be accepted by the Secretary. That on these drafts they could raise the money necessary to enable them to perform their contract, and as the money for the transportation and supplies became due, they should receive it and take up the acceptances of the Secretary before or at maturity. Under this arrangement the Secretary accepted drafts to the amount of \$5,000,000, most of which were taken up by Russell, Majors & Waddell, as agreed; but over \$1,000,000 in amount remain unpaid.

Counsel for the plaintiffs seem to have been of the opinion, from the start, that there was nothing in the nature of the transaction which would support the paper on which they sued, for they steadily resisted all efforts on the part of government to give the facts in evidence; and the arguments made in this court, the right to recover is rested almost exclusively on the proposition that, because in some cases the Secretary might lawfully accept, it must be presumed in their favor that these drafts were lawfully accepted.

It seems to us that such a transaction can be defended on no principle of law, and that, in thus lending to Russell & Co. the name and credit of the United States, the Secretary was acting wholly beyond the scope of his authority. The paper was, in fact, accommodation paper, as it was found to be by the Court of Claims, by which the Secretary undertook to make the United States acceptor for the sole benefit of the drawers. It was a loan of the credit of the government volunteered by him, without consideration and without authority. That the transaction was not payment, nor intended to be payment for the supplies furnished, is clear, because the acceptances were not expected to be paid by the government, nor payable at the treasury, but were to be met by the drawers at the bank with which they dealt. These drafts did not interrupt in the least the regular payments made to Russell & Co. by the Quartermaster's Department, according to their contracts. Nor do the drafts seem to have had any relation to anything due on these contracts, or to what might become due before their maturity. It was, therefore, not payment, nor so considered by either party.

But if these acceptances can be considered as

payments, they were payments in advance of the service rendered and supplies furnished—payments made before anything was due. They are, in that view, not only without authority of law, but are expressly forbidden by the Act of January 31, 1823 (8 U.S.St., 723). The 1st section of that statute, which has never been repealed, enacts "that, from and after the passing of this Act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the services rendered, or the articles delivered previous to such payment."

The transactions by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the government. Every citizen of the United States is supposed to know the law, and when a purchaser of one of these drafts began to make the inquiries necessary to ascertain the authority of their acceptance, he must have learned at once that, if received by Russell, Majors & Waddell, as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority.

It is proper to observe, that it does not appear from this record that anything remains due to Russell & Co., under their contract with the government, or that anything was due them at the maturity of any of these drafts, nor is there any attempt on the part of plaintiffs to show either of these things, or the state of the accounts between these contractors and the government at the time the drafts matured.

These cases have long been before the departments, before Congress, and the Court of Claims, and have been the subject of much laborious consideration everywhere. The amount involved is large, the principles on which the claims are asserted, are, to some extent, new, and we have given them a careful and earnest investigation. *We are of opinion that the judgments rendered by the Court of Claims against the plaintiffs must be affirmed.*

Mr. Justice Nelson, dissenting:

I am unable to concur in the opinion just delivered.

The instruments, in the form of bills of exchange, drawn by Russell, Majors & Waddell, upon, and accepted by Floyd, Secretary of War, were drawn on "account of our contract for supplies for the Army in Utah," or "on account of our transportation contract of the 12th April, 1860."

These are not bills of exchange, in the sense of the law merchant, or possessing the properties of negotiable paper. They are drawn upon a particular fund, in terms which may or may not be sufficient to pay the bills, and hence a contingency exists whether or not they will be paid at maturity. All the cases agree that the money mentioned in the instrument must be payable absolutely and at all events, and not made to depend on any uncertainty or contingency. 8 Kent, Com., 76, 77, and notes; Story, Bills of Exch., sec. 46, p. 56.

The instruments not being negotiable, the assignees or holders taking them are subject to all the equities that may exist between the

acceptor and the drawer, and stand in no better position, in the present case, than Russell, Majors & Waddell. As between these parties and the Government, the obligation assumed by Floyd, as representing it by his acceptance, was to account and to apply all the moneys due, or that might become due, on the contracts for transportation or supplies, specified in the bills or drafts, at their maturity. To this extent the government became bound to the contractors, or to the assignees or holders of the same; and as the acceptance by the Secretary assumes or implies that there were some funds due, or might become due on the contracts in his hands, subject to these drafts, the *onus* was on the government to give evidence to the amount, or to state the account with the drawer, so as to ascertain the amount due, if any. This evidence was peculiarly in the power of the government. As no such adjustment has been made, for aught that appears, the government may now have in its hands moneys belonging to these contractors to pay the drafts.

I am of opinion, also, that under the 6th section of the Act of May 1, 1820, it was competent for the Secretary of War to accept bills of exchange in behalf of these contractors, and that if the bills in question had possessed negotiable properties, the government would have been bound to a *bona fide* holder for value.

That section provides, "that no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment; and excepting, also, contracts for the subsistence and clothing of the Army or Navy, and contracts by the Quartermaster's Department, which may be made by the secretaries of those departments."

It will thus be seen that contracts for the subsistence and clothing of the Army and Navy, by the secretaries, are not tied up by any necessity of an appropriation or law authorizing it. The reason of this is obvious. The Army and Navy must be fed, and clothed, and cared for at all times and places, and especially when in distant service. The Army in Mexico or Utah are not to be disbanded and left to take care of themselves, because the appropriation by Congress, for the service, has been exhausted, or no law can be found on the statute book authorizing a contract for supplies. The above Act confers upon the secretaries full authority to contract for these supplies, and which bind the government; and the most ready and convenient mode of accomplishing this, would be by accepting bills of exchange drawn by the contractors of the distant Army or Navy, upon the secretaries at home.

The credit of the government, thus pledged, would at once furnish the necessary subsistence, clothing and shelter.

Our conclusion is, that the judgment below should be reversed, and the cause remitted, with directions to grant a new trial, and further proofs taken, that complete justice may be done between the parties.

Mr. Justice Clifford concurs in this opinion.

Cited—10 Wall., 686, 675, 683; 91 U.S., 336; 23 U.S., 648; 1 McCrary, 465; 16 Blatchf., 209; 2 Dill., 365; 59 N.Y., 587; 9 Kan., 704; 12 Kan., 216; 45 Mo., 340; 54 Mo., 570.

THE AGAWAM WOOLEN COMPANY,
Appt.,
v.

EBEN D. JORDAN.

(See S. C., 7 Wall., 588-610.)

Real inventor, who is—public use of patent, when not a defense—abandonment, what is not—insufficient objection to letters patent—evasive answer—what damages recoverable.

Whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made some experiments toward putting it in practice.

Suggestions from an employé, not amounting to a new method or arrangement, which, in itself, is a complete invention, are not sufficient to deprive the employer of the exclusive property in the perfected improvement.

That the invention had been on sale and in public use for a long time before, is not a good defense to an action for infringement except on proof that the invention was on sale and in public use more than two years before the application therefor was filed in the Patent Office.

Merely forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, is no abandonment.

Objection that proviso in the Act of Congress authorizing a re-issue of letters patent is not recited in the re-issued letters patent, is without merit where it appears in the record that the certificate of renewal and extension was made subject to the proviso.

Defense that the respondent's machinery was in use before the patent in this case was granted, where it is not alleged that his machinery was in use before the extended patent was issued, is no defense to the charge of infringement of such extended patent.

Evasive answers, under such circumstances, afford strong presumptive evidence against the respondents.

Complainant cannot recover damages for any infringement antecedent to the date of the re-issued patent where the extended patent was surrendered.

[No. 80.]

Argued Feb. 10-16, 1869. Decided Mar. 1, 1869.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The bill in this case was filed in the court below by the appellee, to recover damages for an alleged infringement of certain letters patent, and for an injunction and for other relief.

The court below having entered a decree in favor of the complainant, the respondent took an appeal to this court.

The facts of the case are fully stated in the opinion of the court.

Messrs. C. Cushing, James B. Robb, and W. W. Boyce, for appellant:

The re-issued patent, June 28, 1864, is void because it is not in conformity with the Act of Congress authorizing the extension.

The Act of Congress for the relief of John Goulding, authorized the Commissioner of Patents to grant the extension of the patent or withhold it, the same as if the application had been seasonably made, "provided that such renewal and extension shall not have the effect or be construed to restrain persons who may be using the machinery invented by said Goulding at the time of the renewal and extension hereby authorized, from continuing the use of the same; nor to subject them to any claim or damage for having used the same."

Here is an express limitation of the authority

NOTE.—Impeaching witness by proof of character. Scope of inquiry as to character and time. See note to Teese v. Huntington, 64 U. S., XVI., 479.

See 7 WALL.

U. S., BOOK 19.

vested in the commissioner. The grant is to be limited, so that it shall not be construed to vest in the patentee any right to restrain persons who may be using the machinery at the time of the extension, etc.

This limitation should appear in the grant, and it was so intended by Congress.

It is not only provided that the extension shall not have the effect to restrain persons, etc.; but further, it shall not be so construed. Now, if it had not been intended to qualify this grant by appropriate words of limitation, why were the words "shall not be so construed" added?

By the Act of 1836, ch. 357, sec. 18, in the case mentioned, it is provided that "it shall be the duty of the commissioner to renew and extend the patent by making a certificate thereon of such extension," etc. Now, to construe is to "discover or express the meaning by the right arrangement of the words of a sentence." This certificate was the subject to be construed, and the Commissioner of Patents very properly indorsed upon the patent of 1826, as re-issued July 29, 1836, the extension, "subject to the proviso of the Act of Congress," aforesaid, by which the extent of the rights granted to Goulding was qualified and limited, and the rights of persons therein provided for were protected.

But the plaintiff, the assignee of Mr. Goulding, not being satisfied with the patent subject to qualification or limitation, "presented a petition" (in the language of the patent), "signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose"; and it was done accordingly.

No protection whatever is afforded thereby to an extensive interest and to a numerous class whom it was the intention of Congress to exempt from its operation.

It is respectfully submitted that it is no answer to say that they have the protection of the Act. It was never intended to make it incumbent upon them to appeal for protection to the courts.

This is a private statute; no one entitled to the benefit of the proviso would ever learn it from any suggestion contained in this patent.

Again, it is recited on the face of the patent, that the original "Letters patent were issued to John Goulding, Dec. 15, 1836, which letters having been surrendered, the same were canceled, and new letters ordered to issue to him July 29, 1836, which last letters were extended by the commissioner for the term of seven years from and after Aug. 30, 1862"; that is, it appears upon the face of this patent, that it was extended nearly twenty years after the expiration of the term for which it was originally issued.

Now, by the 19th section of the Act of 1835, aforesaid, it is provided that "No extension of a patent (by the commissioner) shall be granted after the expiration of the term for which it was originally issued." *Prima facie*, therefore, this patent is void, and it is only by invoking the statute that it can be saved. Now, that being a private statute, it should be incorporated with and accompany the exercise of the authority claimed under and by virtue of it.

Messrs. B. R. Curtis, E. W. Stoughton, and Brooks & Ball, for appellee:

1. Congress had power to pass the Act au-

thorizing the commissioner to extend the patent.

Const. of U. S., art. 1, sec. 8; *Evans v. Jordan*, 9 Cranch, 199; *Evans v. Eaton*, 3 Wheat., 454; *Bloomer v. McQueenan*, 14 How., 539; *Blanchard v. Sprague*, 3 Sumn., 535; *Blanchard Gun Stock Co. v. Warner*, 1 Blatchf., 276; *Blanchard v. Haynes*, decided in N. H., by Judge Woodbury, 6 West. Law J., 83; *Bloomer v. Stolley*, 5 McLean, 158.

2. The statement in the answer that the Act was procured by fraud, cannot avail the appellants.

An Act of Congress cannot be attacked collaterally, in a suit between private persons, by an allegation that it was procured by fraud. The Judiciary Act has no such control over the legislation.

Fletcher v. Peck, 6 Cranch, 87; *Gibson v. Gifford*, 1 Blatchf., 531; *Stark v. McGowen*, 1 Nott & McC., 400; *Commonwealth v. Breed*, 4 Pick., 464.

Fraud is a conclusion of law from facts. The facts which constitute the fraud, must be specifically alleged. But this answer alleges no such facts.

Gilbert v. Lewis, 7 L. Times, N. S., 543; *Goodyear v. Prov. R. Co.*, C. C., U. S., R. I., per Clifford, J.; 2 Fish. Pat. Cas., 514, and cases there cited.

Not the slightest evidence whatever of the procurement of the Act by fraud has been adduced.

3. It is alleged in the answer that the extension of the patent was procured by fraud. This allegation cannot avail the appellants.

Feld v. Seabury, 19 How., 332 (60 U. S., XVI., 654); *Goodyear v. Prov. Rub. Co.*, 2 Fish. Pat. Cas., 514; *Foley v. Harrison*, 15 How., 446; *Phila. & Trent. R. Co. v. Stimpson*, 14 Pet., 458; *Jackson v. Lawton*, 10 Johns., 23.

4. The action of the commissioner is conclusive evidence that the surrender and re-issue were regular, when the only difference between the two patents is in the claims, and the claims in the surrendered patent are obviously vague, confused, and of doubtful meaning, and there is no evidence of fraud.

Laws, Dig., tit. Re-issue, B, 617; *Stimpson v. Westchester R. R.*, 4 How., 404; *Woodworth v. Stone*, 8 Story, 753; *Colt v. Young*, 2 Blatchf., 471; *Clum v. Brewer*, 2 Curt., 518; *Battin v. Taggart*, 17 How., 84 (58 U. S., XV., 41); *Carver v. Braintree Mfg. Co.*, 2 Story, 440.

The patent is *prima facie* evidence that Goulding was the original and first inventor of the thing patented.

The answer charges a fraudulent and surreptitious appropriation by Goulding of Winslow's invention, and fraud is to be proved by the party alleging it.

To sustain this burden, it is not sufficient for the appellant to prove that Winslow, while a hired workman of Goulding, suggested mechanical means of carrying some part or parts of Goulding's plan into effect. He must prove that the entire plan of the invention, as described by Goulding in the original letters patent of Dec. 15, 1826, was the sole invention of Winslow; for the answer does not set up a joint invention by Goulding and Winslow, but a several invention by Winslow, and a fraudulent and surreptitious appropriation of the entire invention by Goulding.

Pitts v. Hall, 2 Blatchf., 234; *Alden v. Dewey*, 1 Story, 338; *Dixon v. Moyer*, 4 Wash., 71; *Teese v. Phelps*, McAll., 48; Story, J., in *Washington v. Gould*, 3 Story, 183; Web. Pat. C., 132, note, c; *Allen v. Rawson*, 1 Man., G. & S., 574; *Eyre v. Potter*, 15 How., 56.

As to the danger of this kind of evidence, even where the supposed occurrences are recent, see *Alden v. Dewey*, 1 Story, 339; *Pennock v. Dialogue*, 4 Wash., 544.

As to the views, which a court of equity takes, of attempts to overturn existing titles by such evidence as the appellants rely on, after the lapse of forty years, see *Badger v. Badger*, in C. C., U. S., Mass. Dis., 1 Cliff., 237, per Clifford, J., and S. C., on Appeal, 2 Wall., 87 (69 U. S., XVII., 836.)

Another defense set up is:

That at the time of the application for a patent, the invention was, and had been for a long time, on sale and in public use, with Mr. Goulding's consent and allowance, and that he abandoned the same to the public.

The allegation in the answer is as follows:

"And further answering, this defendant says that at the time of the application of the said Goulding for a patent, the said invention was, and for a long time had been, on sale and in public use, with his consent and allowance, and that he abandoned the same to the public.

It is not alleged that such sale or use had been for more than two years prior to such application for a patent; nor is it alleged when Goulding made the application referred to, nor when the alleged use or sale took place, and so no such defense is open on the record.

The 7th section of the Act of 1839 applies to all patents, whether granted before or after its date.

McClurg v. Kingsland, 1 How., 202; *Stimpson v. Westchester R. R. Co.*, 4 How., 890.

The defense that he abandoned the same to the public, can be made out only by showing an intention to abandon, accompanied by sufficient acts of abandonment. The law does not favor forfeitures, and their grounds must be precisely averred and clearly proved. *Pitts v. Hall*, 2 Blatchf., 235.

The Acts relied on must have reference to the machine substantially as patented. *Wyeth v. Stone*, 1 Story, 281.

Mr. Justice Clifford delivered the opinion of the court:

Patentees acquire, by virtue of their letters patent, if properly granted and in due form, the full and exclusive right and liberty of making, using, and vending to others to be used, their respective inventions for the term of years allowed by law at the time when the letters patent were issued. Such exclusive right and liberty may be held and enjoyed by the patentee throughout the entire term for which it is granted; or he may assign the letters patent, by an instrument in writing, either as to the whole interest or any undivided part thereof; or he may grant and convey to another the exclusive right under the patent to make and use, and grant to others to make and use, the thing patented, within and throughout any specified district. 5 Stat. at L., 117, 119, 121.

Damages may be recovered by an action on the case for any infringement of that ex-

clusive right and liberty; or the party aggrieved may, in any case, at his election, bring his suit in equity and pray for an injunction to prevent the violation of the same; but the express provision is, that all such actions, suits, and controversies shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States, or any district court having the powers and jurisdiction of a circuit court. 5 Stat. at L., 123, 124.

Jurisdiction of such cases is exclusive in the circuit court, subject to writ of error and appeal to this court, as provided by law; but the requirement is, that the suit must be brought in the name of the person or persons interested, whether patentees, assignees, or as grantees, as aforesaid, of the exclusive right within a specified locality. 5 Stat. at L., 123.

Present suit was in equity, and was founded on certain re-issued letters patent granted to the complainant on the 28th of June, 1864, as the assignee, by certain *mens* assignments, of John Goulding, who was the original patentee, and who, as alleged, was the original and first inventor of the improvement. Original patent was granted December 15th, 1826, for the term of fourteen years, and was, as alleged, for a new and useful improvement in the mode of manufacturing wool and other fibrous materials; but the claims of the specification were defective, and it was surrendered on that account, and re-issued July 29th, 1836, for the residue of the original term.

Representations of the complainant were, that the original patentee, without any neglect or fault on his part, failed to obtain by the use and sale of the invention a reasonable remuneration for his time, ingenuity, and expenses employed and incurred in perfecting the invention, and introducing the same into use within the time for which the patent was originally issued, and that he failed, also, by accident and mistake, to obtain an extension of the patent before the expiration of the original term.

Power of the commissioner to renew and extend the patent having expired, the allegation was that the original patentee applied to Congress, and that Congress, on the 30th of May, 1862, passed an Act for his relief. Pursuant to that authority, the bill of complaint alleged that the commissioner, thereafter, on the 30th of August, in the same year, renewed and extended the patent, in due form of law, for the further term of seven years from and after that date, subject to the provisions contained in the Act conferring the authority.

Derivation of the title of the complainant is fully set forth in the bill of complaint, but it is unnecessary to reproduce it, as it is not the subject of controversy in this case. Possessed of a full title to the invention by assignments, the complainant, as such assignee, surrendered the letters patent, and the commissioner, on the 28th of June, 1864, re-issued to him the original patent, as extended under the Act of Congress, for the residue of the extended term.

Founded upon those letters patent, the bill of complaint alleged that the assignor of the complainant was the original and first inventor of the improvement therein described, and the change is that the Corporation respondents, having full knowledge of the premises, and in

violation of the complainant's exclusive rights and privileges, so acquired and secured, have, since the date of the re-issued letters patent, and without his license or consent, made, used and sold, and continue to make, use and sell, in large numbers, cards, jacks and machinery, embracing and containing mechanism substantially the same in principle, construction and mode of operation as the improvement so acquired and owned by the complainant.

Prayer of the bill of complaint was for an account, and for an injunction, and for such other and further relief as the nature and circumstances of the case shall require.

Respondents appeared and filed an answer, and proofs were taken by both parties, and they were heard in the circuit court upon bill, answer, replication and proofs, and a final decree upon the merits was rendered for the complainant, and thereupon the respondents appealed to this court.

Numerous defenses were set up in the answer, but none of them will be much considered except such as are now urged upon the consideration of the court.

The grounds of defense specially enumerated in the brief of the appellants, and urged in argument, are as follows:

1. That the combinations set forth in the several claims of the patent were first invented by one Edward Winslow, and that neither of them was original with the assignor of the complainant.

2. That the invention, at the time the application for the original patent was made, had been on sale and in public use, with the consent and allowance of the applicant, for more than two years, and that he had abandoned the same to the public.

3. That the re-issued letters patent described in the bill of complaint are void, because they do not contain the limitations and conditions expressed in the extended patent, and were not issued in conformity with the Act of Congress passed for the relief of the original patentee.

4. That the respondents' machinery, having been in use before and at the time the patent in this case was granted, is within the saving clause of the proviso in the said Act of Congress.

1. Exception might well be taken to the first proposition, upon the ground that it is a departure from the special defense set up in the answer, unless it can be admitted as included in the more general allegation, denying that the assignor of the complainant was the original and first inventor of the improvement described in the patent.

Persons sued as infringers may plead the general issue in suits at law, and may prove, as a defense to the charge, if they have given the plaintiff thirty days' notice of that defense before the trial, that the patentee was not the original and first inventor of the thing patented; but the same section which authorizes such a defense provides that whenever the defendant relies in his defense on the fact of a previous invention, knowledge, or use of the thing patented, "he shall state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used." *Willon v Railroad*, 1 Wall., Jr., 195.

Evidence to prove such a defense, in a suit at law, is not admissible without an antecedent compliance with those conditions, and the settled practice in equity is to require the respondent, as a condition precedent to such a defense, to give the complainant substantially the same information in his answer. Unless the practice were so, the complainant would often be surprised, as the rule of law is that the letters patent afford a *prima facie* presumption that the patentee is the original and first inventor of what is therein described as his improvement, and if the respondent should not be required to give notice in the answer that proofs would be offered to overcome that presumption and establish the opposite conclusion, very great injustice might be done, as the complainant might rely upon that presumption and fail to take any countervailing proofs. *Teese v. Huntingdon*, 23 How., 10. [4 U.S., XVI, 482].

Better opinion is, that the defense embraced in the first proposition of the respondents, is not admissible under that allegation in the answer which denies that the assignor of the complainant was the original and first inventor of the improvement. Such a defense, if recognized at all in this case, must be admitted under that part of the answer which was evidently framed for that special purpose.

Substance and effect of those allegations are, that the respondents deny that the original patentee ever bestowed any ingenuity upon the improvements, and they allege that the same were invented and applied by one Edward Winslow, that the patentee first derived knowledge of the invention from that individual, and that the original patentee fraudulently and surreptitiously obtained the patent for that which he well knew was the invention of his informant.

No exception was taken to the answer in the court below, and in that state of the case the allegations of the answer, that the invention was made by a third person and not by the assignor of the complainant, may be regarded as a good defense, but it is quite clear that the charge that the original patentee in this case fraudulently and surreptitiously obtained the patent for that which he well knew was invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to the charge of infringement. 5 Stat. at L., 117, 123; *Reed v. Cutter*, 1 Story, (U. C.), 599.

Viewed in any light, the proposition amounts to the charge that the invention was made by the person therein mentioned, and not by the assignor of the complainant, and the burden to prove it is on the respondents, not only because they make the charge, but because the presumption arising from the letters patent is the other way.

Application for a patent is required to be made to the commissioner appointed under authority of law, and inasmuch as that officer is empowered to decide upon the merits of the application, his decision in granting the patent is presumed to be correct. *Pitts v. Hall*, 2 Blatchf. (C. C.), 229; *Union Sugar Refinery v. Matthiessen*, 2 Fish, 800.

Before proceeding to inquire whether or not that defense is sustained by the proofs, it becomes necessary to examine specifications and claims of the patent, and to ascertain, by a comparison of the mechanism therein described, with the antecedent state of the art, the true nature, character and extent of the improvement.

Sets of carding machines, for the production of yarn from wool, were well known, and in use before the invention of the original patentee. They usually consisted, besides the spinning-jenny, of three carding-machines, called the first and second breaker and the finisher, but they could not be used to much practical advantage, in connection with the jenny, without a separate machine, called the billy, for splicing the rolls. Two jennies were often used, instead of one, in that combination, and in some instances two double carding-machines were preferred, instead of three single machines.

Like the still older carding-machine, the breaker had what was called a feed table, and the wool, previously prepared by other means, was placed on that table, and was, by that means, fed to the carding mechanism, and having passed through the carding apparatus to the delivery end of the machine, was stripped from the device called a doffer, and fell to the floor. The device for stripping the filament from the doffer was a comb, which constituted a part of the machine. Second breaker was similar in construction to the first, and the process of feeding and carding was the same, but the filament from the first breaker constituted the material to be used in the second instead of using wool prepared by hand or from the picker, and the filament, when carded and stripped from the doffer, was wound round a drum. The method of feeding the material into the carding apparatus of the finisher was also the same, but it was provided with an additional apparatus, at the delivery end of the machine, called the roller and shell, which formed the material into short rolls. Those rolls were about the length of the card surface of the doffer. They were taken to the billy, and were there spliced by hand, on the apron of that machine and, as the apron moved forward, they were fed to the spindles, and converted into roving, suitable to be spun into yarn.

Goulding aimed to dispense with the billy altogether, and sought to accomplish, with four machines, what had previously required the use of five; and the evidence shows, beyond controversy, that his invention enabled manufacturers to produce yarn from wool at much less cost, of better quality and in greater quantity, than was produced by the old process. His purpose, also, was to dispense with short roll, and to introduce the long or endless roll in its place. Years were spent by him in experiments to accomplish these purposes, but the result was that he was successful. He dispensed altogether with the billy and, by a new combination of old devices, he obtained the endless roll, and so perfected his machinery that he could use it successfully, from the moment the roving left the delivery end of the first breaker, till it was converted into yarn, fit to be manufactured into cloth.

Attempt will not be made to describe the various plans which he formed, nor the experi-

ments which he tried, as it would extend the opinion to an unreasonable length. Under his method, as described, the wool, as it comes from the picker, is placed on the table of the first breaker, and is fed to the carding apparatus as before, but the sheet of carded material, when stripped from the doffer, is taken away on one side of the delivery end of the machine, by means of two rollers, through a turning-tube, or pipe, to which a slow rotary movement is given by a band passing from a drum, actuated by the machine, and operating upon a pulley affixed to the tube. Description is also given of the means by which the roving or sliver is condensed and wound round the bobbin, and also of the means by which it is retained in the proper position, and made to partake of the rotary movement communicated to the drum. Particular description is also given of the means by which the roving may be evenly wound upon the bobbins, either by carrying it and the drum backward and forward, or by passing it between guides, affixed to a bar, to which a similar movement is communicated.

Next step is, that the bobbins, with the roving thereon, twenty in number at least, are placed in a frame or creel, in order that the roving may be fed to the second carding-machine, and guided into it, between certain dividing pins, but it is taken away at the delivery end, in a single roving, and by the same means as from the first machine.

Principal object in passing the material through the second breaker is, that it may be more completely mixed, so that every part of the roving will be of the same fineness. Third operation is, that the bobbins of roving, as delivered and wound in the second breaker, are placed in a frame or creel, similar to that before described, but each roving is now to be kept separate, and certain blocks are provided for that purpose, made broader in front than behind, so that each roving shall preserve its proper situation, without mingling with those adjacent to it, during the operation of carding, and also that it may finally reach its proper place upon the delivering cards.

The feeding of the material into the carding apparatus of the finisher is accomplished in the same way as before described, but the mechanism for carding and for delivering the roving is more complex, and widely different. Two delivering cylinders are constructed, placed one above the other, surrounded with wire card, in strips, with uncovered spaces of equal width, and so arranged that the uncovered spaces on one cylinder shall correspond with the strips of wire card on the other, for carding the separate rovings as they are fed into the carding apparatus. Different mechanism is also provided for removing the carded material from the delivering cylinders, which is accomplished by the rotary action of the tubes upon such material, by which the several filaments, as they are delivered, are formed into a loose, continuous roving, which is guided between certain pins, and passed through certain rollers, in order to give the roving a sufficient coherence before it is wound on to the bobbins, to be used in the jenny.

Means for slightly twisting the roving as it leaves the finisher are also described, and the directions are, that the guides of the finisher must have a lateral motion backward and forward,

so that each roving may be regularly laid side by side, within its own proper limits, and the devices to accomplish that function are fully described. Modifications were also made by the inventor in the devices of the carding apparatus of the finisher, and also in the apparatus for delivering the roving in the third operation, and for winding it on to the bobbins preparatory to their transfer to the jenny where the roving is spun into yarn. Those modifications of old machinery are minutely described in the specifications, and it is obvious that they are of great value in accomplishing the final result, and that they constitute some of the main features of the invention.

Changes were also made in some of the devices of the jenny, and also in their arrangement and mode of operation as compared with prior machines, and those alterations also are so clearly described as to constitute a full compliance with the 8th section of the Patent Act. Substitutes are suggested for many of the described devices, but it is not practicable to enter into those details. Separate parts of the machinery, as used in the several combinations, are not claimed by the patentee. Omitting redundant words the claims of the re-issued patent are to the effect following:

First. I claim in combinations the following sets of apparatus making up a machine, namely: 1. A bobbin stand or creel. 2. Bobbins on which roving may be wound. 3. Guides or pins. 4. A carding machine. 5. Condensing and drawing off apparatus. 6. Winding apparatus, whereby rovings may be fed to a carding machine, carded, condensed, drawn off, and wound again in a condensed state, substantially in the manner herein set forth.

Second. I claim the feed rollers of a carding machine, in combination with bobbins and proper stands therefor, and guides or pins whereby slivers or rovings may be fed to be carded by mechanism substantially such as herein described.

Third. I claim a delivering cylinder of a carding machine in combination with apparatus for drawing off, condensing, or twisting and winding carded filaments, by apparatus substantially such as herein described.

Lastly. I claim a mule or spinning frame, provided with spindles mounted on a carriage, and with jaws or their equivalents for retaining roving in combination with bobbins, whose axes are parallel or nearly so with the line of spindles, and rest upon drums revolving to unwind the bobbins substantially as herein set forth.

Careful attention to the description of the invention and the claims of the patent, will enable the parties interested to comprehend the exact nature of the issue involved in the first defense presented by the respondents. Purport of that defense is, that the invention was made by Edward Winslow, and not by the assignor of the complainant. The settled rule of law is, that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made some experiments towards putting it in practice. He is the inventor and is entitled to the patent who first brought the machine to perfection and made it capable of useful operation.

Washburn v. Gould, 3 Story (C. C.), 138.

No one is entitled to a patent for that which he did not invent unless he can show a legal title to the same from the inventor or by operation of law; but where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle, and may be embodied in his patent as a part of his invention.

Suggestions from another, made during the progress of such experiments, in order that they may be sufficient to defeat a patent subsequently issued, must have embraced the plan of the improvement, and must have furnished such information to the person to whom the communication was made that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation.

Persons employed, as much as employers, are entitled to their own independent inventions, but where the employer has conceived the plan of an invention and is engaged in experiments to perfect it, no suggestions from an *employé*, not amounting to a new method or arrangement, which, in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement. But where the suggestions go to make up a complete and perfect machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belonged to another. *Pitts v. Hall*, 2 Blatchf., 234; *Allen v. Rawson*, 1 Man., G. & Scott, 574; *Alden v. Dewey*, 1 Story (C. C.), 388; *Minter's Patent*, 1 Web. P. C., 132, n.; *Curtis*, Pat. (8d ed.), 99; *Reed v. Cutter*, 1 Story (C. C.), 599.

Guided by these well established principles, the first inquiry is: what was actually done by the person who, as alleged by the respondents, was the real inventor of what is described in the re-issued letters patent? They do not pretend that he invented or even suggested the entire invention, nor all of the several elements embraced in any one of the separate combinations, as expressed in the claims of the patent; and if they did, it could not for a moment be sustained, as it finds no support whatever in the evidence. None of the devices described in the specifications are new, but the claims of the patent are for the several combinations of the described elements arranged in the manner set forth, and for the purpose of working out the described results.

Regarded in that light, it is clear that the concession that the person named did not invent nor suggest the entire invention, nor any one of the separate combinations, is equivalent to an abandonment of the proposition under consideration, as it is clear to a demonstration that nothing short of that averment can be a valid defense. Respondents do not allege in the answer that the person named was a joint inventor with the original patentee, but the al-

legation is that he made the invention, and they deny that the assignor of the complainant ever bestowed any ingenuity upon what is described in the letters patent as his improvement. Such a defense cannot be successful unless it is proved, as common justice would forbid that any partial aid rendered under such circumstances, during the progress of experiments in perfecting the improvement, should enable the person rendering the aid to appropriate to himself the entire result of the ingenuity and toil of the originator, or put it in the power of any subsequent infringer to defeat the patent under the plea that the invention was made by the assistant and not by the originator of the plan.

The evidence shows that the original patentee was born in 1793, and that he commenced working on machinery in his youth, while he was with his father, and that, as early as the year 1812, he went into the employment of certain machinists, residing at Worcester, Massachusetts, who were engaged in constructing machinery for the manufacture of wool and cotton. While in their employment, he began experiments in woolen machinery. Those experiments were directed to the object of improving the billy, for the purpose of drawing out the carriage more accurately, and thereby making better work. Several years were spent in that business, but, in 1820, he went to Halifax, in that State, and, while there, he made numerous experiments to get rid of the billy entirely, and to dispense with short rolls, and substitute long rolls in their place. He remained there three years, and, during that time, he was constantly engaged in experiments to accomplish those objects. In the spring of 1823 he moved to Dedham, in the same State, and there hired a mill, and engaged in the manufacture of broadcloth, and also carried on the machine business, and the witness also states that he then prosecuted his experiments on a large scale.

Cans were used as a receptacle for the rovings delivered from the doffers, before the drawing off and winding apparatus, described in the patent, was invented. Rovings, before that invention, were spun from cans, instead of being wound upon, and spun from, spools or bobbins. Considerable importance is attached to the new method, as it was largely by that means that the use of the endless roving was made practical, and that the difficulty produced by the kinking of the roving, incident to the use of the cans, was overcome.

Theory of the respondents is, that the new method of accomplishing that function was invented by Edward Winslow, but their witness, John D. Cooper, only testifies that he made or suggested the spool or drum, which are not the only elements of that apparatus. Unaccompanied by the traverser, they would, perhaps, be better than the cans, but it is clear that the apparatus would be incomplete without that device, as it is by that means that the bobbins are evenly wound with the roving.

Testimony of that witness is, that he first suggested to Winslow that the roving must be wound on a spool, else they never could make good yarn, and he proceeds to state that they procured some pasteboard, and that Winslow made a pattern for a spool and drum from that material. Explanations, in detail, are given by the witness, of the several steps taken

by them in accomplishing the change in the apparatus, and the witness states that the original patentee never saw the spool and drum until he came into the mill and saw those devices in the machine. Argument for the respondents is, that the spool and drum were invented by that party while he was in the employment of the original patentee, but the complainant denies the theory of fact involved in the proposition, and insists that the statement of the witness is untrue, and that he is not entitled to credit. Further statement of the witness is, that the improvement, as soon as it was perfected, was applied to all the carding and spinning machines in the mill, and that the mills, so adjusted as to embrace that improvement, were put in successful operation during the summer and autumn of that year.

Two answers are made by the complainant to the defense founded on that testimony, both of which are sustained by the court. 1. Suppose the testimony of the witness to be all true, the complainant contends that is not sufficiently comprehensive to support the allegations of the answer, nor even to support the proposition presented in the brief of the respondents. Taken in the strongest view for the respondents, the testimony merely shows that Winslow, or the witness Cooper, or both together, after the originator of the plan had nearly completed his great and valuable improvement, and while he was still prosecuting his experiments with the utmost diligence, suggested the spool and drum as substitutes for the cans, and that Winslow actually made those devices and, with the aid of witness, put them into one of the machines as an experiment. When their employer first examined the arrangement, rude as it was, he expressed great satisfaction with it, but upon seeing it tried he pronounced it of no value. Neither of those opinions, however, turned out to be quite correct, as, upon further trial, when better adjusted, and by adding the traverser, so that the contrivance would wind the roving evenly on the spool, it proved to be a useful auxiliary part of the invention.

Valuable though it was and is, as aiding in the accomplishment of the desired result, it is, nevertheless, a great error to regard it as the invention described in the subsequent patent, or as such a material part of the same that it confers any right upon the party who made the suggestion to claim to be the inventor, or a joint inventor, of the improvement, or to suppose that the proof of what was done by that party can constitute any defense, as against the owner of the patent, to the charge of infringement.

Second answer to the defense founded on that testimony is, that the testimony is unreliable, because the witness is not entitled to credit. Hundreds of pages of the transcript are filled with proof, introduced either to assail or support the credit of that witness; but the court is of the opinion that it is not necessary to enter into those details, as the decision must be in favor of the appellee, even if every word stated by that witness is taken to be true. Entirely satisfied with our conclusion upon the merits, we are the less inclined to enter into those details, as a full analysis of the proofs within reasonable limits would be impracticable; but

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it is proper to say that the proofs have been carefully examined, and it is the opinion of the court that the letters patent in this case cannot be held to be invalid upon such testimony.

II. Second defense, as stated in argument, is, that the invention, at the time the application for the original patent was made, had been on sale and in public use, with the consent and allowance of the applicant, for more than two years, and that the applicant abandoned the same to the public. Abandonment, as set up in the concluding paragraph of the proposition, is a distinct defense from that set up in the preceding part of the same proposition, and must be separately considered.

Sale and public use, for more than two years prior to the application for the patent, are not alleged in the answer. What the respondents do allege is, that the invention, at the time the application for a patent was filed, and for a long time before, had been on sale and in public use, which, without more, is not a good defense against the charge of infringement. On the contrary, the correct rule is, that no patent shall be held to be invalid on account of such sale and public use, except on proof that the invention was on sale and in public use more than two years before the application therefor was filed in the Patent Office. 5 Stat. at L., 354; *McClurg v. Kingsland*, 1 How., 209; *Stimpson v. Railroad*, 4 How., 380.

Evidence to show that the invention of the original patentee, as finally perfected, was on sale and in public use more than two years before he applied for a patent, is entirely wanting, and if such evidence was offered, it could not be admitted under the pleadings, as no such defense is set up in the answer. *Foster v. Goddard*, 1 Black, 518 [66 U. S., XVII., 232].

Undoubtedly, an inventor may abandon his invention, and surrender or dedicate it to the public; but mere forbearance to apply for a patent during the progress of experiments, and until the party has perfected his invention and tested its value by actual practice, affords no just grounds for any such presumption. *Kendall v. Winsor*, 21 How., 322 [62 U. S., XVI., 185]; *Pennock v. Dialogue*, 2 Pet., 1.

Application for a patent in this case was probably filed in the Patent Office before the middle of November, 1826, and the proofs are full and satisfactory to the court that the inventor, up to that time, was constantly engaged in perfecting his improvements, and in making the necessary preparations to apply for a patent.

III. Third defense is, that the re-issued letters patent are void, because they were not issued in conformity with the Act of Congress relating to that subject. Omission of the original patentee seasonably to apply for an extension of his patent was occasioned through erroneous information given to him by the commissioner, and not from any negligence or fault of his own. Acting upon information from that source, the inventor did not file his application until it was too late to give the notices as required by law, and the time for presenting such an application having expired, the commissioner had no power to grant his request. Deprived of any legal remedy under the general laws for the protection of inventors, he applied to Congress, and on the 80th of May,

1862, Congress passed an Act for his relief. 12 Stat. at L., 904.

By the terms of that Act he was authorized to apply to the commissioner for a renewal and extension of the letters patent, previously granted to him for the term of seven years from the time of such renewal and extension, and the commissioner was empowered to grant such renewal and extension, or to withhold the same under the then existing laws, in the same manner as if the application therefor had been seasonably made. Annexed to the body of the Act is a proviso, that such renewal and extension shall not have the effect nor be construed to restrain persons using the invention, at the time of such renewal and extension, from continuing the use of the same, nor to subject them to any claim or damage for having used such machinery.

Objection now taken is, that the said proviso in the Act of Congress is not recited in the re-issued letters patent; but the objection is entirely without merit, as it appears in the record that the certificate of renewal and extension, as granted by the commissioner, was made subject in express terms to the proviso contained in that Act.

Doubts are entertained whether even that was absolutely necessary; but it is clear that there is nothing in the proviso to warrant the conclusion that the form of the extended patent might not be the same as that in general use, and it is not even suggested that the form of the extended or re-issued patent was in any respect different from the corresponding established forms of the Patent Office.

IV. Fourth defense is, that the respondent's machinery was in use before the patent in this case was granted; but is not alleged that their machinery was in use before the extended patent was issued and, therefore, the allegation affords no defense to the charge of infringement. *Simpson v. Railroad*, 4 How., 380.

Other defenses are mentioned in the brief of the respondents; but none of them were urged in argument, and they must be considered as abandoned.

V. Infringement is an affirmative allegation made by the complainant, and the burden of proving it is upon him, unless it is admitted in the answer. Specific inquiries were made of the respondents in this case, and they did not satisfactorily answer those interrogatories. Evasive answers, under such circumstances, if not positively equivalent to admissions, afford strong presumptive evidence against the respondents. Apart from that, however, the answer of the respondents is unsatisfactory in other respects. They do not in terms deny that they have used, and are using, the invention as alleged; but what they do deny is, that they use any machinery in violation and infringement of any rights of the complainant, or that they are using, or have made, used, or sold any machinery not protected by the proviso contained in the Act of Congress passed for the relief of the original patentee.

Clear implication from the answer is, that they had made machinery such as that described in the letters patent, and if so, then they are clearly liable as infringers, as they were not incorporated at the date of the extended patent. Machines made since the patent was extended

are not protected by that proviso, as is plain from its language; but the complainant cannot recover damages for any infringement antedated to the date of the re-issued patent, as the extended patent was surrendered.

Proofs of the complainant to show infringement consist in a comparison of the machines made by the respondents with the mechanism described in the patent, and in the testimony of scientific experts, and they are so entirely satisfactory, that it is not deemed necessary to pursue the investigation.

Decree affirmed.

Cited—8 Wall., 427; 10 Wall., 122; 11 Wall., 639; 19 Wall., 390; 23 Wall., 564; 24 U. S., 94; 15 Blatchf., 44, 164; 8 Cliff., 588, 590; 4 Cliff., 180, 389, 446.

JOHN ROLAND, *Appt.*,

v.

THE UNITED STATES.

(See U. S. C., 7 Wall., 748-751.)

Mexican claim rejected.

Claim to Mexican grant rejected because the archive papers fail to make out the title, and the papers produced by the claimant are not genuine, but the result of an afterthought.

[No. 50.]

Argued Jan. 18, 1869. Decided Mar. 1, 1869.

APPEAL from the District Court of the United States for the Northern District of California.

The petition in this case was presented by the appellant to the Board of Land Commissioners, to ascertain and settle the private land claims in the State of California, for the confirmation of his title to eleven leagues of land. The said Commissioners denied the confirmation, whereupon the petitioner took an appeal to the District Court of the United States for the District of California, by which the said decree was affirmed. Thereupon the said petitioner took an appeal to this court.

The case is sufficiently stated in the opinion of the court.

Messrs. Delos Lake, C. T. Botts, J. M. Carlisle, and J. S. Black, for appellant.

Messrs. Wm. M. Evarts, Atty-Gen., and John A. Wills, for appellee:

1. Without reference to antecedent authorities, this case is ruled by the doctrine declared by this court in the case of *White v. U. S.*, 1 Wall., 680 (68 U. S., XVII., 701). This summary of the law in regard to this class of cases is therefore:

"It has been held by this court in a long and unbroken line of adjudications, that where there is no archive evidence and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and especially when in addition the *expediente* produced is tainted with suspicions of fraud, the claim must be rejected."

This claim, when tested by that rule, must be rejected.

1. There is no Mexican archive evidence of the genuineness of the grant in this case, because:

2. The grant is vague and indefinite in its description of boundaries. The map is a necessary part of such a grant. 23 How., 226 (63 U. S., XVI., 336).

In the absence of the map, the grant is void for uncertainty.

The alterations appearing on the face of the grant were evidently made subsequent to the original fabrication of the grant, with a view to cure this defect by placing the land at the junction and within the arms of the two streams. They may have been made while the claim was pending, or after the Land Board had announced its doctrine as to the necessity of definiteness of boundary to sustain the validity of grants.

8. There has been no such possession or occupancy under this claim as creates an equity in favor of its confirmation. No contemporaneous possession. No attempt made to take possession, until the spring and fall of 1847. No possession of any kind taken till 1848, after the negotiation of the Treaty of Cession. Judicial possession given after the beginning of the American occupation of California, unavailing. *Fuente's case*, 23 How., 458 (68 U. S., XVI., 381).

When there is no survey or judicial possession given, the claim is only an equity. 23 How., 497 (64 U. S., XVI., 473).

Mr. Justice Davis delivered the opinion of the court:

The claim which we are now asked to confirm is for eleven leagues of land in California, at the junction of the San Joaquin and Stanislaus rivers, and was rejected by the Board of Land Commissioners and the district court. The *expediente* in the case is obtained from the archives and was among the papers of which Hartwell made an index. It consists of a petition, marginal order that title issue, decree of concession, and the *borrador* or draft of the title to be given to the party interested. It differs from other *expedientes* in this: that there was no report, no *diseño*, no approval by the Departmental Assembly, and because the whole proceedings were begun and consummated on the same day. This document is not enough to establish the title, and the claimant, in order to make it complete, produces from his own custody the *titulo* which annexes conditions to the grant, a petition asking for further time to comply with these conditions; the order of the Governor granting the request and a certificate that the Departmental Assembly approve the grant.

The question at issue is, whether this is a genuine title to land in California acquired under Mexican rule, which this government is under obligations to protect.

The haste and recklessness, to use no harsher term, with which this grant was made, cannot but suggest grave doubts of the *bona fides* of the transaction. It nowhere appears that Roland had any claim on the bounty of the Mexican nation, or ability or intention to occupy so large a tract of country; and yet Pico, near the time when power passed from his hands, in the midst of civil commotion, disregarding the customary and established modes of making concession of the public domain to meritorious persons; without an *informe*; without a map; without any inquiry whatever, grants to him eleven leagues of land (the maximum quantity grantable to a single person) in a remote wilderness, occupied by hostile Indians, and of which so little was known that the best description that could be given of it was, that it was situated on the banks of the San Joaquin and Stanislaus Rivers.

That the plain requirements of the Mexican colonization laws were violated in these proceed-

ings, is very apparent from the frequent decisions of this court in this class of cases; but it is unnecessary to examine the effect of this departure on this title, if it were genuine, because in our opinion it has no validity. And it is not the first time, in the history of California land cases in this court, that grants made at or near the time of the one in controversy purports to be made by Governor Pico, and countersigned by his secretary, Moreno, have been held not to be genuine. *Knight's case*, 1 Black, 327 [66 U. S., XVII., 76]; *Galbraith's case*, 2 Black, 394 [67 U. S., XVII., 449]; *Luco's case*, 23 How., 548 [64 U. S., XVI., 550].

The struggle in this case, as in others of like character, is to make up parol proof for a deficiency of record evidence. Pico and Moreno have been examined in support of the title, but their testimony is singularly unsatisfactory. Pico has no recollection of making the grant, nor, indeed, of Roland's application, but is able to identify his signatures. Although he knew Roland—that he had married a Mexican woman, the number of his children, and the state of his property—yet he cannot recollect that he donated to him an immense tract in a remote part of the country, and broke through all the forms of law in order to do it quickly.

A transaction of this magnitude, where the favored party was known, is not apt to be forgotten, and to say the least on the subject, this want of memory on Pico's part, is, in itself, a circumstance of great suspicion that the grant was never made. Moreno's memory, if somewhat better than Pico's, is not enough so to clear away the difficulties from this title.

It is a little singular, if Pico's signatures to the papers produced by the claimant are authentic, that they should differ so materially from his signatures to public documents of that date. In *Luco v. U. S.*, 23 How., 548 [64 U. S., XVI., 551], the same differences existed, and the court adopted the conclusion that they were not genuine. If these inequalities in Pico's signatures create distrust as to their genuineness, the different phraseology in describing the land in the *borrador*, from that used in the *titulo*, increases the distrust in the authenticity of this title.

In the *borrador* the land is described "as eleven leagues, situated on the banks of the Rivers Stanislaus and San Joaquin," corresponding with the description given in the petition, while the *titulo*, issued on the same day as the *borrador*, directs "that the measurement of the eleven leagues shall be on the banks of the Stanislaus, of the width of one league, commencing where the two rivers run." On the theory that the *borrador* and *titulo* were actually signed on the same day, how did it come to pass that the designation of the tract is so much more particular in the one than in the other? It will be borne in mind that Pico and Moreno have no definite recollection concerning this grant, and yet in this most important point the title paper issued to the claimant differs essentially from the one which forms part of the *expediente*. Why think of the necessity of this change of description, when both documents were made on the same day, and form part of the same transaction? The change of description cannot be explained on the hypothesis that both papers were prepared and executed on the

same day; but it is easily understood, if the *título* was prepared at a subsequent date, when the parties interested could see that a more definite description was wanting, than that which the *borrador* furnished.

But there are much graver difficulties affecting this title than those which we have noticed.

The claimant, in attempting to prove too much, has established the falsity of his title. This court has frequently decided, that the approval by the Departmental Assembly was not necessary to the validity of a grant; but has also observed that, under certain circumstances, the absence of such approval is entitled to great weight. It was, doubtless, with a view to meet all objections, and to show the fullness of his title, that the claimant furnished evidence that the Assembly did approve the grant. If this evidence is true, it strengthens the claimant's title, but if false, it destroys all confidence in it. It is important, therefore, to ascertain whether the Assembly met on the 4th day of May, 1846. Pico certifies that it did meet on that day, and approved this grant; but it is clear that very little reliance can be placed on this certificate, if genuine, because, when interrogated on the subject, Pico testifies that he has no recollection of the approval, nor, indeed, of giving a certificate to that effect, and but for the fact that he sees his signature to the certificate of approval, he has no reason to believe that the grant was approved. It is true that he testifies that there was a great looseness in the administration of public affairs at the time; but from this no inference can be properly drawn that the Departmental Assembly convened on the 4th day of May, 1846. It will not do to say that there might have been a meeting of that body on that day. In the absence of direct proof of the fact, there must be evidence affording reasonable grounds to believe that the meeting actually took place, and that the records of it are lost. But we are not left, in this case, to rely on conjectures or probabilities, for, fortunately, the journals of the Departmental Assembly have been preserved, and they show that the body was not in session at the date when the *testimonio* states the grant to have been approved. It appears by the journals that the earliest meeting in May was the 8th day of the month, when the minutes of the meeting held on the 29th day of the preceding month of April, as was customary, were read and approved.

It is not credible that the Assembly could have met between these dates, and overlooked the fact in recording the proceedings of the 8th of May.

To escape the force of this evidence, the claimant has pointed out some discrepancies and omissions in the journals, but they are not of a character requiring notice, and do not tend to prove that the Assembly convened on the day when the *testimonio* purports to have been signed.

If Pico does not remember the sale of this large tract of country, nor the fact of approval by the Assembly, of what value is his testimony that the approval must have been obtained, because the document certifying to it bears his signature?

But if what has been said is not enough to show that the alleged grant was not issued to

Roland, there is still further evidence in the record, which is conclusive on the point.

In deciding this case we are to be governed by the laws and usages of the Mexican Government, in granting lands, before the conquest of California, and according to the principles of equity. Tested by these rules, this claim has neither a legal nor equitable *status*.

Lands were to be granted by the colonization laws of Mexico, for the purpose of cultivating and inhabiting them, and no more than eleven leagues could be granted to a single individual. It is stipulated in the record that, on the 22d day of July, 1845, Governor Pico granted to John Roland and Julius Horkman, four leagues of land, and that the claim has been prosecuted and confirmed. And that on the 6th day of May, 1846, only four days after the date of the grant in controversy, a still further grant was made to John Roland and Louis Arenas, of the *sobrantes* of certain *ranchos*, to the extent of nine leagues. This latter grant is also claimed to be genuine, and has been presented for confirmation, and is now pending in the District Court of California. All these grants cannot be sustained, because Pico had no power to make them. If they could be sustained Roland would receive from the Mexican Government (if the surplus lands of the *ranchos* reached nine leagues) a quantity of land exceeding seventeen leagues. The United States are under no obligations to recognize grants which aggregate, in the hands of one person, such a quantity of land, even if they were actually made; but the strong probability is, that the eleven league grant was abandoned when the petition was presented, and the grant obtained for other lands in a different part of the country. In no other way can we acquit Pico of a willful departure from the law under which he acted, and account for the petition and grant of the 6th of May.

It is fair to infer from this record that Roland was an intelligent man, and knew the limit of the Governor's power to grant lands, and the corrective applied by the Departmental Assembly when he exceeded his authority. If so, he knew Pico had no right to make the eleven league grant, because he had already conceded to him the undivided half of four leagues, in July, 1845. It may be, before the proceedings were completed for the eleven league grant, he saw his difficulty, and concluded to rely on the first grant made to him, and to ask for a concession of other lands nearer the settled part of the State, and which lands, although less in quantity, were more desirable. Adopting this theory, the conduct of Roland in asking for other lands on the 6th of May, can be explained. On any other theory his petition on that day for an additional grant, and Pico's action conceding it, were palpable frauds committed against the letter and spirit of the colonization laws of Mexico.

Without pursuing the subject further, in our opinion this claim should not be confirmed.

The archive papers fail to make out the title, and the papers produced by the claimant are not genuine, but the result of an afterthought, and would never have been produced in court if the unparalleled growth of California had not stimulated the cupidity of speculators to experiment with fragments of title papers left

unfinished by Pico, and which were gathered up by our officers on the conquest of the country.

Dissenting, *Mr. Justice Miller* and *Mr. Justice Field*.

CHARLES HART SMITH, *Appt.*,

THE WASHINGTON GAS LIGHT CO.

Specific performance—renewal of a contract not compelled without demand, nor when an option is given to pay money.

Specific performance of a renewal of a contract cannot be compelled without a demand and refusal, nor where the contractor has an option to renew or pay a specific sum of money.

For a refusal to renew, the remedy is an action at law to recover such sum of money.

[No. 86.]

Argued Feb. 18, 1869. Decided Mar. 1, 1869.

APPEAL from the Supreme Court of the District of Columbia.

The complainant, Smith, claimed by his bill the specific performance of a written contract made by the defendant with Charles Wilson, the assignor of the complainant, for gas tar for the term of five years, at an annual rent of \$500 from June 1, 1859.

The cause was heard in the court below at a special term, and a decree dismissing the bill was passed; afterwards, upon appeal, it was again heard by the court in general term, and the decree of dismissal affirmed. From the last decree an appeal was taken to this court.

The case is sufficiently stated by the court.

Messrs. R. J. Brent and R. T. Merrick, for appellant.

Messrs. Kennedy & Webb, for appellee.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a suit in equity to enforce the specific performance of a contract for the delivery of gas tar, and to obtain compensation in damages for partial non-performance.

The alleged contract was for the delivery of all the tar made by the Company and not wanted for a specified purpose, from time to time, as made and called for by the contractor, during the term of five years; and for the renewal of the contract at the end of that period for another like term. The consideration to be paid to the Company by the contractor, was the sum of \$500 a year, in half yearly installments. In case of refusal to renew, the Company engaged to refund to the contractor the payments made during the last year.

It is unnecessary to examine the question whether, upon sufficient evidence in support of the allegations of the bill, the complainant could have relief by a decree for specific performance; for we are all of opinion that no case for relief is made by the proof.

It is not alleged that during the first five years the Company failed in any respect to perform its contract. The main ground of complaint is, that the Company, after having renewed the contract for a second term of five years, failed to fulfill its stipulations.

There is much evidence in the point of renewal, and it is very contradictory. We shall not enter into any minute criticism upon it.

It is clear that the Company was not bound

to renew, except upon the request of the contractor. There could be no refusal, except upon a demand, nor was the Company bound to renew, even upon demand. It might still refuse; and in that case would be bound only to return to the contractor or his assignee, the last year's payment of \$500.

The proof shows that the contract proved unexpectedly profitable to the contractor; and that the tar would be worth, during a second term of five years, not \$500 only, but over \$5,000 a year.

It was natural that the contractor should seek a renewal; and it was equally natural that the Company should be unwilling to renew, except at an advanced rate, corresponding in some degree to the increased value.

No formal demand for renewal seems to have been made, but there appears to have been a good deal of negotiation between the parties, and some adroit attempts on the part of the contractor to obtain admissions, either in words or acts, from the officer of the Company, upon which a claim that the contract had been in fact renewed might be established.

But these attempts were not successful. We are unable to find in the testimony any satisfactory evidence of a renewal of the contract. On the contrary, the whole weight of the proof shows refusal to renew, except at an advanced rate, and failure on the part of the contractor to accept the terms required. Refusing to renew the contract, the Company was under no obligation to the contractor, except to refund the \$500 received from him during the preceding year; and for the recovery of this sum, the remedy of the complainant was complete at law.

The decree of the Supreme Court of the district dismissing the bill must, therefore, be affirmed.

JOHN S. JOHNSON, PHILIP DORSHEIMER, AND OTIS F. PRESBREY, *Appts.*,

v.

THE UNITED STATES.

(See S. C. 7 Wall., 166-175.)

Remission of penalties by Secretary, not subject of appeal.

The remission of penalties, under revenue laws, by the Secretary of the Treasury, is the exercise of his discretion in a matter intrusted to him alone, from which there can be no appeal.

[No. 90.]

Argued Feb. 19, 1869. Decided Mar. 15, 1869.

APPEAL from the Court of Claims.

This case comes here from the Court of Claims, by appeal from a decision sustaining a general demurrer to the appellant's petition.

That petition alleged that, between Jan. 1 and April 1, 1865, one Rhomberg, a distiller at Dubuque, violated the laws relating to internal revenue (*inter alia*), by making false returns and fraudulently withholding taxes to the amount of \$195,000, which acts involved, as a legal consequence, the liability of forfeiture, or, as they say, the actual forfeiture of certain of his property. Upon information furnished by the appellants, the petition alleges, such property was seized, and afterwards proceedings for its forfeiture were instituted by the respective district attorneys in the following districts: southern and northern New York, northern Illinois and Iowa, where the seizures were made.

Besides this property, there also appear in the case 75,000 gallons of highwines, manufactured in the distillery while the distillery was in the custody of the law, under seizure, which was conceded to be the property of the government, valued at \$150,000, on which the distiller claimed to be allowed \$54,814 for the value of the materials, etc.

After the seizure, third parties intervened, most prominently Sturges & Sons, of Chicago, claiming that they had innocently made advances of property thus seized; and they paid to the United States \$33,946. "On confession by Rhombert that that amount of taxes had been withheld by him."

Then followed offers of compromise from Sturges & Sons, for themselves and other interests, and reports of the Commissioner of Internal Revenue thereon.

May 26, 1865, they offered to pay \$100,000 taxes and \$5,000 penalties.

June 26, 1865, they offered to purchase all the property seized, paying (including \$33,946 before paid), as unpaid taxes, \$195,809, and \$10,000 for informers.

Commissioner Lewis, on the eve of leaving the office, June 30, 1865, drafted a report stating a still remaining deficiency (after payment of \$33,946) of taxes to the amount of \$161,156; and his successor, Commissioner Orton, adopted his statement of facts.

Thereafter, on July 26, 1865, Sturges & Sons made an offer to pay for the property seized \$70,000, namely: by the sum claimed as their due for materials of the wines distilled by the government, \$54,814, and a cash balance of \$15,186, all seizures to be released, while the wines manufactured since the seizure were to be the property of the government.

Commissioner Orton reported these wines worth \$150,000, which, added to the cash balance offered (\$15,186), makes the total offer in compromise at that time \$165,186, and in all, \$199,182.

The petition then goes on to state that the Secretary delivered to Sturges & Son *et al.*, all the property under seizure for forfeiture, also moneys received as proceeds of cattle sold at Dubuque; and also the wines manufactured after the seizure, with the claim of the United States for forfeiture.

The government received, the petition states, in all, \$220,102. "Which amount the Secretary of the Treasury stated to be constituted as follows:"

Deficiency of taxes paid before \$33,946	
Now.....	\$161,156
	—————\$195,102
In lieu of penalties and forfeitures...	25,000

\$220,102

And a further sum for interest, of \$3,023.14.

Of the sum stated as a lieu of penalties and forfeitures, \$25,000, the Secretary never refused, but was always willing to pay the appellants a moiety.

Their claim, however, was for a moiety of the whole sum, \$220,102.

Messrs. M. Blair, F. A. Dick, and W. Dorschheimer, for appellants:

This case is best understood by taking the events in the order in which they occurred:

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and first we should look to the Act of Congress of June 30, 1864, relating to the internal revenue. This Act imposes duties upon distillers, requiring them to furnish to the government an account of what they produce and to pay the duties thereon (see secs. 58-63), and provides (in secs. 48, 68) that the failure to comply with the requirements of the law shall be a forfeiture of all the liquors produced and all the vessels, apparatus, tools and raw materials used in their production.

Under this law the plaintiffs undertook the performance of the services stated in the petition for the joint use of the government and themselves. This made them the *employees* of the government; and well understood legal rights accrued to them for their services, and they are entitled to the ordinary legal construction of the contract so entered into with the government the same as if it had been made with an individual.

When the United States District Attorney instituted the proceedings, they were based upon a title given by the law. "The forfeiture is the statutory transfer of right." *Caldwell v. U. S.*, 8 How., 366.

To whose use had this transfer been made? Equally and jointly to that of the government and the informant, and so continued until the final settlement was made.

Jones v. Shore, 1 Wheat., 462.

In *In re Flournoy*, 1 Ga., 606, it was held that the interest of an informer is a matter of contract, and the right of property vests beyond the power of the State to affect. This case cites *King v. Amery*, 1 D. & E., 149, 363, 575, which held, that although the King has the power to remit a forfeiture, yet he cannot revoke a moiety of the same given by a law to a subject. It also cites 1 Nott & McC., 28.

See, also, *Roue v. State*, 2 Bay (S. C.), 565; 1 *Id.*, 878; *U. S. v. Morris*, 1 Paine, 232.

This right transferred from the former owner by the statute, is property both of the government and of the individual. There is no power in the Secretary of the Treasury to remit the informer's share in any other way than that provided by law.

The Margaretta, 2 Gall., 515; *The Palo Alto*, DAVIS, 343.

In *U. S. v. Morris*, 1 Paine, 309, the power of the Secretary to remit forfeitures is fully examined, and the court says that before the Act of 1797, courts were obliged to condemn property where the owner had innocently violated the law and, therefore, the power to remit was given in the Secretary of the Treasury, to be exercised to cases of innocence. "A pardon, as the very term implies, is an act of mercy, and generally supposes its object guilty. A remission, on the contrary, is an act of justice, and cannot be obtained unless the entire innocence of the petitioner be established, not by testimony taken *ex parte*, but after full notice to the proper officer of the government and the collector who makes the seizure."

See, also, *U. S. v. Lancaster*, 4 Wash. (C. C.), 64; *The Grey Jacket*, 5 Wall., 342 (72 U. S., XVIII., 646).

In *U. S. v. Morris*, 10 Wheat., 246, the court says: "Before such power to remit was given (by the statute then under consideration), the right of the custom-house officers attached upon

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the commencement of the prosecution, and could not be devested.

See, also, *McLaen v. U. S.*, 6 Pet., 404, 1 Stat., 789; *Hoyt v. U. S.*, 10 How., 109.

In the case at bar there has been, as between the government and the plaintiffs, the conclusive ascertainment of the lawfulness of the seizure which has transferred the title of the property in question. There having been no remission of the forfeiture under the Act of 1797, and the property not being liable to taxes as a matter of law, the money received was so much reserved out of the forfeiture.

In *McLaen's* case, the court laid much stress on the fact that the Secretary treated part of the amount reserved as penalty; and for that, as one of the reasons, held the settlement to be of a penal nature. Thus: "The very circumstance that the government itself has treated any part of the reservation as forfeiture and as distributable accordingly, is conclusive to show that the whole is incapable of being treated as duties, part of it being confessedly received in the character of a forfeiture. We think the whole must be treated as received, as a reservation by way of forfeiture."

The case made by the petition shows an inchoate title vested in the petitioners, in which the government had the same interest as they; prosecuted by the government with success, never devested by surrender by the government to the owner on the grounds of innocence, but on the contrary, persisted in to a successful issue.

Messrs. Wm. M. Everts, Atty Gen., T. H. Talbot, and E. P. Norton, for appellees:

The only question in the case is, whether the sum of \$195,102, now under consideration, was penalty paid into the Treasury of the United States. The Secretary of the Treasury, who, on the part of the United States, negotiated this payment, states that it was not received as penalty, and beyond the statement of this officer in relation to this matter, it is submitted that this court will make no inquiry. That statement will be deemed sufficient to sustain the demurrer to the petition in this court, as in the court below.

But if this court looks into the other statements of the petition, to ascertain whether or not this statement is correct, they will be found strongly to corroborate this representation of the Secretary.

Whether brought about lawfully or otherwise, the result, namely: the non-payment of the sum of \$195,102, or of any part thereof, as penalty, takes away the foundation of this claim. For this is a claim, not for damages, because the Secretary of the Treasury has unlawfully prevented a moiety from accruing to the appellants, but, which they allege did accrue. Nor does it avail the appellants that what was received ought to have been received as penalty. It is enough, in support of the demurrer, to show that, in fact, it was not paid and received as penalty.

Furthermore, it cannot be shown that the act of the Treasury Department in discontinuing these proceedings upon full payment of the taxes withheld, and of \$25,000 in lieu of fines and penalties, was unlawful. Such action was entirely within the scope of authority conferred by the 44th section of the Act of 1864 (vol. 13, p. 40), upon the Commissioner of In-

ternal Revenue, subject to regulations to be prescribed by the Secretary of the Treasury, to compromise all suits relating to internal revenue.

The earlier decisions in cases of seaport revenue, do not affect this case and are not discussed. But further, none of those arose in a suit discontinued before judgment.

Thus far the argument has admitted the appellants to the full benefits of the Amendment of March 3, 1865, to section 179 of the Act of June 30, 1864. They are, however, not within the scope of that Amendment. The petition sets forth a forfeiting offense committed prior to the date of the amendment; and section 16 of the Amendatory Act makes the provisions of the former Act govern the collection of all penalties incurred thereunder (vol. 13, p. 484).

Mr. Justice Grier delivered the opinion of the court:

The Act of Congress of March 3, 1797 (ch. 13), made perpetual by Act of Feb. 11, 1800, confers authority on the Secretary of the Treasury "to mitigate or remit any fine, forfeiture or penalty, incurred by any vessel goods or wares, by force of the laws for laying, levying or collecting any duties or taxes which, in his opinion, shall have been incurred without willful negligence or any intention of fraud in the person or persons incurring the same."

The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. The offer of a portion of such penalties to the collectors, is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes.

The 179th section of the Act to Provide Internal Revenue, etc., passed June 8, 1864, gives authority to collectors to prosecute for the recovery of fines, penalties and forfeitures in the name of the United States. It confers the right to one moiety of them upon the collector or deputy-collector who shall first inform of the cause, matter or thing whereby such penalty may have been incurred.

The amendment to this section in the Act of March 3, 1865 (ch. 78), gives this to any person who shall first inform, and adds that "when the penalty is paid without suit or before judgment, and a moiety is claimed by any person as informant, the Secretary of the Treasury shall determine whether any claimant is entitled to such moiety and to whom it shall be paid."

As the great object of the Act "to Provide Internal Revenue" is to collect the tax, the Secretary of the Treasury has no power to remit it. When the primary object of collecting the tax is obtained, as in the present case, the further infliction of penalties is submitted entirely to the discretion of the Secretary. No discretion is given to the courts to act in the case further than to give their judgment; and if the penalties are not mitigated or remitted by the Secretary, either before or after judgment, to enforce them by proper process.

The subject has been carefully examined by this court in the case of *U. S. v. Morris*, 10

Wheat., 246, 287, where it is decided "that the Secretary of the Treasury has authority, under the Remission Act of March 3d, 1797, to remit a forfeiture or penalty accruing under the revenue laws at any time, before or after judgment for the penalty, until the money is actually paid over to the collector," and that "such remission extends to the shares of the forfeiture or penalty to which the officers of the customs are entitled, as well as to the interests of the United States."

The court say that, "It is not denied but that the custom house officers have an inchoate interest upon the seizure; and it is admitted that this may be defeated by a remission at any time before condemnation. If their interest before condemnation is conditional, and subject to the power of remission, the judgment of condemnation can have no other effect than to fix and determine that interest as against the claimant. These officers, although they may be considered parties in interest, are not parties on the record, and it cannot be said with propriety, that they have a vested right in the sense in which the law considers such rights. Their interest is still conditional, and the condemnation only ascertains and determines the fact on which the right is consummated, should no revision take place." The right does not become fixed until the receipt of the money by the collector.

If these well settled principles be applied to the case before us, its solution is easy.

It was the first duty of the collector to collect the amount of duties or taxes on the property seized. The Secretary had no right to mitigate, remit or compromise that amount. Persons who had advanced money on the property in good faith offer the whole amount of the tax due, and finally agreed to pay the sum of \$25,000 to have the penalties remitted. This offer was accepted, and the further prosecution of the suits was, consequently, ended.

The power intrusted by law to the secretary was not a judicial one, but one of mercy, to mitigate the severity of the law. It admitted of no appeal to the Court of Claims, or to any other court. It was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal. Even if we were called upon to review the acts of the secretary, we see no reason to doubt their correctness, or that of the judgment of the Court of Claims in dismissing the case.

Decree affirmed.

Dissenting, *Mr. Chief Justice Chase.*

EDWARD L. MEAD, *Plff. in Err.*,

v.

ANSON BALLARD.

(See S. C., 7 Wall., 290-295.)

Condition subsequent in deed—effect of—complicity with—right of reversion to grantor.

A condition in a deed that a permanent location

NOTE.—Conditions precedent and subsequent in deeds, who may perform, and their effect. Conditions, not raised by implication. Condition unperformed. See note to Taylor v. Mason, 22 U. S. (9 Wheat.), 329; and note to U. S. v. Clarke, 34 U. S. (9 Pet.), 168.

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of an Institute on the land conveyed should be made between the date of the deed and the same day of the succeeding year, is a condition subsequent.

If it was done within that time, the grantor's right of reverter was gone; if it was not done within the year, he could refund the consideration money and recover the land.

A resolution of the trustees locating the building on the land, with the intention that it should be the permanent place of conducting the business of the Corporation, is permanently locating the Institute within the true construction of the contract.

By it the condition was fully complied with and performed, and with it passed all right of reversion to the grantor or his heirs.

[No. 92.]

Argued Feb. 23, 1869. Decided Mar. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

This was an action of ejectment, commenced in the court below by the plaintiff in error.

The case is stated by the court.

Mr. H. L. Palmer, for plaintiff in error:

It is submitted that the conveyance made by Mead to Lawrence was made with conditions subsequent; and that as a consequence, the estate in the lands described therein vested in Lawrence on the execution and delivery of the deed, Sept. 7, 1847, subject to be defeated by the failure or neglect of the grantee to perform the conditions.

Nicoll v. N. Y. & E. R. R. Co., 12 N. Y., 121; *Underhill v. S. & W. R. R. Co.*, 20 Barb., 455; *Finlay v. King*, 3 Pet., 346; 2 Bos. & P., 295; 1 D. & E., 645; *Parmelee v. O. & S. R. R.*, 6 N. Y., 74; *Ludlow v. N. Y. & H. R. R.*, 12 Barb., 440; *Parsons v. Miller*, 15 Wend., 561; *Jackson v. Topping*, 1 Wend., 388; *Lawrence v. Gifford*, 17 Pick., 366; *Austin v. Cambridgeport Parish*, 21 Pick., 218; *Gray v. Blanchard*, 8 Pick., 284; *Police Jury v. Reeves*, 6 Mart. (N. S.), 117; 4 Kent, 124; 5 Pick., 528; *Sperry v. Pond*, 5 Ohio, 387, 9 East, 170.

The first condition contained in the deed is, "That the Lawrence Institute of Wisconsin, chartered by the Legislature of said Territory, shall be permanently located upon said lands." It seems to us that the meaning of this clause is entirely clear; that there is no reason to doubt the grantor intended by the language here used to secure a fixed and continued location of the principal buildings of the Institute upon the lands conveyed.

The University was not so located; a temporary structure was erected in 1848, on block 3, which was on the tract conveyed by Mead, and was burned in January, 1857. The main building, or University proper, was commenced in 1853, on the Law tract, and was completed and occupied in 1855, two years before the old building was burned. Not only that, but the block on which the old building was erected, block 3, was sold and conveyed to the defendant. Such an abandonment of the premises conveyed as a site for the University, and a permanent location of it upon the Law tract, was a violation of this condition of the deed with respect to the permanency of the location.

This condition required the location of the Institution upon the premises conveyed. It seems evident that the principal building of the Institute was intended. The Corporation, then known as the "Lawrence Institute of Wisconsin," had been created by the Legislature of the then Territory of Wisconsin, for the purpose of

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establishing, maintaining and conducting an institution of learning in the then embryo State, for the education of youth generally, and to confer upon those deemed worthy, all such honors and decrees as are usually conferred in colleges and like institutions in the United States. Such an institution must have a local habitation as well as a name. It must have buildings suitable for the business for which it is created. To do what is "usually done in colleges and like institutions in the United States" requires such buildings as are usually occupied by colleges and like institutions.

It was an object to those owning adjacent lands to secure the location of such an institution in their immediate vicinity, and the benefits which might have been reasonably expected to result from its location, would depend largely upon the particular locality selected by the Institute for its main or principal buildings. It was the location of these buildings which was contemplated by the parties to the deed, and intended to be provided for by the condition in the deed under consideration.

This condition is not satisfied by a location upon the Mead tract, of a temporary school; the temporary site of a building thereon for a female boarding house, a steward's office, the store of the Treasurer, the law office of the Vice-President and Auditor, or the fence inclosing another tract on which the principal buildings are in fact erected.

Austin v. Cambridgeport Parish, 21 Pick., 215.

It is submitted that the court below erred in the first instruction given to the jury. "If the Lawrence Institute was located on the land conveyed by Mead and wife to Lawrence, on or before the 7th day of September, 1848, and then proceeded to erect a building thereon, which was used by the Institute in its business, and Mead had knowledge of such erection and use, and that the land was being laid out into lots and sold to purchasers who were improving them, and made no objection during his lifetime, his heir cannot, since his death, claim a forfeiture of the estate against the defendant, a purchaser of the land in dispute under said deed from Mead and wife to Lawrence."

The Supreme Court of Massachusetts, in *Gray v. Blanchard*, 8 Pick., 291, says: "A mere indulgence is never to be construed into a waiver of a breach of condition." *Jackson v. Cryder*, 1 Johns. Cas., 125.

The second instruction, that "The tender of the purchase money in the year 1865, by the heir of John F. Mead, this plaintiff, to Lawrence, cannot prejudice the defendant's title under the deed of John F. Mead," was also erroneous. Mead's interest in the land after his conveyance was an estate in expectancy, and that such estate decended to his heir. It is claimed that the case establishes a breach of the condition after the death of John F. Mead. It was then the prerogative of the plaintiff to waive the forfeiture or enforce it, as he should elect. He elected to enforce it, and tendered the purchase money; that tender completed his title to the granted premises, and gave him a clear right to maintain his action of ejectment.

The third instruction is as follows: "If John F. Mead knew of, or advised, the deed from Law to Lawrence, for the purpose of the institution, and did not claim a forfeiture of the See 7 WALL.

condition in his deed, his heir cannot claim a forfeiture against the purchasers under his deed to Lawrence, and the subsequent erection of a permanent building for the University on the Law tract, adjoining the Mead tract, worked no forfeiture of the condition in the conveyance of Mead and wife, in favor of the heir of Mead."

It is respectfully submitted that this instruction is in direct conflict with the doctrine laid down in *Jackson v. Cryder*, 1 Johns. Cas., 125; *Gray v. Blanchard*, 8 Pick., 284; see, also, *Jackson v. Allen*, 3 Cow., 220.

Mr. George W. Lakin, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The land for the recovery of which this action of ejectment was brought, was conveyed for a full consideration by plaintiff's ancestor, on the 7th day of September, A. D. 1847. The deed contained the usual covenants of warranty, and also a condition expressed in these words: "Said land being conveyed upon the express understanding and condition that the Lawrence Institute of Wisconsin, chartered by the Legislature of said Territory, shall be permanently located upon said lands and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase money, without interest, the said land shall revert to and become the property of said grantors."

The plaintiff, who sues as heir at law of the grantors, maintains that this is a condition subsequent which has not been performed, and having tendered the money received by them, he now claims the right to recover the land.

It must be conceded that the language cited amounts to a condition subsequent, and as no point was made in the trial as to the sufficiency of the tender, the only question before us is whether the condition was performed.

It appears, by the bill of exceptions, that, on the 9th day of August, 1848, the Board of Trustees passed a resolution locating the Institute on the land described in the deed. That contracts were made for the necessary buildings, which were commenced immediately, and that they were finished and the Institution in full operation by November, 1849. These buildings cost about \$8,000, but were burned down in the year 1857 and never rebuilt. It is also said that in 1858 a larger building, called the University, was erected on an adjoining tract. These facts are claimed to constitute an infraction of the condition.

That condition was, that a permanent location of the Institute on the land should be made between the date of the deed and the same day of the succeeding year. The location, then, whatever may have been its character, was something which could have been done and completed within one year. If it was done within that time the plaintiff's right of reverter was gone. If it was not done within the year, he could refund the money and recover the land. His right, on whatever it depended, must have been complete on the 7th day of September, 1848, for within that time the condition was to be performed.

The thing to be done was the location of the Institute. Did this mean that all the buildings

which the institution might ever need were to be built within that time, or did it mean that the officers of the institution were to determine in good faith, the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating the building on the land, with the intention that it should be the permanent place of conducting the business of the Corporation, they had permanently located the Institute within the true construction of the contract.

Counsel for the plaintiff attach to the word "permanent," in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the intention of the parties.

We are of opinion that the testimony shows, in any view that can be taken of it, that the condition was fully complied with and performed, and with it passed all right of reversion to the grantor or his heirs.

The rulings of the Circuit Court, to which exceptions were taken, were in conformity to these views, and its judgment is affirmed.

Cited—100 U. S., 562; 18 Am. Rep., 148 (31 Mich., 48)

JAMES R. BOYD, JOHN J. BOYD AND EDWARD HINCKEN, *Appts.*,

v.

OLIVER MOSES, CHARLES OWEN, FRANK O. MOORE, G. C. MOSES AND ALBERT OTIS.

(See S. C., 7 Wall., 316-320.)

Stipulation in charter-party, construction of—letter, when modifies same—ship, when exempt from liability for injury to cargo.

The stipulation in a charter-party, to take a cargo of lawful merchandise, does not compel the master to take goods which in his honest judgment cannot be carried without injury to the rest of the cargo.

An agreement contained in a letter considered as a modification of the terms of the charter-party.

Where the charterers induced the master, against his objection, to receive and carry lard in a leaking condition, the ship is exempt from liability, as between its charterers and owners, for damages therefrom to other portions of the cargo.

[No. 94.]

Argued Feb. 24, 1869. Decided Mar. 15, 1869.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

This was an action in *personam*, brought by the libelants, the present appellees, against the appellants, to recover a balance due upon a charter-party of the ship Robert Cushman.

The libel was dismissed in the district court, but upon appeal to the circuit court, where an amended libel was filed and further testimony taken, the decree of the district court was reversed, and a decree entered in favor of the libelants for the amount of charter money so withheld, and costs, from which the charterers appealed to this court.

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The case further appears in the opinion.

Mr. E. C. Benedict, for appellant:

The lard was lawful merchandise, which, under the charter-party, the ship was bound to receive as cargo together with grain, and she was bound to stow the whole safely.

It was the duty of the ship to have the between decks water tight and lard tight—as tight as the sides of the ship or the main deck.

The damage to the cargo was caused by the between decks not being tight.

It was the business of the owner to put the ship in good condition to carry this lawful and usual cargo. The owner represented her to be so, and covenanted in the charter that she was so; and under the charter, the charterer had a right to assume that she was so.

The guaranty contained in the letter is without consideration. Its true interpretation as an undertaking is: if you will take the lard on board, that is to say, if you will do what you are by law bound to do; if you will perform the charter-party which you have made and are penally bound to perform, we assume and will pay any damages which may be caused by your negligence in carrying, or your not delivering other cargo in good condition. If the lard should be taken on board and carried, the ship would not be liable for any damages except from her own negligence. This is, then, an undertaking to be responsible for the negligence of the ship, in consideration of her undertaking to do what she was bound to perform.

That a promise to do what a person is bound to do, by law, is not a good consideration for another's undertaking, and that a person is not bound to fulfill his promise to pay another for doing what he is bound by law to do, is familiar law.

The well known cases of promises by masters of vessels, to pay sailors extra for only doing their duty, illustrate this.

Harris v. Watson, Peake, 72; *Stilk v. Myrick*, 2 Camp., 817.

So, also, of a promise to pay pilots for assisting a vessel in distress, such being made their duty by law.

Callagan v. Hallett, 1 Cal., 104; *Crowhurst v. Laverack*, 16 Eng. L. & E., 497, and note.

So a promise to pay extra compensation to a witness obliged by law to attend upon subpoena, is not binding.

Willis v. Peckham, 1 Brod. & B., 515; *Collins v. Godefroy*, 1 B. & Ad., 950; *Smith v. Bartholomew*, 1 Met., 276; *Miller v. Holbrook*, 1 Wend., 317; *Deacon v. Gridley*, 28 Eng. L. & E., 345; *Rann v. Hughes*, 7 D. & E., 346, note.

There was no cause of action on the guaranty in the district court. It was not alleged in the pleadings, and was ruled out of the evidence by the court; the cause in the district court was on the charter-party pure and simple, as the pleadings show. The action in the circuit court was on the guaranty. Of this, as an original cause of action, the court had no jurisdiction, only appellate jurisdiction; and the amendment of the libel in the circuit, by inserting a new and original cause of action without leave of the court, was irregular; and for that the decree must be reversed.

Messrs. E. H. Owen and S. P. Nash, for appellees:

The agreement contained in the letter of Aug.

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7 should be considered as a modification of the terms of the charter-party in respect to the lard in question. It was between the original parties and related to the same voyage, and to merchandise which had been offered to the ship and rejected on account of its condition. It was not in any sense a guaranty, which is an undertaking by a third party.

Emerson v. Slater, 22 How., 28 (68 U. S., XVI., 380).

There was a sufficient consideration, in the consent of the master to receive the lard, to support the agreement. He was not bound to receive it if not in shipping order, which had to be determined not only by its condition but also in reference to the space left in the ship where it had to be carried, if at all. The master, in the exercise of his lawful authority in the matter, had a perfect right to reject the lard unless the charterers assumed the risk. His judgment upon the subject having been reasonably and properly exercised, is entitled to respect, and should not be lightly set aside.

Weston v. Foster, 2 Curt., 119; *Weston v. Minot*, 3 Wood. & M., 436.

When so offered to the ship, the lard was, beyond contradiction, "more like oil than lard." There were three or four hundred barrels of it in this condition, leaking badly from the casks.

The effect of melted lard lying on the deck during the voyage, which lasted over a month, would be and was, in fact, to destroy the pitch on the seams, saturate the oakum and, aided by the excessive heat in the hold, cause it to come out.

There being reasonable ground, therefore, for refusing to receive the lard in the condition it was, the consent to receive it notwithstanding its condition, was a good consideration for the promise.

Dewell v. Odell, 3 Hill, 215; *Eldred v. Huxlett*, 83 Pa., 307.

If the charterers had owned the entire cargo and had so induced the master to receive and carry the lard, and other parts of the cargo had been damaged thereby, as in the present case, they would not have had any right of action therefor against the ship; nor could they have recouped or set off the same in an action for the charter money, and the principle is the same in the present case as between them and the ship.

Major v. White, 7 Car. & P., 41; *Laurence v. Minturn*, 17 How., 100 (58 U. S., XV., 58); *Nelson v. Woodruff*, 1 Black, 156 (66 U. S., XVII., 97).

Mr. Justice Field delivered the opinion of the court:

The libel in this case was filed to recover a balance due upon a charter-party of the ship *Robert Cushman*. The charter-party was executed in July, 1862. The voyage stipulated, was to be from New York to Havre, with a cargo of lawful merchandise, which the charterers were to provide. The ship was to be tight, staunch, strong and every way fitted for the voyage. She was to load "under inspection" and to "go consigned to charterer's friends."

The cargo furnished by the charterers consisted principally of grain, lard and tallow. The grain, which was partly in bulk and partly in bags, was stored in the hold. A portion of her lard was stored between decks. By the leak-

ing of this lard a part of the wheat in the hold was damaged, and the question is, whether the damage shall be borne by the owners or the charterers of the ship. It was charged to the ship at Havre and paid by the consignees, who collected the freight, and its amount was withheld by them from the charter money. The present action is by the owner of the ship for the balance thus withheld.

When the lard was brought to the ship to be taken on board, it was leaking from the casks in which it was packed. It appeared to be mostly in a liquid state, and the stevedore having charge of the loading, refused, without the consent of the master, to receive it and store it between decks—the only part of the vessel not then occupied by merchandise.

He was apprehensive, that in its liquid state, leaking from the casks, it would penetrate through the deck and damage the wheat in the hold. The master, to whom the matter was referred, also refused to take it, and informed the charterer that he could not receive it unless they gave him an agreement to hold the ship harmless. They thereupon wrote to him a letter stating that they understood he objected to their shipping lard between the decks of the ship, requesting him to receive it, and agreeing to pay any damages to which the ship might be subjected on the discharge of the cargo at Havre, arising from the storage of the lard between decks, and its running on any other part of the cargo. Upon the receipt of this letter, the master consented to take the lard, and it was stored between decks. There were between three and four hundred casks, and the lard was leaking from nearly all of them. The weather was excessively hot during the time the ship was receiving cargo, so that it became necessary to relieve the stevedores by extra men, and on some days they could not work at all. The weather continued warm during the greater part of the voyage, which lasted over a month. Upon the discharge of the cargo 26 casks were found entirely empty and 827 partially empty. The decks were covered with lard in a liquid state, being in some places two or three inches deep, which had destroyed the pitch in the seams, and rotted the oakum, and dripped through and injured a large quantity of the wheat in the hold.

There is no dispute as to the extent of the damage thus produced. As already stated, the question is: upon whom shall the damage fall, the charterers or the owners of the ship?

The consignees of the ship at Havre were designated by the charterers as their friends, pursuant to the stipulations of the charter-party, and acted as their agent, and not for the master, in collecting the freight.

We are clear that the master was justified in refusing to receive the lard in its leaking condition.

The stipulation of the charter-party to take a cargo of lawful merchandise necessarily implied that the articles composing the cargo should be in such condition, and be put up in such form, that they could be stowed and carried without one part damaging the other. Whether in any case articles offered can be taken with safety to other articles, will depend upon a variety of considerations; the nature of the articles, the state of the weather, the voyage

contemplated, the amount of cargo already received, and other particulars.

Lard, for example, can be carried in winter to a northern port in loose casks with little damage to other articles, whilst injury may be reasonably apprehended if the voyage is to be made through the tropics, and the casks are not perfectly tight. Very different care must necessarily be given by the master in receiving and stowing goods perishable in their nature from heat or moisture, and such as are unaffected by either. All that is required of him in such case—he being a competent officer—in determining whether particular goods are at the time in shipping order and condition, or can be received in the state and stowage of cargo already aboard, is that he shall not act capriciously or without due consideration, but shall exercise an honest and reasonable judgment in the matter.

In *Weston v. Foster*, 3 Curt., 119, the whole of the vessel, except the cabin and room for the crew, sails, cables and provisions, was let, and the owners covenanted to receive all such lawful merchandise as the charterers should choose to put on board. The master, who was a competent officer, took on board all the cargo he thought his vessel could safely carry, which, however, did not fill it, but left a space capable of holding fifty tons more, and the charterers insisted that there should be deducted from the freight money the amount they would have received if fifty tons more had been brought. But the court held that the whole charter money was earned, and that the honest opinion of the master, though not absolutely binding on the charterers, could only be controlled by decisive evidence of a mistake on his part.

The master was here sustained in refusing to take all the cargo the hold of the vessel could receive, because, in the exercise of his honest judgment, he thought it would endanger her safety, notwithstanding the terms of the charter-party.

For the like reason he may refuse to take goods offered, if in his honest judgment they are in such condition or of such character that they cannot be carried without injury to the rest of the cargo.

In *Weston v. Minot*, 3 Wood. & M., 436, where a vessel was chartered for a voyage to Calcutta and back, to carry all lawful goods placed on board, and for a gross sum for freight out and back, to the entire capacity of the vessel, it was held that the charter-party must be considered to mean all goods not contraband nor diseased, and as many of them as could be put on board without making the vessel draw too much for safety, and that, if the goods put on board were heavy articles and, before the ship was full, sunk her as low as is usual and proper without extra danger, the master might refuse to take more without violating the charter-party.

The principle upon which the action of the master was justified in these cases applies to the case at bar. Safety to the cargo received on board, though not so high a consideration as safety to the ship, is one which should constantly govern the action of the master.

That his apprehensions were well founded in this case is established by the result. His conduct, therefore, in insisting upon protection to his ship, was reasonable, and this was in effect

conceded by the charterers, as otherwise they would have insisted upon the ship receiving the lard, or that the matter should have been submitted to the inspector under whose inspection it was stipulated the ship was to be loaded.

The agreement contained in the letter must be considered as a modification of the terms of the charter-party in respect to the lard in question. It relieved the ship from the responsibility of safe carriage of the cargo so far as that was affected by the lard. It may be regarded as a stipulation to that effect embodied in the charter-party; a stipulation which, though of no efficacy as between shipper and vessel, was valid as between charterer and owner.

If the charterers had owned the entire cargo, and had induced the master, against his objection, to receive and carry the lard in its leaking condition, they would not have had any right of action against the ship for the damage sustained, nor could they have recouped or set off the amount of damage in an action against them for the charter money. The principle upon which the ship would be exempt from liability in such case is applicable to the present case between the charterers and owners.

Decree affirmed.

WILLIAM S. GRANT. *Appt.*,

v.

THE UNITED STATES.

(See S. C., 7 Wall., 331-338.)

When title passed under contract with government—loss of goods, which party must bear—rescinding the contract, no ground for damages.

Where one had contracted with the government to furnish all supplies at certain posts in Arizona, the title to the goods did not pass to the government by inspection in New York, nor until delivered in Arizona.

Where he was prevented from so delivering them by the public enemy, the loss is his and not that of the United States.

Where property is destroyed by accident, the party in whom the title is vested must bear the loss.

This rule applies where private property is seized by the public enemy without any default of the owner, and in such a case the government is not bound to indemnify the sufferer.

A rescinding of the contract by the Secretary of War is no ground for damages without proof that the supplies were needed and of the damage.

[No. 88.]

Argued Feb. 18, 1869. Decided Mar. 15, 1869.

APPPEAL from the Court of Claims.

The case is stated by the court.

Messrs. C. B. Goodrich, J. S. Black, and W. H. Lamon, for appellant.

Cited the following authorities to show that the title to the property in question passed to the United States on its inspection.

Story, Sales, sec. 311, A. (3d ed.); *Thompson v. Gray*, 1 Wheat., 75; *U. S. v. Lutz*, 2 Blatchf., 383; *Laurence v. Minturn*, 17 How., 100 (58 U. S., XV., 58); *Lou v. Andrews*, 1 Story, 88; *Grove v. Brien*, 8 How., 429; *U. S. v. Del. Ins. Co.*, 4 Wash., 418.

After inspection and marking, the goods remained in the possession of the claimant for transportation; the completion of which was

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prevented by the public enemy and, consequently, the loss must be borne by the government.

The capture of the goods by an armed force in rebellion, acting with intent to subvert the government, under the facts found in the case, is a delivery to the United States of the goods ordered.

The duties of the government and its citizens are reciprocal—protection by the one, obedience by the other. Upon principle, in all cases in which private property is seized by a public enemy, without any default of the owner, the government is bound to sustain the loss. *Vatt. Law Nat.*, 403. The author concedes the principle above stated, although he adds: "But no action lies against the State for misfortunes of this nature." The author does not deny the right, although he denies the remedy. He says: "The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it."

Under the circumstances of the case, it is respectfully submitted that the petitioner has the right and is entitled to the remedy.

Messrs. W. M. Everts, Atty Gen., T. L. Dickey, Asst. Atty-Gen., and E. P. Norton, for appellee:

I. Claimant alleges that the rescinding of the contract by the U. S. without his fault, entitles him to damages, to be measured by the profits he would have made under the contract.

If contract there was, it merely entitled Grant to furnish all the supplies that might be needed at certain military posts in Arizona, until the 20th of March, 1862, at a certain price. It nowhere appears that any such supplies were needed at any of those posts after the rescinding of the order or contract. The rescinding of the order, therefore, was after the full execution of the order, inasmuch as all the supplies needed, etc., had already been furnished, and nothing remained to be done under the contract. If the order of the Secretary of War was, in fact, a violation of a contract which claimant then had, the order was void as against the claimant, and left his contract in the eyes of the law as valid as if the order of rescinding had never been made; and before claimant can recover, he must show a state of case on which he could recover under his contract, throwing the rescinding contract out of consideration. Claimant makes no case even for nominal damages.

Unless claimant can show something more than nominal damages, he has no such "claim" as the Court of Claims has jurisdiction to try.

II. The claim for the loss of private property taken in war by the enemy, cannot be sustained on principles of law, and is no such claim as the Court of Claims has jurisdiction to try and allow.

III. The inspection of goods of the contractor thousands of miles from the place of delivery, does not vest the property so inspected in the United States.

IV. Lastly; claimant insists that the United States is liable for the extra expense of keeping the means of transportation at Lavaca waiting for the arrival of the army supplies, and for the loss of horses, mules and oxen for want of forage while waiting for grass; and lastly, for the loss by capture at Rio Hondo, April 20, 1861.

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All this claim rests upon the position that all these consequences resulted without the fault of claimant, from delays caused by the culpable neglect of the United States to inspect the goods at an earlier day.

The facts in the record do not sustain the claim.

No culpable delay of inspection is found, nor is it found that the delay of shipment caused the loss; nor is it found that the loss was without the fault of claimant. See *McConihe v. N. Y. & E. R. R. Co.*, 20 N. Y., 495.

That this court will not weigh evidence reported, but will only pass upon the law applicable to the ultimate facts or law relating to the competency of evidence, see *Rules of Court of Claims*, p. 16; 1 Wall., 99 (68 U. S., XVII., 561); 6 Wall., 111 (78 U. S., XVIII., 794).

Mr. Justice Davis delivered the opinion of the court:

This controversy grows out of an order of the Secretary of War of the 9th of March, 1860, addressed to the Quartermaster-General and Commissary-General of Subsistence, granting to T. W. Taliaferro and W. S. Grant the privilege of furnishing and delivering at certain posts in Arizona, for a period of two years, all the supplies that might be needed there for the use of the service, at certain stipulated rates.

On the 29th day of July, 1860, the proper officer in Arizona served a requisition on the claimant for commissary articles, and the War Department approved the same on the 22d day of September following, with notice that the articles to be purchased would be inspected at Boston or New York. After various delays the goods were sent by water, and reached Lavaca, in Texas, to be transported by land to Arizona. In the course of transportation, the wagon trains, laden with the goods, got as far as Rio Hondo, where they were captured on the 20th of April, 1861, by the armed forces of Texas then in a state of rebellion.

Grant, who purchased the interest of Taliaferro, seeks to recover from the United States the value of the property which was captured.

On the theory that the order of the Secretary of War was a contract, mutually binding on the government and the claimant, the obligation imposed on the parties to it are clearly defined.

It was the duty of the claimant, as well as his exclusive privilege, to furnish all the supplies which were needed for the use of the service in Arizona, and on the receipt of the goods there, the government was bound to pay him for them the prices which were fixed in the order. It is too plain for controversy, that the property did not vest in the United States until it was delivered. To escape the force of this rule at law, it is insisted, as the goods were inspected in New York and pronounced to be of the proper kind and quality, that the title then passed to the United States, and that they only remained in possession of the claimant for transportation, and as he was prevented from delivering them by the public enemy, the loss must be borne by the United States. This position cannot be sustained, for the inspection at New York, on which it is based, did not work a change of title in the property, nor was it in the contemplation of the parties that it should. It did not affect the contract at all. The goods,

by a well known usage of the War Department had to be inspected somewhere, and as the contract contained nothing on the subject, it was for the advantage of the contractor that they should be inspected before shipment, rather than at the point of delivery. The War Department took upon itself no additional responsibility by inspecting them in New York, instead of Arizona, and this inspection in nowise relieved the claimant from any obligation which he had assumed. He had agreed to deliver the goods in Arizona and until he did this there was no contract on the part of the government, either express or implied, to pay him for them. All that the certificate of Major Eaton, the inspecting officer, proves, is, that the goods, when presented to him for inspection, were contained in strong, sound, full hooped barrels and well secured tierces, properly marked with the names of the places to which they were destined, and were of the kind and quality usually provided by the Subsistence Department.

But, it is said that the capture of the property is chargeable to the delay of the War Department in making the inspection and, in consequence of this, that the government is not only bound to pay for the supplies which were taken possession of by the enemy, but also to re-imburse the claimant for the loss of his wagons and teams. The answer to this is, that the order of the 9th of March, 1860, did not require inspection at Boston or New York, and if the Secretary of War chose to change the order afterwards, by directing that the goods should be inspected at those places, it was optional with the claimant whether or not he would submit to such direction.

But, conceding that the Secretary of War had the right to direct where the goods should be inspected, still he was not required to inspect, until the goods were substantially ready for inspection, and he was notified of the fact; and it is plain, by the finding of the court below, that after such notice and actual readiness, he did not culpably delay the inspection. The evidence shows very clearly that the difficulty which the agents of the claimant experienced in filling the requisition, was the cause of the delay in inspecting and shipping the goods. If, however, it be admitted that the government was in default in not inspecting sooner, that default had no connection with the subsequent injury suffered by the claimant, and was not the proximate cause of it. In such a case the rule of law applies, that where property is destroyed by accident, the party in whom the title is vested must bear the loss. *McConihe v. N. Y. & Erie R. R. Co.*, 20 N. Y., 496.

It is insisted that this rule does not apply where private property is seized by the public enemy without any default of the owner, and that in such a case the government is bound to indemnify the sufferers. But the principles of public law do not sanction such a doctrine, and Vattel (page 408) says no action lies against the State for misfortunes of this nature. "They are accidents caused by inevitable necessity, and must be borne by those on whom they happen to fall."

Whether there are equities in this particular case, and if so, whether they require that the claimant should be re-imbursed, in whole or in part, for the capture of his property, under the

circumstances, are questions that must be addressed to Congress, for it is not the province of the Judicial Department of the Government to determine them.

The only remaining point in the case relates to the rescission, by Secretary Cameron, of the order of the 9th of March. This proceeding was undoubtedly taken because the supplies needed in Arizona could be either purchased there at cheaper rates, or forwarded more securely from St. Louis. Whether the conduct of the Secretary of War was or was not justifiable, is not a question to be considered in deciding this suit, for the claimant has not shown a state of case on which he could recover if the rescinding order had never been made. The contract entitled him to furnish, at certain prices, all the supplies that might be needed in Arizona until the 20th of March, 1862. To enable him to recover, for a breach of this contract, he should have proved that supplies were needed at the posts in Arizona after the rescinding order was made, and the pecuniary loss he sustained in not being allowed to furnish them. This he has wholly failed to do.

We cannot see that this is a case for even nominal damages; but if it is, the Court of Claims was not instituted to try such a case.

Judgment affirmed.

CONFISCATION CASES.

- No. 25.—THE UNITED STATES, *Appt.*, v. THE STEAMER "ELEANOR."
 No. 40.—THE TRENT, *Appt.*, v. UNITED STATES.
 No. 26.—U. S., *Appt.*, v. THE LELIA, ETC
 No. 27.—SAME, *Appt.* v. THE COUNTESS, ETC.
 No. 28.—SAME, *Appt.*, v. THE ANNA PEBRET, ETC.
 No. 29.—SAME, *Appt.*, v. THE FROLIC, ETC.
 No. 30.—SAME, *Appt.* v. THE T. S. CONNOLLY, ETC.
 No. 33.—SAME, *Appt.*, v. THE VIGO, ETC.
 No. 34.—SAME, *Appt.* v. THE J. M. SHARP, ETC.
 No. 35.—SAME, *Appt.*, v. THE NINA SIMMES, ETC.
 AND
 No. 44.—THE GEN'L BEAUREGARD, *Appt.*, v. U. S.
 No. 46.—THE LOUIS D'OR, *Appt.*, v. SAME.
 No. 48.—THE CAPITOL, *Appt.*, v. SAME.
 No. 63.—THE TEXAS, *Appt.*, v. SAME.
 No. 64.—THE T. D. HINE, *Appt.*, v. SAME.

(See S. C., 7 Wall., 454-463.)

Informers, right of in property seized—not entitled to be heard as a party to the suit.

Under Act of Aug. 6, 1861, an informer possesses no such interest in the property seized as will prevent the Attorney-General from dismissing the suit.

The informer is not a party to the suit, nor is he entitled to be heard, as such, in any stage of the proceedings.

Argued Mar. 1, 1869. Decided Mar. 22, 1869.

APPEALS from the Circuit Court of the United States for the Eastern District of Louisiana.

On motions by the Attorney-General to dismiss, in Nos. 35, 26, 27, 28, 29, 30, 33, 34 and 35, and motions by him to reverse in Nos. 40, 44, 46, 48, 63 and 64, the parties having so stipulated.

The history of these cases, and a sufficient statement of the facts, appear in the opinion of the court.

Mr. Wm. M. Evarts, Atty. Gen., for the United States, and *T. J. Durant* and *J. M. Carlisle*, counsel for claimants in Nos. 40, etc., appeared in favor of the motion.

Mr. C. Cushing, for the informer, opposed the motions.

Mr. Justice Clifford delivered the opinion of the court:

Property owned by any person who knowingly uses or employs the same, or who consents to the use or employment of the same in aiding, abetting or promoting insurrection against the Government of the United States, under the conditions specified in the 1st section of the Act of the 6th of August, 1861, is declared by that Act "to be lawful subject of prize and capture," and all property purchased, acquired, sold, or otherwise transferred, with intent that the same may be so used or employed, is also declared to be subject to the same proceedings, and the provision is, that it shall be the duty of the President to cause the same to be seized, confiscated and condemned. 12 Stat. at L., 319.

Proceedings for the condemnation of such property may be instituted by the Attorney-General, or by any district attorney for the district in which the property is situated at the time the proceedings are commenced, and the 3d section provides, that in such cases "the proceedings are wholly for the benefit of the United States;" but the same section also provides, that "any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts."

Pursuant to those provisions libels of information were filed in these cases by the District Attorney of the United States for the Eastern District of Louisiana, in the Circuit Court of the United States for that district, in which it was alleged that the steamer *Eleanor* was seized on the 15th of June, 1865, and that the steamer *Trent* was seized on the 30th of June in the same year.

Apart from the names of the vessels, and the time when the respective seizures were made, the allegations of the libels are similar in every respect material to this investigation. They were addressed to the judges of the circuit court for that district, and the introductory allegation in each states that the District Attorney prosecutes for the United States, and in the name and behalf of the United States and Charles Black, informant, against the respective steamers, their tackle, apparel and furniture, and the prayer of the respective libels is

for process of monition, order of publication, and for a decree of condemnation to the use and ownership of the United States and of the informant.

Both steamers were seized, and process was served in each case; but the steamers were afterwards released by the order of the court, made at the request of the claimants, who respectively gave bonds for their appraised value. Subsequent proceedings in the two cases were in all respects the same, except that the decree in the first case was for the claimants and in the second for the United States, and the losing party in each case appealed to this court. Other appeals in like cases were entered in this court at the same term, and they have remained on the calendar to the present time.

Early in the present term some of the cases were heard upon the merits; but these cases now come before the court on certain motions made in behalf of the United States by the Attorney-General. His motion in the first case is for leave to dismiss the libel of information; and in the second case, his proposition is to the effect that the decree of the circuit court, which was in favor of the United States, shall be reversed and the cause remanded, with a view that the same may be dismissed in the court where the suit was instituted. When the motions were made they were taken under advisement; but the court subsequently decided that the motions ought to be granted, unless the informer desired to be heard in opposition to the discontinuance of the prosecutions. Since that time the informer has been heard, and the court has come to the conclusion that the respective motions must be granted.

Provision was made by the 35th section of the Judiciary Act for the appointment of an attorney of the United States in each district, and the same section makes it his duty to prosecute in such district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the Supreme Court, in the district in which the court shall be holden. 1 Stat. at L., 92.

In the prosecution of suits in the name and for the benefit of the United States, the 7th section of the Act of the 15th of May, 1820, provided that the district attorneys should conform to such directions and instructions as they should receive from the agent of the Treasury; but the 1st section of the Act of the 2d of August, 1861, devolves the general superintendence and direction of district attorneys, as to the manner of discharging their respective duties, upon the Attorney-General of the United States. 8 Stat. at L., 596; 12 Stat. at L., 285.

Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is impaneled for the trial of the case except in cases where it is otherwise provided in some Act of Congress.

Civil suits, in the name and for the benefit of the United States, are also instituted by the district attorney, and, in the absence of any directions from the Attorney-General, he con-

trols the prosecution of the same in the district and circuit courts, and may, if he sees fit, allow the plaintiffs to become nonsuit, or consent to a discontinuance.

Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office. 11 Stat. at L., 51; *Levy Court v. Ringgold*, 5 Pet., 454; *U. S. v. Corrie*, 23 Law Rep., 145; *U. S. v. Stowell*, 2 Curt., 153; *U. S. v. McAvoy*, 4 Blatchf. C. C., 418; *The Peterhoff*, Blatchf. Pr. Cas., 463; *The Anna*, Blatchf. Pr. Cas., 337.

Under the rules of the common law, it must be conceded that the prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his option, and without other liability to his adversary than the payment of taxable costs which have accrued up to the time when he withdraws his suit. 1 Tidd, Pr., 628.

Precisely the same rule prevails in the admiralty courts and, consequently, the libellant has the right, at any stage of the cause, voluntarily to discontinue the same, and the only penalty to which he can legally be subjected, in the absence of any statutory regulation, except, perhaps, in prize cases, is the payment of the costs of the proceedings. *The Oriole*, Olcott, Adm., 67.

Although the name of the informer in these cases is mentioned in the libel of information, still it is nevertheless true that the suit was instituted by the district attorney in the name and for the benefit of the United States. Control of these suits, therefore, while they were pending in the circuit court, belonged to the district attorney, under the general superintendence and direction of the Attorney-General, and he might, if he had seen fit, have discontinued them at any stage of the proceedings prior to the appeals. Such control on the part of the district attorney ceases whenever such a suit, civil or criminal, is transferred to this court by writ of error, appeal, or certificate of division of opinion, as the 85th section of the Judiciary Act also provides that it shall be the duty of the Attorney-General to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned; and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time. Appointed, as the Attorney-General is, in pursuance of an Act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed in the respective motions under consideration, but if more be needed, it will be found in the case of *The Grey Jacket*, 5 Wall., 370 [72 U. S., XVIII., 446], in which this court decided that in such suits no counsel will be heard for the United States in opposition to the views of the Attorney-General, not even when employed in behalf of another of the Executive Departments of the Government.

Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of

the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction and within the control of the Attorney-General.

Objection is made to the granting of the motions in these cases, upon the ground that it would impair the vested rights of the informer, mentioned in the respective libels of information. Argument for the informer is, that the allegations of the libels afford presumptive evidence that he filed the informations with the district attorney; and that the 3d section of the Act provides that, in that state of the case, the proceedings shall be for the use of such informer and the United States, in equal parts. Perhaps the better opinion is, that the allegations of the libels, in case of condemnation, would afford *prima facie* evidence that the person therein named as the informer is entitled to be regarded in that character; but the more important inquiry in this case is, whether he possesses any such interest in the property seized, before final condemnation, as will prevent the Attorney-General from dismissing the suits, as proposed in the motions. Much aid will be derived, in the solution of that question, by a comparison of the 3d section of the Act, invoked as supporting the views of the informer, with similar provisions in other Acts of Congress, upon analogous subjects. Regulations were prescribed for the distribution of fines, penalties and forfeitures, in the first Act passed by Congress for the collection of maritime duties, including forfeitures arising from seizures on navigable waters, as well as on land, and the same provisions, in substance and effect, were incorporated into the Act of the 2d of March, 1799, which, for many purposes, remains in force to the present time. 1 Stat. at L., 48, 697.

Those regulations direct that one moiety of the fines, penalties and forfeitures recovered by those Acts, after deducting all proper costs and charges, shall be paid into the Treasury, and that the other shall, in certain cases, be divided, in equal proportions, between the collector, naval officer and surveyor of the port; and, in other cases, that one half of that moiety shall be given to the informer, and the remainder only to the officers of the customs. Such fines, penalties and forfeitures were required, by those Acts, to be sued for and recovered in the name of the United States, in any court competent to try and determine the controversy.

Questions of various kinds arose in the construction of those regulations, especially in cases where the claims of informers came in conflict with the assumed rights of subsequent purchasers, and with the action of the Secretary of the Treasury in remitting such forfeitures under the Act of Congress conferring that power upon the head of that department. 1 Stat. at L., 506, 626.

Differences of opinion existed among the justices of this court, whether a forfeiture under those provisions, or others of like character, gave such a title to the United States as to overreach a *bona fide* sale to an innocent purchaser, when made before seizure and suit for condemnation, but the majority of the court adopted the affirmative of that proposition.

U. S. v. Bags of Coffee, 8 Cranch, 404; *The Mars*, 8 Cranch, 417.

No one, however, contended that any such rule could be applied, in any way, except by relation back to the criminal offense, in cases where the title had been consummated by seizure, suit and judgment, or decree of condemnation. Next controversy arose between the collector and the heirs at law of his predecessor, in a case where the seizure had been made by the latter, in his lifetime, and while he was in office, but the decree of condemnation was not entered till after his decease and the appointment of his successor. Payment of the amount, as ordered in the decree of distribution, was made to the collector in office at the date of the decree, but the court held that the money belonged to his predecessor, in consequence of the inchoate right which he acquired, by virtue of the seizure, and the incipient steps taken by him to cause the suit to be instituted. *Jones v. Shore's Exrs.*, 1 Wheat., 468.

Express ruling of the court in that case was, that the right of the collector to forfeitures *in rem*, attached on the seizure, but that the right must be defined and consummated by the judgment or decree. Authority to remit such fines, penalties and forfeitures, was conferred upon the Secretary of the Treasury, by the Act of the 3d of March, 1797: and the next important controversy which arose upon the subject, was as to the extent of that authority, and whether the Secretary could remit the share of the informer, or that of the officers of the customs, subsequent to the judgment or final decree.

Just prior to the decision in the case of *Jones v. Shore's Exrs.*, Judge Story ruled, in the circuit court, that the right of the collector, antecedent to the judgment or decree, was merely inchoate, but he added, what was not necessary to the decision of the case, that his right to the forfeiture vested absolutely with the final sentence of condemnation, and that, after judgment, it could not be remitted by the Secretary of the Treasury. *The Margaretta*, 2 Gall., 515.

Unguarded expressions, supposed to support the same conclusion, are also employed in some of the prior, as well as subsequent decisions of this court. *Van Ness v. Buel*, 4 Wheat., 74.

Doubts arose whether the Secretary could remit a forfeiture or penalty, accruing under the several Acts, subsequent to the final decree or judgment, but those doubts were soon removed by a unanimous decision of this court, and one which is characterized by accurate analysis, clear statement, and sound conclusions. *U. S. v. Morris*, 10 Wheat., 281.

Merchandise was imported into the United States in violation of the Non-Intercourse Act then in force, and the vessel and cargo were seized on that account, and were afterwards condemned as forfeited. Subsequent to the decree of condemnation, the Secretary of the Treasury remitted the whole forfeiture, and this court held that he did not exceed his authority; that neither the rights of the informer, nor the rights of the collector or other officers of the customs, were violated in the case; that their rights were conditional, and subordinate to the power of remission; and that the Secretary had authority, under that Act, to remit a forfeiture, at any time before or after a final decree or judgment, until the money was actually paid
See 7 WALL.

over to the collector for distribution, and that the power to remit extends not only to the interest of the United States, in the forfeiture, but also to the share of the informer, and that of the officers of the customs.

Informations, to recover municipal forfeitures, whether the seizure was made on navigable waters or on land, must be instituted in the name of the United States; and they must be prosecuted, in the subordinate courts, by the district attorney, and in this court, when brought here by appeal, or by writ of error, by the Attorney-General. Where the seizure was made on navigable waters, the case belongs to the instance side of the subordinate court; but where the seizure was made on land, the suit was one at common law, and the claimants are entitled to a trial by jury. 3 Greenl. Ev., sec. 396; 1 Kent, Com. (11th ed.), 387; *The Sarah*, 8 Wheat., 394; *Armstrong's Foundry*, 6 Wall., 769 [73 U. S., XVIII., 884].

Mention of the name of the informer, in the information, in such cases, is not necessary, as he is not a party to the suit, nor is he entitled to be heard, as such, in any stage of the proceedings. He cannot institute the suit, nor move for process, nor join in the pleadings, nor take testimony, nor except to the ruling of the court, nor sue out a writ of error, nor take an appeal. Judgment is for the claimants, or for the United States, and if for the latter, and the claimants do not remove the cause into this court for revision, it then becomes the duty of the court to render the decree for distribution. Prior to such a decree, the interest of the informer is conditional, and under the decisions of this court it continues to be so until the money is paid over, as required by law. *U. S. v. Morris*, 10 Wheat., 280.

Viewed in any light, it is quite clear that the informer, in these cases, has no vested interest in the subject-matter of these suits, and that both motions ought to be granted.

The order in the first case is, that it be dismissed, and that order also disposes of Nos. 26, 27, 28, 29, 30, and 33, 34, and 35.

Order in the second case is, that the decree be reversed, as stipulated by the parties, and that the cause be remanded, with directions to dismiss the libel of information; and this order also disposes of Nos. 44, 45, 46, 48, 49, and 54, on the calendar.

Cited—8 Wall., 511; 16 Wall., 165, 431, 433; 98 U. S., 375; 99 U. S., 597; 100 U. S., 297; 24 Am. Rep., 592 (36 Mich., 155); 3 Cliff., 317.

WILLIAM N. WHITELEY, *Appt.*,
v.

WILLIAM SWAYNE.

(See S. C., 7 Wall., 685-687.)

First inventor, who is—Dinsmore's patent.

He is the first inventor and entitled to the patent, who, being an original discoverer, has first perfected and adapted the invention to actual use. Dinsmore's patent was prior to that of Steadman for improvements in harvesters.

[No. 99.]

Argued Mar. 2, 1869. Decided Mar. 22, 1869.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below by the appellant, to restrain the appellee from selling certain reaping and mowing machines, alleged to infringe certain patents for harvesters.

The court having entered a decree dismissing the bill, the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Samuel S. Fisher, for appellant.

Mr. D. Wright, for appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case is founded on two patents. One issued to J. L. Hardeman, 20th August, 1850, for an improvement in a machine for cutting hemp, millet and grain, which was assigned to the plaintiff, Whiteley, and surrendered, and three re-issues granted to him on the 18th June, 1861; the other to T. S. Steadman, May 28d, 1854, for an improvement in clover and grass seed harvester, which is assigned to the plaintiff and surrendered, and three re-issues granted to him on the 19th June, 1860.

The machine complained of, and sought to be enjoined, is known as the Kirby harvester, originally patented to Byron Dinamore, February 10th, 1852. Nothing is heard of the Hardeman patent, except in the bill. The litigation, therefore, so far as the plaintiff's interests is concerned, depends upon the Steadman patent for cutting clover heads and grass seed. On April 18th, 1862, Steadman filed a *caveat* in the Patent Office in which he states that he is engaged in making experiments for perfecting certain improvements in a machine for harvesting clover and grass seed preparatory to letters patent therefor. We have seen that this patent was granted May 28d, 1854. Besides the *caveat* and the patent, we have an account of the working of the machine by Mr. Hatch, in 1854. Steadman resided in Holley, Orleans County, New York, and was a neighbor of Hatch. The machine, which was tried in the neighborhood on several occasions, in clover fields, never went into successful practical operation. None were ever made under the patent after the first, which was about the time the patent was granted. The experiment appears to have been wholly given up and abandoned by Steadman as a failure; and it thus remained for some six years, when the plaintiff, Whiteley, took from him an assignment of the patent and procured the three re-issues already referred to.

The plaintiff's title, and the one upon which he must succeed against the defendant, if he succeeds at all, rests upon a patent for improvements in a machine for harvesting clover and grass seed; which improvements, after a full and fair trial, resulted in unsuccessful experiments, and were finally abandoned. They never went into any useful or practical operation, and nothing more was heard of them from Steadman or any other person, for a period of six years. At the end of this period the plaintiff takes an assignment of the patentee, and is, doubtless, vested with all his rights. But what were those rights? Clearly, if any other person

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had chosen to take up the subject of the improvements, where it was left off by Steadman, he had a right thus to enter upon it, and if successful, would be entitled to the merit of them as an original inventor, for he is the first inventor and entitled to the patent, who, being an original discoverer, has first perfected and adapted the invention to actual use. Curtis, Patents, sec. 43, p. 37, and *notes*.

Hence, if Dinamore's patent was later than that of Steadman, and was for similar improvements, it would constitute a perfect defense against the suit in the present case, as the plaintiff is obliged to rely wholly on this assignment of Steadman, and stands in his footsteps, and has no better title. But the fact is otherwise. Dinamore's invention goes back to the year 1850. His first machine was successfully tried in the harvest of that year. Some twenty-one were made in the year 1851, and from fifty to sixty in 1852. Steadman's *caveat* was even not filed in the Patent Office till after Dinamore's patent was issued. The present defendant derives his title from Dinamore. The case is too plain to require any extended examination.

Decree below affirmed.

Cited—7 Blatchf., 72; 15 Blatchf., 186.

ENOCH JACOBS, *Appt.*,

v.

THOMAS F. BAKER.

(See S. C., 7 Wall., 295-299.)

Patent decision affirmed.

Decision of the court below, that the improvements for which a patent was granted were not original, affirmed.

[No. 100.]

Argued Mar. 3, 1869. Decided Mar. 22, 1869.

A PPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this case was filed in the court below by the appellant, to recover damages resulting from an alleged infringement of certain patents, and for an injunction.

The court having entered a decree dismissing the bill, the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Samuel S. Fisher, for appellant.

(No counsel appeared in this court for the appellee.)

Mr. Justice Grier delivered the opinion of the court:

The Patent Act of 1836 enumerated the discoveries or inventions for which patents shall be issued, and describes them as "any new and useful art, machine, manufacture, or composition of matter."

We have been at some loss to discover under which category to class the four patents which are the subjects of this bill. The complainant alleges that he has invented a new and useful improvement in the construction of jails. Now, a jail can hardly come under the denomination of "a machine"; nor, though made by hands, can it well be classed with "manufactures"; nor, although compounded of matter can it be termed

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a "composition of matter" in the meaning of the Patent Act. "But if the subject-matter be neither a machine nor a manufacture, nor a composition of matter, then," says an authority on the subject of patents (Curtis, Patents, 91), "it must be an art, for there can be no valid patent except it be for a thing made, or for the art or process of making a thing." Now, without attempting to define the term "art" with logical accuracy, we take as examples of it, some things which, in their concrete form, exhibit what we all concede to come within a correct definition, such as the art of printing, that of telegraphy, or that of photography. The art of tanning leather might also come within the category, because it requires various processes and manipulations. The difficulty still exists, however, under which category of the Patent Act an improvement in the construction of jails is to be classed, or whether under any.

The Act of 29th August, 1842, gives a copyright for "new and original designs for manufacture, whether of metal or other material, for bust, statue, etc., or any new and original shape or configuration of any article of manufacture, to any inventor who shall desire to obtain an exclusive property, to make, use, and vend the same, or copies of the same."

Now, although the complainant might contend (as one would suppose from the immense number of plans, designs and drawings with which the record in the case has been incumbered) that his patent could be supported under this Act, yet still the difficulty remains whether the erection of a jail can be treated as the infringement of a copyright.

But waiving all these difficulties as hypercritical, and assuming the correctness of the positions taken, that whatever is neither a machine nor a manufacture, nor a composition of matter, must (*ex necessitate*) be "an art"; that a jail is a thing "made"; and that the patent is for the "process of making it," let us examine the case as presented by the bill and answer.

The bill relies upon four several patents which it sets forth. The first, dated January 7th, 1859, is for a certain new and useful improvement in the construction of prisons, all which the complainant sets forth in his specification with plates and designs too tedious to mention. The claim concludes thus:

"What I claim as my invention and desire to secure by letters patent, is a secret passage or guard chamber around the outside of an iron plate jail, and between said jail and a surrounding inclosure, constructed and arranged substantially as described for the purpose set forth."

The next patent is dated 20th December, 1859, and purports to be for "a new and useful improvement in iron plate jails." The claim is for "The improved iron walls for the same, consisting of the following parts arranged and united as set forth, to wit:

The entire wall plates (A) having their edges closely abutting joint plates (E) united to and uniting the plate A by rivets (I), which have their riveted ends inward and countersunk to the depth of the thickness of the plate A in the manner and for the purposes herein set forth."

This specification is also accompanied by numerous plates.

The third patent is dated 21st February, 1860, and is for an improvement in joining plates of

metal and is stated to be specially applicable to prisons. The claim was for the construction of the joint made by means of the closely abutting plates (AA) and the flat and semi-cylindrical plates (BB) and rivets (CC), substantially in the manner and for the purpose set forth. This, too, had numerous drawings.

The fourth patent was dated 24th July, 1860, and was for an improvement in iron prisons. The claim was for constructing and arranging iron plate cells in jails, separately from each other, with vertical spaces (E) between the cells upon the same level, and horizontal spaces between the cells, arranged, one above another, substantially as, and for the purpose described."

It would seem from the quick succession of these patents and before the plans for building jails which they severally suggested could well be put practically into operation, and before any inquiry was made as to how other persons constructed them, as a new idea came into the complainant's mind, he immediately proceeded to the Patent Office to get it patented.

It is not necessary to the decision of this case to examine whether all or any of the suggestions made by the complainant were proper subjects of patent. The bill presents a number of interrogatories to the defendant, and requires him to answer them under oath. The answer of the defendant denies that the complainant was the original and first inventor of the several inventions claimed, or of any of them, and avers that the devices described in the complainant's patents were well known, and in use prior to the pretended invention of them by the complainant. And it enumerates many persons who had used the devices before the complainant. The record presents no question of law as to the construction of these patents. The only issues were of fact. It would be a tedious as well as an unprofitable task to attempt to vindicate the correctness of our decision of this case by quoting the testimony and examining the volume of plates annexed to it. It could never be a precedent in any other case.

It is enough to say that we see no reason to doubt the correctness of the decision of the Circuit Court on the issues made, or the pleadings, and it is, therefore, affirmed.

GUSTAVE A. LE MORE AND LEONTERE
LE MORE, Claimants of 880 BALES OF
COTTON, *Appts.*, v.

THE UNITED STATES.

*Printed transcript of the record not amendable
after cause is decided.*

This court will not order the record of a cause to be brought before it, in order to correct an error in the printed transcript, after the cause has been decided and sent to the court below.

[No. 107.]

Motion filed Mar. 19, 1869. Decided March 22, 1869.

APPEAL from the District Court of the United States for the Southern District of Illinois.

For the history and facts of the case, see the report of the decision of this court on the merits, 6 Wall., 521, (73 U. S., XVIII, 935). No argument was made on the motion.

On motion of *Mr. C. Cushing*, in behalf of the United States.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a petition that the court will cause to be brought before it the record and proceedings in a cause which was argued and disposed of by decree at the last term, in order to correct an error in the printed transcript of the record.

To make the allowance of the prayer of the petitioners available to them through the correction of the alleged error, it would be necessary to recall the mandate sent to the inferior court, to set aside the decree rendered at the last term, to rehear the cause and make a new decree.

This cannot be done without reversing the settled and uniform practice of the court, and the petition must, of course, be denied.

THE UNITED STATES, *ex rel.* SAMUEL C. MORGAN, *Pff. in Err.*,

v.

EGBERT GATES, Town Clerk of the Town OF BELOIT.

See S. C., "*Morgan v. Town Clerk*," 7 Wall., 610-618.)
Circuit court may command town clerk to levy town tax.

The circuit court may issue a *mandamus* to compel a town clerk in Wisconsin to levy a tax to pay a judgment against the town, there being a statute of that State authorizing him to levy such tax.

[No. 118.]

Argued Feb. 23, 1869. Decided Mar. 22, 1869.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. Matt. H. Carpenter, for plaintiff in error:

The *mandamus* may be issued by a court of the United States to an officer of the State. *Knox Co. v. Aspinwall*, 24 How., 376 (65 U. S., XVI., 735).

2. It is submitted that this *mandamus* cannot be granted, because the individual at present holding the office has neglected to levy a tax. If this be a sound objection, it amounts to a repeal of the statute. It cannot be legally known that this individual officer will not perform this duty, until the time for the performance is passed; and then he cannot be compelled to do so, until another annual assessment. In the meantime the town will do, what they did in this instance, elect another individual who cannot be compelled for the same reason, and so on forever. But this objection is expressly overruled by *Soutter v. Madison*, 15 Wis., 87; *People v. Collins*, 19 Wend., 56.

3. The learned district judge, holding the court below, denied this *mandamus*, upon the ground that, inasmuch as the Act under which the bonds were issued, provided for the levying of taxes by the supervisors, that was exclusive of all other remedies.

But it is submitted that the objection, if it could ever be taken, comes too late after judgment on the coupons has been rendered. If the town had a right to insist that the bondholder should confine himself to the single

remedy provided by the Act, the objection should have been raised when the bondholder sought another remedy by action at law. It must be presumed here, that the objection if made was overruled; if not made, it was waived. This has been so ruled by the Supreme Court of the State of Wisconsin.

In *Bushnell v. Gates*, 22 Wis., 210, in Supreme Court of the State of Wisconsin, the same objection was made and was overruled, and the *mandamus* was granted.

Although the bondholder had a right under the law which provided for the issue of these bonds, to apply to the court for a *mandamus* against the Board of Supervisors of the town, to compel taxation upon the maturity of his coupons, and without seeking a judgment, he was not bound to this course; but might, as he did in this instance, bring suit and recover judgment at law. This is supposed to be settled by the fact that this judgment is rendered. The unfortunate standing in the stocks was wholly unable to believe that he could not be put there; and the fact that this judgment was rendered on these coupons, is regarded as equally conclusive to show that such judgment can be rendered. *Bushnell v. Beloit*, 10 Wis., 195.

When the judgment is rendered, whether rightly or wrongly, it is to be enforced; and the statute has provided that no execution shall issue on any judgment against a town; but that on receiving transcript, affidavit, etc., the clerk shall assess a tax to pay the judgment.

The objection taken by the learned counsel opposed, that the remedy given by the Act, the levy of the tax by the Board of Supervisors, is exclusive of all other remedies, comes too late. It should have been interposed when the plaintiff sought another remedy, by this action at law.

The plaintiff has fully exhausted his remedy as against the Board of Supervisors, under the Act authorizing the issue of these bonds; and the court below has decided that on the state of facts shown by the papers in this case, no relief can be had in that direction.

The fact is, the bondholder may pursue one of three courses, to recover his interest.

1. He may apply to the court on the maturity of his coupon, without obtaining judgment, for a *mandamus* to compel taxation under the Act.

Com. v. Allegheny Co., 32 Pa., 218; *Com. v. Pittsburg*, 34 Pa., 496.

2. He may recover judgment on his coupons, and then apply to the court, using his judgment only as evidence to the non-payment of his interest, and obtain *mandamus* to compel taxation under the original Act, as he might have done without obtaining judgment.

Soutter v. Madison, 15 Wis., 87; *Haemeyer v. Mineral Point*, 22 Wis., 396; *Ward v. Sheboygan Co.*, not reported.

3. He may, after obtaining judgment at law, enforce judgment by his execution or otherwise as the law may regulate the enforcement of judgments, without regard to the cause of action upon which it was rendered.

These various proceedings are cumulative remedies, and the party may pursue either. *Anderson v. Hooks*, 9 Ala., 704.

A mortgagee with mortgage containing power

of sale, may exercise the power, or waive it and go into equity to foreclose his mortgage. The power of sale is an additional weapon in the hands of the creditor, not a shield to the debtor. So here the creditor may pursue either or all these remedies, until he obtain one satisfaction.

Messrs. H. L. Palmer and E. G. Ryan, for defendant in error:

The *mandamus* was prayed for to enforce the collection of a tax, to satisfy a judgment recovered on coupons of bonds issued under the Act of Feb. 10, 1858.

Under that Act, sec. 8, it is provided that the supervisors shall annually levy a tax to pay the interest on the bonds whenever necessary.

By the general law regulating towns, R. S., ch. 15, sec. 78, this is the mode provided for the payment of judgments against towns. An exemplified copy of the judgment, with an affidavit that the judgment is in force and unpaid, is to be filed in the office of the town clerk; whereupon it is the duty of the town clerk to assess the amount on the next town assessment and tax roll, in a separate column, and the same is to be collected like other taxes and paid to the proper party.

This latter is the proceeding which the relator has seen fit to take.

His proper remedy is by *mandamus* to the supervisors, whose duty it is to levy the tax under the Act authorizing the issue of the bonds, and not under the general provision relating to other judgments. This has been so held by the Supreme Court of the State, and by this court.

State v. Beloit, 20 Wis., 79; *Knox Co. v. Aspinwall*, 24 How., 376 (65 U. S., XVI., 785); *Von Hoffman v. Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403); *Walkley v. Muscatine*, 6 Wall., 481 (73 U. S., XVIII., 930).

This is not a case of alternative remedies, of which the relator has an election. He can have but one payment levied by one tax, once assessed. And if it be the duty of the supervisor to levy the tax, it cannot be the duty of the clerk. The special Act providing for the special tax to pay these special liabilities, to be levied by the supervisors, takes this judgment out of the general Act, providing for the assessment of a tax by the clerk, to pay other judgments against towns.

And this view is perhaps strengthened by the language of ch. 15, R. S., Sec. 77 provides that no execution shall issue on any judgment against a town. Sec. 78 provides for the payment of any judgment, rendered by any court of this State.

And the relator should have applied in the court below for *mandamus* against the supervisors, and not against the clerk.

Mr. Justice Swayne delivered the opinion of the court:

On the 9th of January, 1861, the plaintiff in error recovered a judgment against the defendant in error for \$1,540 damages, and for costs. The cause of action was overdue interest coupons attached to bonds issued by the town of Beloit in payment of its subscription to the stock of the Racine, Janesville and Mississippi Railroad Company, pursuant to chapter 12 of the local and private laws of Wisconsin, passed See 7 WALL.

in 1853. The plaintiff in error instituted the proceedings in the court below to obtain a writ of *mandamus*, directed to the town clerk of the defendant, commanding him to assess the amount necessary to pay the judgment and interest upon the taxable property of the town, and to place the assessment upon the next assessment and tax roll for collection. A statute of Wisconsin, ch. 15, sec. 77, Rev. Stat. 1858, p. 186, forbids the issuing of an execution against a town, and expressly prescribes this mode of procedure.

Ample authority to issue the writ is given by the statute. The proceedings on the part of the plaintiff in error are in all things in strict conformity to its requirements. The power of the circuit court to issue writs of *mandamus* to state officers in proper cases is no longer an open question in this court; and it has been repeatedly held to be an appropriate remedy in the class of cases to which the one lying at the foundation of this proceeding belongs. *Knox Co. v. Aspinwall*, 24 How., 376 [65 U. S., XVI., 785]; *Von Hoffman v. Quincy*, 4 Wall., 535 [71 U. S., XVIII., 403]; *Riggs v. Johnson Co.*, 6 Wall., 166 [78 U. S., XVIII., 768]. We learn from the record that the court below denied the writ upon the ground that the statute under which the bonds were issued, provided that the requisite tax should be levied by the supervisors of the town, and that this remedy was exclusive of all others. There are several obvious answers to this view of the subject. We deem it sufficient to advert to one of them. In the case of *Bushnell v. Gates*, 22 Wis., 210, this precise question, arising under the same circumstances, came before the Supreme Court of Wisconsin. It was held that the objection was untenable, that the statute authorizing the writ to go against the town clerk applied to the case, and that it was conclusive. If there could otherwise have been any doubt upon the question, this determination by the highest court of the State giving a construction to the statute under consideration, is unanswerable. We need not further consider the subject.

The judgment below is reversed. A mandate will be sent to the Circuit Court directing that an order be entered in the case in conformity with this opinion.

SAMUEL C. MORGAN, *Appt.*,

v.

THE TOWN OF BELOIT AND THE CITY OF BELOIT.

(See S. C., 7 WALL., 618-619.)

Bill in equity against city and town—remedy to tax, how enforced.

A bill in equity will lie to compel a city and town to pay a judgment which they are bound to pay in proportion to their taxable property.

The remedy to tax for the payment of the judgment may be enforced in equity.

[No. 281.]

Argued Feb. 23, 1869. Decided Mar. 22, 1869.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The bill in this case was filed in the court below, by the appellant, to enforce payment of a number of judgments at law previously ob-

tained by him against the defendants, on certain bonds, issued by the Town of Beloit on a subscription to the stock of a certain railroad company. The bill contained only a prayer for general relief. The defendants demurred. The court sustained the demurrer and dismissed the bill. Whereupon the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Matt. H. Carpenter, for appellant:

1. The complainant, the holder of these bonds, was clearly entitled to some remedy against the City for its proportion of the sum secured thereby, and the question is: what was the appropriate remedy?

In *Goodhue v. Beloit*, 21 Wis., 636, the Supreme Court of Wisconsin held, under a similar provision of the same charter, that a joint action at law could not be maintained against the Town and City. The court, however, very strongly intimate that a suit in equity against both Town and City might be maintained.

It is believed that no action at law can be maintained against the City on these bonds. To such an action the plea of *non est factum* by the City would be true in fact and fatal in law. If any action at law could be maintained against the City, it would be debt founded on the statute. But then there would be the difficulty of settling, as between the City and the Town, the proportion which each ought to pay in an action where the Town was not a party. This consideration alone, it is submitted, gives a court of equity jurisdiction. There must be a decree as between the Town and City, fixing their respective proportion of the indebtedness, before a decree can be rendered against the City. Hence, a court of equity is the only tribunal that can render complete justice between all the parties.

Again; if the Town were compelled to pay the whole debt, it would be entitled to an action against the City for the proportion which the City ought to pay. Circuity of action is, therefore, avoided by maintaining a suit in equity against both. The charter binds the City to pay, not a certain sum of money, nor an ascertained nor specified proportion of the bonds, but a proportion to be ascertained by extrinsic facts and evidence; and the Town is interested in the question of the amount to be recovered against the City. The Town should, therefore, be a party to the proceeding, which it can only be in a court of equity.

By the law of Virginia and Kentucky, an indorsee cannot maintain an action at law against a remote indorser; but this court has held that, for that reason, he might have suit in equity. The principle decided is, "Equity will make that party immediately liable, who is ultimately liable at law."

Riddle v. Mandeville, 5 Cranch, 323; *Bank U. S. v. Weisiger*, 2 Pet., 381.

This principle justifies the bill in this case.

2. That this claim has been reduced to judgment against the Town, is no objection to proper proceedings against the City. It is only in the case of joint contractors, that a judgment against one merges the contract as to the other.

3. The bill contains a prayer for general relief, and that is sufficient. Under such prayer,

the court will grant the ordinary equitable relief to which the complainant is entitled upon the facts stated in the bill. This was held by this court in December Term, 1850, subsequent to the rule upon which the defendants' counsel rely. *Taylor v. Balt. Ins. Co.*, 9 How., 390.

Messrs. H. L. Palmer and E. G. Ryan, for appellees:

The omission of any prayer for special relief is fatal to this bill. Were it not for this appeal, we should suppose the omission to be a clerical mistake.

There are, indeed, a few cases holding the dangerous and inconvenient rule, that a prayer for general relief is sufficient; and that the special relief may be prayed for at the bar on hearing. But even under that rule, the bill must indicate by its frame the special relief sought, which this bill does not.

Is this bill framed for a declaratory decree of the proportions in which the judgments should be paid by the City and Town, leaving the plaintiff to his *mandamus*, to enforce a tax accordingly? Or is the bill framed for a decree awarding execution against the defendants? Or is the bill a confession that our plea in abatement, of the non-joinder of the City in the actions at law, was well taken and an effort to establish the liability of the City, after judgment at law, by decree in equity?

We do not know. A pleader who frames his bill, with a prayer for general relief only, even when permitted, does a bold act, and is bound to do it skillfully.

But this court has wisely abrogated the rule that a bill may be framed with the prayer for general relief only. Rule 21 given by this court to the Federal Courts of Equity, which is also Rule 21 in order, of the court below, provides that "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief."

Had the bill prayed any special relief pertinent to the case made by the bill, the court might have granted any cognate relief, under the prayer for general relief. But under the prayer for general relief only, this court, under its most judicious rule, can grant no relief whatever. The prayer for general relief must be accompanied by a prayer for special relief. A prayer for general relief only, is, under the rule, no prayer at all.

And this bill stands as a bill without any prayer, except the prayer for process and is clearly demurrable.

We refer, if reference be necessary on this subject, to Story, Eq. Pl., sec. 42, 453.

Mr. Justice Swayne delivered the opinion of the court:

The bill of the appellant presents the following case: In the year 1853, the Legislature of Wisconsin, by an Act duly passed, authorized the Town of Beloit to subscribe for \$100,000 of the stock of a railroad company authorized to construct a railroad from the City of Racine to the Village of Beloit, and to make payment in its bonds to be issued for that purpose. The bonds were accordingly issued. A portion of them came into the hands of the appellant, and he recovered upon them the several judgments at law described in the bill. These

judgments are all in full force and unsatisfied. By an Act of the Legislature, passed in 1856, the City of Beloit was created. It embraces a part of the territory which before constituted the Town of Beloit. This Act provides:

"That all principal and interest upon all bonds which have heretofore been issued by the Town of Beloit for railroad stock or other purposes, shall be paid, when the same or any portion thereof shall fall due, by the City and Town of Beloit, in the same proportions as if the said City and Town were not dissolved."

This provision was re-enacted in 1857.

It is averred that the City and Town ought respectively to pay the proportions set forth—of the judgments—with interest from their several dates. The prayer is for general relief. The appellee demurred. The court sustained the demurrer, and dismissed the bill. This appeal was thereupon taken.

The two corporations are as separate and distinct as if the territories they embrace, respectively, had never been united. It is obvious that, without a legislative provision to that effect, the City would not be answerable at law for the debts of the Town, incurred before the former was created. Whether, but for the statute, the City there would have been chargeable in equity, it is not necessary to consider. The statute is conclusive as to a liability, to be enforced in some form of procedure. The only question before us, whether there is a remedy in equity. It may be, as suggested by the counsel for the appellant, that an action would lie upon the statute. It is also possible that a proper case for a writ of *mandamus* might be made. But these inquiries are only material as bearing upon the question whether there is an adequate remedy at law. If so, a suit in equity cannot be maintained. To have this effect, the remedy at law "must be as plain, adequate and complete," and "as practical and efficient to the ends of justice, and to its prompt administration, as the remedy in equity." 3 Pet., 215. When the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial by jury. 19 How., 278 [60 U. S., XV., 635]. The objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. 5 Pet., 496; 3 How., 383. The provision upon the subject in the 16th section of the Judiciary Act of 1789, was only declaratory of the pre-existing rule.

In the case before us, the adjustment of the amount to be paid by the City will depend upon accounts and computations founded upon the proper assessment rolls. In order to bind the Town, it is necessary that it should be made a party. This cannot be done in proceedings at law. If the Town should be compelled to pay the entire amount, the right is given by the statute to recover back the proportion for which the City is liable. This would involve circuitry of litigation. The remedy at law is, therefore, neither plain nor adequate.

The question, whether a bill in equity will lie, is disembarrassed of this objection.

The authority to tax for the payment of municipal liabilities, in cases like this, is in the nature of a trust. *Von Hoffman v. Quincy*, 4 See 7 WALL.

Wall., 555 [71 U. S., XVIII., 410]. The jurisdiction of a court of equity to interfere in all cases involving such an ingredient, is too clear to require any citation of authorities. It rests upon an elementary principle of equity jurisprudence.

"The power is reserved to a court of equity to act upon a principle often above mentioned, namely: that whenever there is a right it ought to be made effectual." 1 Kaime, Prin. Eq., 3. Where there is a right which the common law, from any imperfection, cannot enforce, it is the province and duty of a court of equity to supply the defect and furnish the remedy. *Quick v. Stuyvesant*, 2 Paige, 92.

The decree is reversed. A mandate will be sent to the circuit court directing that the demurrer be overruled, and the cause proceeded in according to the principles of equity and the rules of equity practice.

Cited—11 Am. Rep., 604 (31 Wis., 125).

THE TOWN OF BELOIT, *Appt.*,

v.

SAMUEL C. MORGAN.

(See S. C., 7 Wall., 619-624.)

Town cannot compel surrender of town bonds after a judgment at law sustaining them—state statute.

After a judgment at law has conclusively established the validity of town bonds, a suit in equity cannot be maintained by the town to compel their surrender.

Where a state statute distinctly affirms that the bonds shall be paid, that is a fatal objection to a bill to compel their surrender.

[No. 281.]

Argued Feb. 23, 1869. Decided Mar. 22, 1869.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The case is stated by the court.

Messrs. H. L. Palmer and E. G. Ryan, for appellant:

The bonds in question were not an execution of the authority granted by the Act of Feb. 10, 1853, but were executed by the officers of the Town without authority of law.

Notwithstanding the leaning of this court to overrule objections to the validity of municipal bonds, we believe it has never been doubted here, that there must be specific legislative authority to give validity to such bonds. That was the very point decided in *Aspinwall v. Daviess Co.*, 22 How., 364 (63 U. S., XVI., 296), and is recognized in *Knox Co. v. Aspinwall*, 31 How., 539 (63 U. S., XVI., 208), and in all subsequent decisions of the court upon the subject, especially in *Thompson v. Lee Co.*, 3 Wall., 827 (70 U. S., XVIII., 177).

The bonds are void for usury under the provisions of ch. 172, of 1851, limiting the rate of interest.

The bonds carry on their face adequate notice of their invalidity.

The bonds were issued without valid consideration.

No subsequent Act of the Legislature ratified these bonds.

The Acts relied on by the defendant as a

ratification, are Acts incorporating the City of Beloit, out of the old Town of Beloit, and amending the charter.

Private Laws, 1856, 991; Private Laws, 1857, 437.

It is very certain that the Legislature could have had no intention, by this provision, to legalize the unauthorized issue of the bonds, nor to ratify the bonds.

We submit that a statute cannot operate as a ratification of a void contract, without assent of both parties. It is for the Legislature to authorize the contract; but it is for the parties to contract. If a legislative Act could operate as a ratification, making valid what was before void, it is the Legislature which makes the contract, not the parties. This point is very elaborately settled by the Supreme Court of Wisconsin, in *Hastrouck v. Milwaukee*, 13 Wis., 37.

We are not unaware of decisions in this court, giving effect to retrospective statutes.

Satterlee v. Mattheuson, 2 Pet., 380; *Watson v. Mercer*, 8 Pet., 88; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420, were all writs of error to state courts, in which this could and did only decide that there was nothing in retrospective state legislation, in civil matters, in conflict with the Constitution or authority of the United States.

Wilkinson v. Leland, 2 Pet., 627, and *Leland v. Wilkinson*, 10 Pet., 294, are repetitions in this court of the same kind of case.

In *Thompson v. Lee Co.*, above cited, an Act was passed by the Legislature of Iowa, "Legalizing the issue of county, city and town corporation bonds, in the counties of Lee and Davis," and providing that "the bonds issued, etc., shall be a valid lien upon the taxable property of said county." After, not before, the passage of this curative Act, the bonds in suit were issued.

The original authority of law had been conditional on an election, held to have been irregular; and to cure that, the Legislature, which might have given the authority to issue the bonds without election, gave a new authority to issue them notwithstanding the irregularity of the election; and under that authority the bonds were issued.

This was held to be a ratification, not, as we understand it, of the bonds, but of the authority.

It is submitted that here was nothing to ratify; no ratification intended or expressed by the Legislature; no assent nor ratification by the parties; no salvation of these bonds by legislative confirmation.

The proofs disclose no act of the Town, nor of its officers, which operates as a ratification.

Our case is not precluded by any previous adjudication. *Bushnell v. Beloit*, 10 Wis., 195, was relied on in the court below as conclusive of the validity of these bonds. An examination of that case will show that it turned on entirely different points, and that no single question here argued was disposed of by the court. The points which we make are open questions; and it is not deemed necessary to argue that the judgment by default pleaded in the answer as an estoppel, has no such effect.

Mr. M. H. Carpenter, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

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The bonds and coupons to which this litigation relates were issued under the same statute of Wisconsin, and for the same purpose, as those involved in the preceding case, just decided. The object of the bill is to enjoin the appellee from proceeding in the suits at law which he has instituted upon a part of the securities in his hands; and to have those and all others belonging to him, delivered up and canceled. The court below heard and dismissed the case. It is brought here by this appeal for re-examination.

Numerous objections have been made to the validity of the bonds.

The argument on both sides has been learned and elaborate. The view which we have taken of the case will render it necessary to consider but two of the points to which our attention has been called.

I. On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject-matter, though the *res* itself may be different.

An apt illustration of this principle is found in *Gardner v. Buckbee*, 3 Cow., 120. Gardner bought a vessel from Buckbee, and gave two notes for the purchase money. Buckbee sued him upon one of the notes in the Marine Court. Gardner set up as a defense, fraud in the sale and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the City of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. *Bouchaud v. Dias*, 3 Den., 238; *Doty v. Brown*, 4 N. Y., 71, and *Babcock v. Camp*, 13 Ohio St. 11, are to the same effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time. *Ferrar's case*, 6 Co., 8; *Hilchen v. Campbell*, 2 W. Bl., 831; *Duchess of Kingston's case*, 2 Sm. L. Cases, 656; *Aurora v. West*, [ante, 42]; see, also, *Birchhead v. Brown*, 5 Sandf. S. C., 135. But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented.

In *Henderson v. Henderson*, 1 Hare, 115, the *Vice-Chancellor* said: "In trying this question, I believe I state the rule of the court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter

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which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. *Brandenagle v. Cocks*, 19 Wend., 207. The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the Town to pay them. Nothing is disclosed in the case which affects this condition of things.

II. The City of Beloit was chartered by the Legislature of Wisconsin in 1856. It embraces a part of the territory which previously belonged to the Town of Beloit. In the 17th section of the charter it is enacted that "All principal and interest upon all bonds which have heretofore been issued by the Town of Beloit for railroad stock or other purposes, when the same or any portion thereof shall fall due, shall be paid by the City and Town of Beloit in the same proportions as if said Town and City were not dissolved," etc.

This provision was re-enacted in 1857 in an Act amending the charter of the City. No bonds were issued in payment for railroad stock but those to a part of which this controversy relates. The language used by the Legislature is clear and explicit. No gloss can raise a doubt as to its meaning. It distinctly affirms, and the affirmation is repeated, that the bonds shall be paid.

The only point to be considered is the effect of this provision. That is not an open question in this court. Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the Legislature is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution. *Gelpcke v. Dubuque*, 1 Wall., 230 [68 U. S., XVIII., 530]; *Thompson v. Lee Co.*, 8 Wall., 327 [70 U. S., XVIII., 177]. The same principle has been applied in the courts of the States. *Wilson v. Hardisty*, 1 Md. Ch. Dec., 66; *Shaw v. Norfolk Co. R. R. Co.*, 5 Gray, 180. This court has repeatedly recognized the validity of private and curative statutes, and given them full effect, where the interests of private individuals were alone concerned, and were largely involved and affected. *Satterlee v. Mathewson*, 2 Pet., 380; *Wilkinson v. Leland*, 2 Pet., 627; *Leland v. Wilkinson*, 10 Pet., 294; *Watson v. Mercer*, 8 Pet., 83; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; *Stanley v. Coll.*, 5 Wall., 119 [72 U. S., XVIII., 502]; *Crozall v. Sherard*, 5 Wall., 268 [72 U. S., XVIII., 572]. The earlier and more important of these authorities are so well known to the profession, and are so often referred to, that it would be waste of

time to comment upon them. We hold this objection also fatal to the appellant's case.

Several other important propositions have been discussed by the learned counsel for the appellee. They have not been considered, and we express no opinion in regard to them.

The decree of the Circuit Court is affirmed.

Cited—9 Wall., 414; 20 Wall., 143; 91 U. S., 533; 94 U. S., 370; 100 U. S., 528; 4 Hughes, 361; 15 Blatchf., 342; 66 N. Y., 137.

WILLIAM WARD AND FRANCIS X.

WARD, *Plffs. in Err.*,

v.

FRANCIS L. SMITH.

(See S. C., 7 Wall., 447-453.)

Effect of designation of place of payment in bond
—tender at place—bank, when agent for collection—authority of agent to receive currency in payment—bank-notes, when not good tender—bonds due enemy, when draw interest—interest between alien enemies.

The designation of a place of payment in a bond imports a stipulation that its holder should have it at such place when due, to receive payment, and that the obligors would produce there the funds to pay it.

If the instrument be not lodged there, and the obligor is there at its maturity, with the necessary funds to pay it, he cannot be made responsible for any future costs of suit or interest.

When the instrument is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment.

Without special authority, an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value.

A bank is not agent of the payee for collection of bonds not deposited with it, although payable there.

Bank-notes not current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

A collecting agent can receive for the debt of his principal only legal tender, or money which passes at par.

Bonds drew interest pending the civil war when the principal debtor resided within the lines of the Union forces, and the bonds were there payable, although the creditor was within the Confederate lines.

The rule that interest is not recoverable on debts between alien enemies can only apply when the money is to be paid to the belligerent directly,

[No. 117].

Argued Mar. 19, 1869. Decided Mar. 29, 1869.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This action was brought in the court below, by the defendant in error, to recover the amount alleged to be due upon certain bonds. The trial below having resulted in a verdict and judgment for \$14,310, with costs, in favor of the plaintiff, the defendants sued out this writ of error.

NOTE.—Suspension of interest during war.

A prohibition of all intercourse with an enemy during a war, furnishes a just reason for the abatement of interest on debts due to subjects of the belligerent. *Conn. v. Penn.*, Pet. C. C., 496; *Jackson Ins. Co. v. Stewart*, 6 Am. L. Reg. N. S., 732; *Begler v. Waller*, 3 Am. L. T. Rep., 157.

This rule does not apply where creditor remains in debtor's country during war or has an agent there

A further statement of the case appears in the opinion of the court.

Messrs. Arthur G. Brown and F. W. Brune, for plaintiffs in error:

1. When securities are left with a bank for collection, the bank is, *ipso facto*, made the agent of the payee, to receive payment thereof. It is the agent of the payee, not of the payer.

Grant, Bank., 2, 3, 4; Dunl. Paley, Agt., 91, and notes; Pars. Merc. L., 144; *Marine Bk. v. Fulton Bk.*, 2 Wall., 253 [89 U. S., XVII., 785]; *Marine Bank v. Rushmore*, 28 Ill., 463; *Smith v. Essex Co. Bk.*, 22 Barb., 627; *Bk. of Wash. v. Triplett*, 1 Pet., 25; App. to *Rouse v. Young*, 2 Brod. & B., 184; 6 Eng. Com. L., 165; Best, J., in *Filler v. Beckley*, 2 Watts & S., 458.

2. The bank may release the payer by receiving payment in gold, silver, copper, drafts, or checks on other banks, or private bankers, bank notes of its own or other banks, circulating at or below par.

It matters not what may be the particular kind or forms of money accepted by the bank; its relation of agent towards its principal and the debtor ceases, the moment the funds so received are mingled with its own funds and credit is given on its books for the amount so collected, as cash.

The relationship of debtor and creditor from that moment subsists between the bank and its former principal, and the bank is liable for the whole amount so credited.

Edw. Bail., 66; Story, Bail., sec. 88; Pars. Merc. L., 144; *Wallace v. McConnell*, 13 Pet., 136, 150; *Bk. of U. S. v. Bk. of Ga.*, 10 Wheat., 333; *Levy v. Bk. of U. S.*, 4 Dall., 284; *Marine Bk. v. Birney*, 28 Ill., 90; *Marine Bank v. Rushmore*, 28 Ill., 463; *Tinkham v. Heyworth*, 31 Ill., 522; *Robison v. Beall*, 26 Ga., 17; *Marine Bk. v. Fulton Bk.* (*supra*); *Lourey v. Murrell*, 2 Port., 280; *Honore v. Colmeauil*, 1 J. J. Marsh., 506, 523; *Bk. of Northern Liberties v. Jones*, 42 Pa., 537.

3. It was stipulated in the bonds, that they should be payable at the Farmers' Bank; and it was thus made part of the contract that all the bonds should be deposited in that bank by the payee, Smith, at maturity or before, so that the obligors might be able to make payment of them at that bank, according to the law and usage of banks, in making collections and receiving payments.

Wallace v. McConnell, 13 Pet., 150; *Filler v. Beckley*, 2 Watts & S., 458; *Bradston v. Gibson*, 9 How., 263; *Swift v. Hathaway*, 1 Gall., 417.

4. Finally, the plaintiffs in error contend that the court below erred in instructing the jury that the plaintiffs in error were not entitled to the benefits of any of the credits or pay-

ments, either at their par or actual value, except the three credits mentioned in said instruction; and in holding plaintiffs in error liable for interest on the entire balance during the war.

Jackson Ins. Co. v. Stewart, 17 Am. Law Reg. (6 N. S.), 782, and note 735; *Tucker v. Watson*, 17 Am. Law Reg., 6 N. S., 220; *Brewer v. Hastie*, 3 Call. (Va.), 22; *Hoare v. Allen*, 2 Dall., 102; *Poxcroft v. Nagle*, 2 Dall., 132; Letter of Mr. Jefferson, 1 Am. St. Pap., 257, 304-312; Code of Va., 1860, tit. 18, ch. 58, p. 348, secs. 15, 16.

Messrs. R. J. and J. L. Brent, for defendant in error:

The question simply is, whether a debtor on three notes payable at a particular bank, where only one of the notes is left for collection, has a right to deposit depreciated notes of suspended banks in payment for one or all these notes.

The very statement of the question would seem to furnish its own answer.

So far as relates to the first note which was deposited for collection, the bank may have had an implied authority to collect in currency; but that did not authorize a receipt of notes of insolvent banks.

13 Wend., 101.

Chief Justice Holt declared, in *Ward v. Evans*, 2 Ld. Raym., 930, that "Where a servant is sent to receive money on a bill, he cannot accept a note instead of money without the particular directions of his master."

He further decided that, "If the master returns the note which his servant has taken, it is no payment."

To the same effect is Story, Ag., secs. 98, 101.

The principle of the case in 18 Wend., 105, so far as it ignores the *scienter* of the party paying current bank-notes in ignorance of the stoppage of the bank, seems to be sanctioned by the courts of Me., Vt., and N. H.

22 Me., 88; 11 Vt., 576; 9 N. H., 362.

This is held to be the true doctrine.

2 Pars. N., 190, and notes; Story, Prom. N., sec. 389, note 2.

But it is denied in Pa., Tenn., Va., La., and Mass.

See Smith, Merc. L., 528, n., ch. 13, sec. 2.

But in our case, the *scienter* is not only shown by the stipulation of the parties as to the notorious depreciation of Virginia funds in the market, but by the evidence of the defendant, Ward, that he had purchased this paper at a large discount for the special purpose of making this payment.

There can be no doubt that a bank receiving notes for collection is agent for the owner, but only *pro hac vice* to receive payment in money,

authorized to receive the debt. Conn. v. Penn., Pet. C. C., 469; *Denniston v. Imbrie*, 3 Wash., 396; *Lash v. Lambert*, 15 Minn., 416; 8 C., 2 Am. Rep., 142.

Nor does it apply if an account contains a charge for interest during war and there is, after peace, a promise to pay the amount, or the account is in fact or law a settled account from which a promise results by operation of law. *Bainbridge v. Wilcocks*, Bald., 536.

Interest is not allowed during the time the right of action is suspended by war. *Mayer v. Reed*, 37 Ga., 483; *Selden v. Preston*, 11 Bush., 191; *Begier v. Waller*, 3 Am. L. T. Rep., 167.

Interest on loans made previous to and maturing after the commencement of war, ceases to run during the subsequent continuance of the war, although interest was stipulated in the contract.

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Brown v. Hiatts, 82 U. S. (15 Wall.), 177; *Walker v. Beauchler*, 27 Gratt., 511; *Fred v. Dixon*, 27 Gratt., 541.

Where the holder of a note parted with it before it fell due, entered the army of the other power, and after his return became repossessed of the note, which was then long past due, the maker during the whole time continuing a resident of the State, the holder recovered interest during the war. *Thomas v. Hunter*, 29 Md., 406.

Where a creditor resided within the territory of one and the debtor within the territory of the other of the belligerent powers, such debtor is, under the rules of public law, entitled to an abatement of interest during time the war lasted. *Roberts v. Cocke*, 28 Gratt., 207; *McVeigh v. Bk. of Old Dom.*, 26 Gratt., 188.

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and when that is collected, the debtor is discharged. This principle explains 22 Barb., 627, and cognate cases.

Here, all the authority is to collect the note according to its tenor, and being payable in dollars on its face, there is no authority to take anything which is not dollars, or at least notes of solvent banks, current as money.

13 Iowa, 256.

Again; upon the conceded facts in this case, the defendant, Ward, knew that the bank held his note, payable in dollars, and that he was offering and the officers of the bank were receiving, less than dollars.

The holder, Smith, was not bound by this improper tender or deposit, until he had an opportunity to accept or reject.

Shan v. Petrie, 16 Ill., 262.

Interest was legally due on all these notes.

The first note matured in February, 1861, and the defendants failed to pay it, although it remained overdue, and in the Federal lines during the whole war.

All liquidated demands bear interest in law.

7 Wend., 109; 20 Wend., 151; *Sipperly v. Stewart*, 50 Barb., 62.

But it will be argued that interest is suspended during the war because Smith, the legal holder, was in the Confederate lines.

All the learning in favor of this proposition will be found embodied in the following cases:

Tucker v. Watson, 6 Am. Law Reg. (N. S.), 238; *Hanger v. Abbott*, 6 Wall., 535 (73 U. S., XVIII., 441).

To apply such a principle to this case would be grossly unjust, because Ward was the vendee, in full possession of the land in payment of which these notes were given.

In such a case the courts of Va. have held that interest will run, though the payment of the principal was delayed by an adverse claim.

Selden v. James, 6 Rand., 465; *Brockenbrough v. Blythe*, 3 Leigh, 619; *Oliver v. Hallam*, 1 Gr., 298.

In this case the principal debtor, Ward, could have protected himself from interest by paying the money at Alexandria, where it was made payable, and which was in the lines. The property sold and the place of payment were all on this side of the belligerent lines, and Smith but a naked trustee.

Surely Ward ought to pay interest, as an equivalent for the use of the land. But one of the makers, Francis X. Ward, was with the plaintiff, Smith, on the other side of the lines, and in such a case the interest runs, as decided in *Paul v. Christie*, 4 H. & McH., 161.

No principle of public policy was contravened if Ward had paid or tendered the money at the office of the Farmers' Bank at Alexandria, because the agent and himself were both in the Federal jurisdiction; and the reason of the rule prohibiting intercourse with the enemy applied as between Mr. Marbury, the cashier, and Mr. Smith, inhibiting any intercourse between them, and to the relation of Ward and the bank. This is clear upon authority.

Conn. v. Pa., Pet. (C. C.) 496; *Denniston v. Imbrie*, 3 Wash. (C. C.) 399.

Mr. Justice Field delivered the opinion of the court:

In August, 1860, the defendant, William See 7 WALL.

Ward, purchased of the plaintiff, then administrator of the estate of William Leggett, deceased, certain real property, situated in the State of Virginia, and gave him for the consideration money, the three joint and several bonds of himself and co-defendant, upon which the present action is brought. These bonds, each of which is for a sum exceeding \$4,000, bear date on the 23d of that month, payable with interest, in six, twelve and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, Alexandria."

In February, 1861, the first bond was deposited at the bank designated for collection. At the time there was indorsed upon it a credit of over \$500, and it is admitted that subsequently, the further sum of \$2,500 was received by the plaintiff, and that the amount of certain taxes on the estate purchased, paid by the defendants, is to be deducted.

In May, 1861, the plaintiff left Alexandria, where he then resided, and went to Prince William County and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, the defendant, William Ward, deposited with the bank to his credit, at different times between June, 1861, and April, 1862, various sums in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank indorsed the several sums thus received as credits on the first bond; but he testifies that he made the indorsement without the knowledge or request of the plaintiff. It was not until June, 1865, that the plaintiff was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and the defendants of his refusal. The cashier thereupon erased the indorsements made by him on the bond.

The defendants now claim that they are entitled to have the amounts thus deposited and indorsed, credited to them on the bonds, and allowed as a set-off to the demand of the plaintiff. They make this claim upon these grounds: that by the provision in the bonds, making them payable at the Farmers' Bank in Alexandria, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted, whether the instruments were or were not deposited with it, the agent of the plaintiff for their collection; and that as such agent it could receive in payment, equally with gold and silver, the notes of any banks, whether circulating at par or below par, and discharge the obligors.

We do not state these grounds in the precise language of counsel, but we state them substantially.

It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual

convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds.

But even as agent of the payee of the first bond, the bank was not authorized to receive in its payment depreciated notes of the banks of Virginia. The fact that those notes constituted the principal currency in which the ordinary transactions of business were conducted in Alexandria, cannot alter the law. The notes were not a legal tender for the debt, nor could they have been sold for the amount due in legal currency. The doctrine that bank-bills are a good tender, unless objected to at the time, on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

In *Ontario Bank v. Lightbody*, 18 Wend., 105, it was held that the payment of a check in the bill of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent, by the general law, is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge. Story, Prom. N., secs. 115, 889; *Graydon v. Patterson*, 18 Ia., 256; *Ward v. Evans*, 2

Ld. Raym., 930; *Howard v. Chapman*, 4 Carr. & P., 508.

The objection that the bonds did not draw interest pending the civil war is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of the Union forces, and the bonds were there payable. It is not necessary to consider here whether the rule that interest is not recoverable on debts between alien enemies, during war of their respective countries, is applicable to debts between citizens of States in rebellion and citizens of States adhering to the National Government in the late civil war. That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal. "The rule," says *Mr. Justice Washington*, in *Conn v. Penn*, "can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offense is imputable to him, and not to the person paying him the money." 1 Pet. (C. C.), 496; *Denniston v. Imbrie*, 4 Wash. (C. C.), 395. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul v. Christie*, 4 Harr. & McH., 161.

Here the principal creditor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between *Marbury*, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor being within the Union lines could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not, in that event, an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

Judgment affirmed.

Cited—22 Wall., 206; 95 U. S., 432; 99 U. S., 571; 3 Wood, 407; 1 Hughes, 218; 1 Flipp., 294; 4 Bank. Reg., 86; 1 Dill., 391; 5 Dill., 108; 1 Sawy., 410; Chase, Dec., 345; 9 Blatchf., 255; 9 Kan., 510; 1 Am. Rep., 153 (200 Mass., 573); 2 Am. Rep., 147 (15 Minn., 416); 3 Am. Rep., 233 (20 Gratt., 614); 3 Am. Rep., 235, 236 (7 Bush, 16, 179); 5 Am. Rep., 491, 494 (43 Miss., 286); 7 Am. Rep., 742 (45 Misc., 581); 10 Am. Rep., 542, 545 (50 N. Y., 634); 43 Am. Rep., 410, 412 (15 Vroom., 629).

WHITE'S BANK OF BUFFALO, *App't.*,

v.

THE PROCEEDS OF THE SCHOONER,
ROBERT EMMETT, ROBERT SMITH,
Claimant.

(See S. C., 7 Wall., 646-656.)

Mortgage of vessel, where recorded—preferences in—Congress has power to pass a recording Act.

The home port is the one at which mortgages of vessels are to be recorded, under the Act of July 22d, 1850.

Mortgage of a vessel recorded under said Act, has preference over one subsequently recorded under said Act, although the first mortgage was not refilled at the end of a year in pursuance of a state Act.

Congress has power over the title and property of vessels of the United States to such an extent as to enable it to pass a Recording Act.

[No. 85.]

Argued Feb. 17, 1869. Decided Mar. 29, 1869.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

This is an appeal from the decree of the court below, which reversed the decree entered Apr. 18, 1866, in the District Court of the United States for the Northern District of New York, directing the proceeds of the sale of the schooner, Robert Emmett, remaining in the registry of said court, to be paid to White's Bank of Buffalo, the petitioner.

The case is stated by the court.

Mr. L. K. Haddock, for appellant:

The mortgage of White's Bank upon the schooner Robert Emmett, was recorded as required by the Act of Congress passed July 29, 1850 (9 U. S. Stat., 440), viz.:

The Act of the Legislature of the State, so far as it requires chattel mortgages upon vessels to be recorded, is a regulation of commerce, and therefore repugnant to that clause of section 8 of the Constitution which provides: "Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

2 Story, Const., p. 8, sec. 1067, 3d ed.; 1 Kent, Com., 437; Rawle, Const., 81; Serg. Const., 291; 2 Curt. Const., 870; Pom. Const., 205; Pars. Merc. L., 330, 2d ed.; 1 Pars. Mar. L., 58; *The Chusan*, 2 Story, 456; 4 Wheat., 122; 5 Wheat., 1; Farrar, Const., 108, 326, 78, 330, 141; *Gibbons v. Ogden*, 9 Wheat., 1; *Brown v. Maryland*, 12 Wheat., 447.The law of 1850 overrides a state law. *The Martha Washington*, 25 Mon. Law Rep., 22.

The omission to refile the White's Bank mortgage according to the laws of New York, did not affect its validity as between the parties thereto.

Wiles v. Clapp, 41 Barb., 645; *Thompson v. Van Vechten*, 27 N. Y., 568; *Hill v. Beebe*, 13 N. Y., 565; *Meech v. Patchin*, 14 N. Y., 71; *Ely v. Carnley*, 19 N. Y., 496; *Westcott v. Gunn*, 4 Duer., 107.**Mr. Sherman F. Rogers**, for respondent:

The mortgage to the appellant is void as against the respondent, because the filing thereof was not renewed in accordance with the statute.

4 R. S. Edm.'s ed., 435, secs. 1 and 2; *Ely v. Carnley*, 19 N. Y., 496.

The necessity for a renewal of the filing was

not obviated by the fact that the mortgage had become absolute.

Ely v. Carnley (supra.)

The Act of Congress of July 28, 1850, "providing for the recording of conveyances of vessels, and for other purposes" (9 Stat. at L., 440), does not supersede the necessity of filing mortgages on vessels, as required by the Statute of the State of New York.

If Congress has power to enact this registry law for the protection of creditors, purchasers, etc., simply because a ship is a vehicle of commerce, they have also the power to enact a similar law in relation to all locomotives, cars, wagons, sleighs and other vehicles used in carrying on of commerce between the States and with foreign nations.

The Act of Congress does not supersede the necessity of filing under the state law, because it is not repugnant to, and does not in any manner conflict with, that law.

In the application of the principle of the supremacy of the laws of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts cannot be reconciled or consistently stand together.

Sinnot v. Davenport, 22 How., 227 (63 U. S., XVI., 243); *Gilman v. Philadelphia*, 8 Wall., 780 (70 U. S., XVIII., 101); *Steamship Co. v. Port Wardens*, 6 Wall., 81 (73 U. S., XVIII., 749); *Gibbons v. Ogden*, 9 Wheat., 204; *Willson v. Black Bird Cr. Co.*, 2 Pet., 245.**Mr. Justice Nelson** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Northern District of New York.

The controversy in this case arises out of the conflicting claims of two mortgages, to the proceeds of The Robert Emmett. One of the mortgages is executed by Gabriel Hoyt, owner of the vessel, to White's Bank, of Buffalo, on the 22d May, 1863, for \$4,000, the other by Henry Zahn, the then owner, to Robert Smith, on the 5th June, 1865, for \$6,000.

The mortgage to White's Bank was recorded 12th June, 1863, in the collector's office at Buffalo, where The Emmett was duly enrolled, and at which place the owner resided. The mortgage to Smith was recorded in the collector's office, at the Port of Sandusky, Ohio, on the 17th June, 1865, where The Emmett was also duly enrolled and at which place the owner, Zahn, then resided.

The mortgage to White's Bank was filed in the office of the Clerk of the County of Erie, on the 5th June, 1863, according to the requirement of the New York law, in respect to personal mortgages, but it was not refilled at the end of the year as required by that law, in order to perpetuate the lien.

The Emmett was libeled for seamen's wages on the 29th August, 1865, which was a paramount lien on the vessel, and was sold under a decree in that suit. The remnants remaining in the registry of the district court, after satisfying this demand, constitute the subject of contest between the present parties. The last mortgagee, Robert Smith, claims that the lien of the mortgage to White's Bank was lost, on account of the omission to refile it in the Clerk's

office in Erie County at the end of the year, and which raises the material question in the case, namely: whether or not the recording of the mortgage in the collector's office at Buffalo, had the effect, by its own force, and irrespective of the filing in the clerk's office, to give a preference to it over any subsequent purchaser or mortgagee.

The Act of Congress, July 29, 1850, on this subject, of the present case, is as follows:

"That no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of Customs, where such vessel is registered or enrolled."

The next section provides for recording these bills of sale, etc., and also certificates of discharge and cancellation in a proper book. No provision was made for any authentication of these instruments preparatory to their being recorded. They were received by the collector from the parties delivering them, and were recorded, with no proof of their verity, except from the execution of the same, as appeared on their face; and this, both as it respects the bills of sale, mortgages, etc., and the discharge and cancellation of the same. And the law thus stood for some fifteen years. On March 3, 1865, it was enacted that "no bill of sale, mortgage, hypothecation, conveyance or discharge of mortgage, or other incumbrance of any vessel, shall be recorded unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgement of deeds."

Previous to this Act of 1850, providing for the recording of bills of sale, mortgages, etc., of vessels, they were required to be filed, by the laws of many of the States, in the clerk's office, or some place of public deposit in the town or city where the vendor or mortgagor resided, in order to protect the interest of the vendee or mortgagee against subsequent *bona fide* purchasers or mortgagees. And this practice continued in many places after the passage of the Act of 1850, for abundant caution, on account of a doubt as to the effect that would or might be given to it as a recording Act, from the very imperfect provisions of the law. There can be no doubt, however, but that the system of recording these instruments in the collector's office, at the home port of the vessel, furnishes a much readier opportunity to persons dealing in this species of property, to obtain a knowledge of the condition of the title, than by the former mode under the state law. We say the home port, because it is quite apparent from the language of the Act, "be recorded in the office of the collector of customs, where such vessel is registered or enrolled," means the permanent registry or enrollment, which is at the port, "at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of said ship or vessel usually resides. And the name of the said ship or vessel, and the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length," and, if found without such name and

the name of the port, the owner is subject to a penalty of \$50. Act, 31 Dec., 1792, sec. 8.

The same Act provides for a temporary registry, when the owner acquires her in a different district from that in which he resides; but this is to enable him to bring the vessel within the home district or port, where she can obtain her permanent registry. The character of this temporary registry is expressed on the face of it, and is delivered up to the collector on the issuing of the permanent registry, whose duty it is to return it to the collector that granted it. *Ib.*, sec. 11.

So a registered vessel may be controlled, or an enrolled vessel registered, on the master giving up to the collector the registry or enrollment, as the case may be; and if such vessel shall be in any other district than the one to which she belongs, the collector of such district, upon the master taking an oath that, according to his best knowledge and belief, the property remains as expressed in a registry or enrollment proposed to be given up, and on giving the bond required, shall make the exchanges above mentioned; but the collector to whom the registry or enrollment is given up, shall transmit the same to the Register of the Treasury, and the registry or enrollment granted in lieu thereof, shall, within ten days after the arrival of such vessel within the district to which she belongs, be delivered to the collector of said district, and be by him canceled. 1 Stat., at L., p. 140, sec. 8.

This exchange of registry or enrollment may occur in any part of a voyage or voyages, and the temporary registry or enrollment continues till the vessel, in the regular course of her employment, arrives at the port to which she belongs, where she may again obtain a renewal of her permanent documentary title. As we have said, we think it apparent that the collector's office in the district in which this temporary registry or enrollment is made, is not the office contemplated by the Act of 1850. The temporary papers are made in the office where the vessel happens to be at the time of the sale or exchange of the documentary title, and continues only till her arrival at the port to which she belongs. Her name, and the name of her home port, remains painted on her stern, notwithstanding this temporary document, and satisfies the requirement of the Act in that respect, and both continue until a new home port is acquired by a change of ownership, requiring a permanent registry or enrollment on account of the different residence of the owners, when the name of that port is substituted. And, confining the record to the home port, there is great propriety and convenience in requiring bills of sale, mortgages, etc., of the whole, or parts of a vessel, to be made matters of record in this office, as in the registries there are the names of all the owners under oath, together with their residences; and since the Act of 1850, containing also the part or proportion of such vessel belonging to each owner (sec. 5). And in this same section it is provided that, "in all bills of sale of vessels registered or enrolled, shall be set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing." And in this connection we may also mention, that in case of the sale of a vessel, which can only be to a

citizen or citizens of the United States, and a new permanent registry becomes necessary, the former certificate of registry must be delivered to the collector to whom application is made for the new registry, to be transmitted by him to the Register of the Treasury to be canceled; and in every such sale or transfer of a vessel, there shall be some instrument in writing in the nature of a bill of sale, which shall recite at length the certificate of the former registry, otherwise the ship or vessel shall be incapable of being registered anew (*Ib.*, sec. 14). And as this bill of sale is recorded in the collector's office in which the new permanent registry is made, it affords information to any person examining it as to the former home port and collector's office in which the vessel had been previously registered, and where examination can be made for any bill of sale, mortgage, or other incumbrance, upon or against the vessel.

It will be seen, therefore, as the law now stands, that there can be very little difficulty on the part of a purchaser or mortgagee in ascertaining the true condition of the title of a vessel, as it respects written evidences of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home ports of the vessel, as the records of the last home port refers to the preceding one, the last bill of sale incorporating into it a copy of the previous certificate of registry. In this respect, the system of recording in the collector's office possesses very great advantages over the filing of these instruments in the clerks' offices where the vendor or mortgagor happened to reside at the time, as no means exist, under this practice, by which the subsequent purchaser or mortgagee, by any diligence, could obtain a knowledge of the actual condition of the title.

We are aware that in the case of *Potter v. Irish*, 10 Gray, 416, the court came to the conclusion, upon an examination of the Acts on this subject, that bills of sale, mortgages, etc., under the Act of 1850, in order to protect the title of the purchaser or mortgagee, should be recorded in the office of the Collector of Customs at the port of the last registry or enrollment, though not the home port of the vessel. And the court in the case of *Chadwick v. Baker*, 54 Me., 9, followed this decision. Our respect for the courts rendering these decisions has led us to examine the several statutes upon which this question depends with more than usual care, and after the best consideration we have been able to give, we are obliged to differ with them. We think the better construction of these statutes leads to the conclusion that the home port was the one in the contemplation of Congress at which these instruments were to be recorded, and is the more appropriate one in furtherance of the object for which the Act was passed.

The temporary registry or enrollment is at a collector's office in a district where the owners do not reside, and is made without any reference to such residence. It is made at any collector's office, and at any port within the limits of the United States where the vessel may happen to be at the time this temporary document is registered.

While the home port may be at the City of New York, the temporary registry or enrollment See 7 WALL.

ment may be made at New Orleans or San Francisco, or Portland in Oregon, where it would be as inconvenient for the vendee or mortgagee to make a record of the bill of sale or mortgage as it would be for a person dealing in this species of property to acquire any notice of such record; whereas, a record at the home port is within the district where the owners reside, and where negotiations or dealings in respect to this species of property would naturally be conducted.

Some question is made as to the power of Congress over the title and property of vessels of the United States to such an extent as to enable it to pass a recording Act.

But, after the regulation of this species of property by the several Acts of Congress to which we have referred, and in respect to which there has never been a question, there can be very little hesitation in conceding the power to protect the rights of subsequent *bona fide* purchasers and mortgagees therein.

Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to the Act of September 1, 1789; and those which, after the last day of March, 1793, shall be registered or enrolled in pursuance of the Act of 31st December, 1792, and must be wholly owned by a citizen, or citizens of the United States, and to be commanded by a citizen of the same. 1 Stat., at L., p. 287.

And none can be registered or enrolled unless built within the United States before or after the 4th of July, 1776, and belonging wholly to a citizen, or citizens, of the United States, or, not built within said States, but on the 16th of May, 1789, belonging, and thence continuing to belong, to a citizen or citizens thereof; or ships or vessels captured from the enemy, in war, by a citizen, and lawfully condemned as prize, or adjudged to be forfeited for a breach of the laws of the United States, and being wholly owned by a citizen or citizens thereof. (*Ib.*, sec. 2, p. 288).

Ships or vessels not brought within these provisions of the Act of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the right and title of all persons dealing therein. The judicial mind seems to have generally taken this direction. *The Martha Washington*, 25 Law Rep., 23; 16 Ala. 722; 8 Cal., 363; 36 Miss., 296.

Decree reversed, and a decree entered for the appellant.

Cited—8 Wall., 496; 16 Wall., 476, 633; 21 Wall., 577; 96 U. S., 495, 499; 1 Abb. U. S., 342; 3 Bank. Reg., 182; 7 Sawy., 187; 8 Ben., 573; 3 Wood, 586; 14 Blatch., 193; 7 Bias., 240; 61 N. Y., 76; 38 Am. Rep., 168 (43 Mich., 150); 103 Mass., 231; 19 O. St., 484.

Ex parte JOSEPH H. BRADLEY, *Petitioner.*

(See S. C., 7 Wall., 364-386.)

Power of court to disbar an attorney—when court has no power—Mandamus, when proper remedy.

The Supreme Court of the District of Columbia has no jurisdiction to disbar an attorney for a contempt committed before another court, to wit: the Criminal Court of the District.

Such Supreme Court possessed no power to punish him, upon an *ex parte* proceeding, without notice or opportunity of defense, or explanation of misbehavior.

Mandamus is the proper remedy when the case is outside the exercise of the discretion of the inferior court, and is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction.

[No. 8. Original.]

Submitted Mar. 20, 1869. Decided Mar. 30, 1869.

PETITION for *mandamus*.

This case arises on a petition by Mr. Bradley to this court for the writ of *mandamus* directed to the Supreme Court of the District of Columbia, in order to restore him to the office of attorney and counselor in that court, from which he claims to have been wrongfully removed, Nov. 9, 1867.

It appears that at the June Term, 1867, of the "Criminal Court" of the District of Columbia, pending the trial of John H. Surratt, for the murder of Abraham Lincoln, immediately after the adjournment of the court, July 2, as the presiding judge, Mr. Justice Fisher, one of the justices of the Supreme Court of the District, was descending from the Bench, an altercation occurred between the petitioner and said judge.

The facts as to said altercation are in dispute, and the conflicting claims concerning them need not be here stated.

NOTE.—*Disbarring an attorney.*

Notice should be given to an attorney of proceedings to disbar him. Even where the offense is committed in open court, he should be heard. *Saxton v. Stowell*, 11 Paige, 526; *Bradley v. Fisher*, 80 U. S. (13 Wall.), 335; *Ex parte Robinson*, 86 U. S. (19 Wall.), 505; *People v. Turner*, 1 Cal., 148; *Ex parte Heyford*, 7 How. (Miss.), 127; *Fletcher v. Daingerfield*, 20 Cal., 430; *Beene v. State*, 22 Ark., 127.

Matter may be brought before the court by an order to show cause founded upon papers presented to court, and served with the papers personally upon the attorney. *In re Percy*, 36 N. Y., 651; *Anon.*, 22 Wend., 656; *In re Peterson*, 3 Paige, 510.

An attorney may be re-admitted after he has been disbarred. *Rex v. Greenwood*, 1 W. Bl., 222; *Ex parte Frost*, 1 Chit., 558, n.

If struck off the roll in one court he will not be admitted in any other. *In re Smith*, 1 B. & B., 522; 4 Moore, 319.

The causes for disbarring an attorney are either moral or professional unfitness for the office; as a conviction for subornation of perjury (*State v. Holding*, 1 McCord, 379); fraudulent conduct, though not criminal (*U. S. v. Porter*, 2 Cranch, C. C., 60); fighting a duel in another State (*Smith v. State*, 1 Yerg., 228); a false oath or professional statement without a conviction for perjury (*Perry v. State*, 3 Iowa, 550); threatening a judge out of court with personal violence during the trial of a cause pending (*Bradley v. Fisher*, 80 U. S., 13 Wall., 335); for a contempt of court (*Austin's case*, 5 Rawle, 191); attempting to get the opposing attorney drunk (*Dickens's case*, 67 Pa. St., 169); deceit and imposition upon the court. *Matter of Loew*, 5 Hun, 462; 8 C. C., 50 How. Pr., 373.

Where the statute prescribes the causes, court cannot disbar for other causes. *Ex parte Smith*, 28 Ind., 47; *Kane v. Haywood*, 66 N. C., 1; *Redman v. State*, 28 Ind., 205.

An attorney cannot be disbarred for refusing, in the presence of the court, to make answer in writ-

On August 10, 1867, the said Justice, while still presiding in said Criminal Court, ordered that the name of Mr. Bradley "be stricken from the roll of attorneys practicing in this court." Some further altercation then took place between the parties.

Oct. 29, 1867, the petitioner was served with an order of the Supreme Court of the District, with a rule to show cause "Why he should not be punished for contempt of court, by reason of said offensive conduct and language toward one of its members, and relating to the official acts of the said Justice." To this rule the petitioner made return. He defended his action in the premises, denied many of the allegations contained in the rule, and claimed that he was not guilty of any contempt. On Nov. 9, 1867, the said court ordered that the name of Mr. Bradley "be stricken from the roll of attorneys, solicitors, etc., authorized to practice in this court."

A rule having issued by order of this court to the Justices of the said Supreme Court of the District of Columbia, requiring them to show cause why a writ of *mandamus* should not issue, agreeably to the prayer of the petitioner, they made return thereto in argumentative form, and submitted the case on said return.

A portion of the return is as follows:

Said rule ought to be discharged—

1. Because said Bradley was removed from said office of attorney of said court, only after due notice had been served upon him, and he had been heard in defense, and after mature consideration by the court. That said order of the court was a judgment of the court in regard to a matter within its own exclusive jurisdiction, and not subject to review in any other court, and especially not in this form of proceeding.

ing to a rule, upon the ground of punishing the refusal as a contempt. *Ex parte Robinson*, 86 U. S. (19 Wall.), 505.

The remedy to restore an attorney improperly disbarred is *mandamus*. *Ex parte Robinson*, 86 U. S. (19 Wall.), 505; *People v. Turner*, 1 Cal., 143.

A proceeding to punish an attorney for professional misconduct by striking his name from the rolls, or otherwise, is penal, and should be sustained by evidence free from serious doubt. *In matter of An Attorney*, 1 Hun, 321.

In proceedings to disbar an attorney he can only be convicted upon evidence good at common law, delivered, if he chooses, in his presence, by witnesses, subject to cross examination. Evidence cannot be taken by commission. Though this is a right, it may be waived either expressly or by tacit acquiescence in the course of the court. *In re An Attorney*, 83 N. Y., 164; *matter of An Attorney*, 86 N. Y., 563; 8 C. C., 13 Week, Dig., 476.

The office of attorney becomes vacant upon the removal of the incumbent or his conviction of an infamous crime. *Matter of Niles*, 48 How. Pr., 246, 253.

It is sufficient ground for disbarring an attorney, that when employed by a husband to bring a divorce suit, he entered into collusion with the wife to manufacture evidence which, if not untrue, was deceptive, and such as to enable the husband to procure the divorce. *Matter of Gale*, 75 N. Y., 523; 8 C. C., 19 Alb. L. J., 96.

It is not proper for parties or attorneys to commence proceedings to disbar or suspend attorneys; such proceedings should originate with the court itself. The court will, however, examine papers submitted and in a proper case institute proceedings. *Matter of Brewster*, 12 Hun, 100.

Pardon for an offense will not relieve the attorney from the consequences of his act. Court has the power to consider the infidelity to his client involved. *Matter of An Attorney*, 86 N. Y., 563; 13 Week, Dig., 476.

The question as to the jurisdiction of the Supreme Court of the United States to reverse the judgment of the inferior court in cases of this character by *mandamus*, was decided in *Ex parte Secombe*, 19 How., 9 (60 U. S., XV., 565).

The opinion in this case was referred to with approbation by this court in the recent case *Ex parte Garland*, 4 Wall., 333 (71 U. S., XVIII., 366).

If it be authority, it would seem to be conclusive in the present case.

One of the grounds of defense for Mr. Bradley's conduct is, that the act was not a contempt of the Supreme Court of the District of Columbia, that court having subsequently taken up the subject *de novo*, and removed the petitioner from its bar.

But at the time the contempt was given, Judge Fisher was holding a Supreme Court and exercising its criminal jurisdiction as such Supreme Court. There is no Criminal Court in this District; there is, therefore, no judge of a criminal court in this District. The Act of March 3, 1863, abolished both the Circuit and Criminal Courts of the District of Columbia, and transferred all their several powers and jurisdictions to the Supreme Court created to take their place. It prescribes in what manner the Supreme Court shall exercise those powers and jurisdiction.

The Supreme Court of the District holds the Criminal Court, and the law makes one judge the court for that purpose.

The contempt in question was, therefore, a contempt of the authority of the Supreme Court. Otherwise no member of the bar could be dismissed for contempt of the authority of the court, unless such contempt was offered to the court in General Term. Thus protected, any member might, if so disposed (and this is by no means an extravagant supposition, should the prisoner succeed in the present attempt), walk round the courts from one to another, denouncing the judges as liars, *seriatim*, and the court would be powerless to rid itself of his presence.

The conduct of Mr. Bradley, however, was not merely a contempt of the authority of the Supreme Court of this District, but was also gross misbehavior in his office as attorney, and for this reason, also, his offense was cognizable by the court in General Term, irrespective of the doctrines of contempts.

The authority of the courts to expel a member from the bar, not merely for contempts offered in the courts, but for misbehavior as an attorney as clearly denounced in the case of *Secombe*, has also received the sanction of this court in the recent case of *Ex parte Garland*, 4 Wall., 379 (71 U. S., XVIII., 370).

The jurisdiction of the court in removing Mr. Bradley, besides, belonged to the court under an express statute of Maryland, which is in force in this District. Act of May, 1719, ch. 4, sec. 2.

The return, we admit, is argumentative; but it is a return in answer to a rule to show cause, and we have only followed in this respect the precedent set up by the Judges of the Court of Queen's Bench, in the great case of *Bridgman v. Holt*, Show. Par. Cas. 111, in their return to an order of the House of Lords, quoted at length with enthusiastic approval by Mr.

See 7 WALL.

Justice Baldwin in *Ex parte Crane*, 5 Pet., 212, etc. That, also, of Judge Conkling in *Ex parte Bradstreet*, 7 Pet., 634; and that of U. S. v. *Kendall*, 5 Cranch (C. C.), 163-385, and in 12 Pet., 527.

D. K. CARTER, *Chief Justice*.
GEORGE P. FISHER,
A. B. OLIN,
ANDREW WYLLIE, } *Justices*.

Messrs. P. Phillips and J. M. Carlisle, for petitioner:

The case presents a judgment rendered in one court for a contempt committed in another court—held months previously.

That this is so, will be readily seen by reference to the statutes organizing the courts of this District.

Act, Feb. 27, 1801 (2 Stat., 108); sec. 24, Act, April 29, 1802; Act July, 1838 (5 Stat. at L., 306); Act, Feb. 20, 1839 (5 Stat. at L., 516).

These statutes show that from the passage of the Act of 1838, the original criminal jurisdiction of this District was vested in a separate and distinct court, known as the "Criminal Court," and that the circuit court thereafter possessed alone a supervisory power in criminal cases by writ of error, or the adjourning of a question of law by the consent of the accused.

March 3, 1863 (12 Stat., 762), the courts of the District were reorganized. Section 1 of the Act provides that a court shall be established, "To be called the Supreme Court of the District of Columbia, which shall have general jurisdiction in law and equity," and be composed of four Justices.

This general jurisdiction is, however, explained by section 3, which provides that "The said Supreme Court shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the Circuit Court of the District of Columbia."

It then provides for a district court, which is vested with the same powers and jurisdiction possessed and exercised by other district courts of the United States; and also for Criminal Courts, for the trial of all offenses and crimes arising within the District, which court shall possess the same powers and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District of Columbia.

Having shown that the Supreme Court of the District is distinct from the Criminal Court, it cannot be necessary to argue that this distinctness is abrogated by the provision that one of the justices of the Supreme Court is directed to preside in that court.

The question then arises, had the Judges of the Supreme Court of the District of Columbia the jurisdiction to punish for a contempt committed in the Criminal Court?

The power here has been exercised upon an attorney; but if it exists, it could have been applied equally as well to any other person.

The punishment inflicted is deprivation of the right to practice his profession, but the power equally extends, when rightfully exercised, to fine and imprisonment.

If we have established that the Supreme Court of the District of Columbia is a tribunal distinct from that of the Criminal Court, then, independently of statutory enactments, there is no power in the former to punish for a con-

tempt in the latter. Such a power was never exercised at common law, and is not included in the principle of self protection, upon which the whole doctrine of contempts is founded. The language of *Chief Justice Marshall* in *Ex parte Tillinghast* is full on this point. "This court does not consider itself authorized to punish here for contempts which may have been committed in that district court.

4 Pet., 108.

The only remaining question is: has this court the power by *mandamus* to restore the petitioner, in a case where the judgment of dismissal on its face shows that the court *quo* exceeded its jurisdiction?

At common law, the writ of *mandamus* is a writ of right every day made use of to oblige inferior courts and magistrates to do justice, but it will not be granted to control the exercise of discretion. *People v. Sup. Ct.*, 5 Wend., 126; 10 Wend., 289.

In general, it lies where one is refused to be admitted or turned out wrongfully from any office or franchise. 8 Burr., 1266.

The nature of the writ and its application are commented on by Bacon, tit. "*mandamus*," where it is held to be the appropriate remedy to restore an attorney.

See, also, *Marbury v. Madison*, 1 Cranch, 161; *Ex parte Crane*, 5 Pet., 193; *Ex parte Hoyt*, 18 Pet., 291; *Ex parte Burr*, 9 Wheat., 529; *Ex parte Secombe*, 19 How., 9 (60 U. S., XV., 565).

In the opening of the opinion in this case, *Chief Justice Taney* refers to the case of *Tillinghast v. Conkling*, decided at the January Term, 1829, in which a similar motion was overruled upon the ground that the court had not jurisdiction.

This "brief written opinion not reported," and thus referred to, the clerk is unable to find, but the popular history of the case enables me to say that the application of *mandamus* did not involve the question of jurisdiction of *Judge Conkling*, but questioned the propriety of its exercise only. See 4 Pet., 108.

The decision was limited to the exigency of the case. The judgment, as recited by *Judge Taney*, is: "The motion is overruled upon the ground that it had not jurisdiction in the case." The case was an application to review, by *mandamus*, the facts upon which the judgment was founded.

The application by *Secombe* for the *mandamus*, rested alone upon the allegation that he had received no notice or information prior to the rendering of the judgment, and that he was not present when it was entered.

In California, where the jurisdiction of the Supreme Court is under the same limitations as is this court, the writ of *mandamus* is held to be the proper remedy to compel the inferior court to restore an attorney whose name had been stricken from the rolls. *People v. Turner*, 1 Cal., 143.

The principle of this case was again recognized, and the order dismissing an attorney directed to be vacated in *Fletcher v. Daingerfield*, 20 Cal., 429; *People v. Justices*, 1 Johns. Cas., 181; *Dew v. Judges*, 3 Hen. & M., 1.

The court, by virtue of its general supervisory power, as well as by statutory grant, has authority to issue the writ of *mandamus* to in-

ferior tribunals, as a means of exerting its appellate power, and that, by the "principles and usages of law," this case justifies its exercise. See, generally, *Yates v. The People*, 6 Johns., 467.

Mr. Justice Nelson delivered the opinion of the court:

This case arises out of the petition by *Mr. Bradley* to this court for the writ of *mandamus* directed to the Supreme Court of the District of Columbia to restore him to the office of attorney and counselor in said court, from which he alleges he was wrongfully removed on the 9th of November, 1867.

The first ground set up in the return to the rule to show cause is, that the order of the court removing the relator was within its own exclusive jurisdiction, and not subject to review in this court, and especially not in this form of proceeding. We shall hereafter examine this question. The second ground is, that on the 10th of August, 1867, while *Judge Fisher*, one of the Justices of the Supreme Court, was holding a criminal court in this district, the relator had been guilty of contemptuous language towards the said judge in the progress of a trial therein, and for which the said justice disbarred him from the privileges of attorney and counselor of the Supreme Court. That, at the time of the committing of the contempt, *Judge Fisher* was holding, not a criminal, but a Supreme Court, and exercising its criminal jurisdiction as such; that there is no Criminal Court in this district, and, therefore, no judge of a Criminal Court; and that the contempt committed before the judge was a contempt of the Supreme Court. That the Act of March 3, 1863, abolished both the circuit and Criminal Courts of the District, and conferred all their powers and jurisdiction upon the Supreme Court created by the Act.

We think a reference to this Act of March 3, 1863, reorganizing the courts in this District, will show that this is an erroneous construction.

The 1st section establishes a court to be called the Supreme Court of the District of Columbia, which shall have general jurisdiction in law and equity. It shall consist of four justices, one of which shall be *Chief Justice*.

The 8d section provides that the Supreme Court shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the Circuit Court of the District of Columbia.

The justices of the court shall severally possess and exercise the jurisdiction now possessed and exercised by the judges of the said circuit court. Any one of them may hold that of the United States for the District of Columbia, in the manner and with the same powers and jurisdiction possessed and exercised by the other District Courts of the United States; and any one of the justices may also hold a Criminal Court for the trial of all crimes and offenses arising within said District, which court shall possess the same powers, and exercise the same jurisdiction now possessed and exercised by the Criminal Court of the District.

The 5th section, that General Terms of the said Supreme Court shall be held at the same times at which terms of the Circuit Court of the District of Columbia are now required to

be held, and at the same place. District courts and Criminal Courts shall also be held by one of said justices at the several times when such courts are now required to be held, and at the same place.

The 6th section provides, among other things, that the Supreme Court may have established such rules as it may deem necessary for the regulation of the practice of the several courts organized by this Act. The 18th, that all suits and proceedings, which, at the time this Act takes effect, shall be pending in any of the courts hereby abolished, shall be transferred to the court to be established under the provision of this Act, and may be prosecuted therein with the same effect as they might have been in the court in which the same were commenced.

The 16th section provides that the Circuit, District and Criminal Courts of the District of Columbia are thereby abolished, and all laws and parts of laws relating to said courts, so far as the same are applicable to the courts created by this Act, are thereby continued in force in respect to such courts, etc.

It will be seen, by reference to this Organic Act, that the new Supreme Court of this District has conferred upon it only the same powers and jurisdiction as was possessed by the circuit court just abolished. This circuit court possessed, at the time, no original criminal jurisdiction whatever, nor had it, since the 7th of July, 1838; for an Act of that date established a criminal court, upon which was conferred all the criminal jurisdiction of the District.

A writ of error lies from the circuit court to this Criminal Court and, doubtless, does from the present Supreme Court to the Criminal Court of the District.

The circuit court had originally been invested with all the powers of a District Court of the United States; but these were taken from it in 1802, and a district court established within the District, to be held by the *Chief Justice* of the circuit court. These courts, the district and criminal, are preserved by the Act of 1863, reorganizing the courts, and are to be held in the same manner, and with the same powers and jurisdiction—the one as possessed by the district courts of the United States, and the other as possessed by the old Criminal Court of the District. The only change made is, that instead of each court having a judge or judges appointed to hold it, any justice of the Supreme Court may hold the same. Under the old law, 20th of February, 1839 (5 Stat. at L., 320), in case of the inability of the judge of the Criminal Court to hold the same, one of the judges of the Circuit was authorized to hold it.

It is plain, therefore, that, according to a true construction of the Act of 1863, reorganizing the courts of this district, the Supreme Court not only possesses no jurisdiction in criminal cases, except in an appellate form, but that there is established a separate and independent court, invested with all the criminal jurisdiction, to hear and punish crimes and offenses within the District. And hence, one of the grounds, if not the principal one, upon which the return places the right and power to disbar the relator, fails; for we do not understand the judges of the court below as contending that, if *Judge Fisher*, at the time of the conduct and

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words spoken by the relator before him, or in his presence, was not holding the Supreme Court of the District, but was holding a court distinct from the Supreme Court, that they possessed any power or jurisdiction over the subject of this contempt as complained of; otherwise the case would present the anomalous proceeding of one court taking cognizance of an alleged contempt committed before and against another court, which possessed ample powers itself to take care of its own dignity and punish the offender. Under such circumstances, and in this posture of the case, it is plain that no authority or power existed in the Supreme Court to punish for the contempt thus committed, even without reference to the Act of Congress of 1831, which in express terms restricts the power, except for "misbehavior in the presence of said courts, or so near thereto as to obstruct the administration of justice." Sec. 1.

The third ground relied on in the return for disbarring the relator is, that his conduct was not merely a contempt of the authority of the Supreme Court, but was, also, gross misbehavior in his office as an attorney generally, and that, for this reason also, his offense was cognizable by the court in general term, and punishable irrespective of the doctrine of contempts. The judges admit that the rule to show cause ordered against him at the General Term, ignored the order made by *Judge Fisher* disbarring the relator, and called upon him to answer simply for the act and conduct specified as for a contempt; yet they insist that, after the return of the relator to the rule in answering the contempt, they had a right in considering the answer, if any other offense appeared therein cognizable by the court, it was competent to take notice of it, and inflict punishment accordingly.

We cannot assent to this view. It assumes the broad proposition, that the attorney may be called upon to answer an offense specified and, when the answer comes in, without any further notice or opportunity of defense or explanation, punish him for another and distinct offense. Certainly no argument can be necessary to refute such a proposition. It violates the commonest and most familiar principles of criminal jurisprudence. It is true, where a contempt is committed in the presence of the court, no other notice is usually necessary; but a proceeding to punish an attorney generally for misbehavior in his office, or for any particular instance of misbehavior, stands on very different ground. The rule to show cause is in the record. After reciting the offensive language and conduct complained of (all of which occurred before *Judge Fisher*), it concludes in these words: "And said conduct and language requiring, in our opinion, investigation by this court, it is therefore ordered, that said Joseph H. Bradley show cause, on or before the 4th day of November next, why he should not be punished for contempt of this court by reason of said offensive conduct and language towards one of its members, and relating to the official acts of the said justice." It will be seen that the offense charged against the relator, and for which he was called upon to answer, was direct and specific, one well known to the law and the proceedings of courts—a contempt of the Supreme Court. And the offense being thus specified,

he was fully advised of the matters against which he was called upon to defend, and enabled to prepare his defense accordingly. That the relator so understood the charge is apparent from his answer, in which he expresses his satisfaction at the opportunity afforded him to present to the court his account of the facts involved in the case, and "to purge himself from any intentional disrespect, contumely or contempt towards the court, or any member thereof, in the transactions referred to."

The order entered on the minutes of the court, after the answer to the rule to show cause, inflicting the punishment confirms this view. It is found in the record, and is headed as follows:

"In the matter of Joseph H. Bradley, Sr.—
Contempt of court."

"Mr. Bradley having filed his answer to the rule of court served on him, and having been heard at the bar in support of his answer, it is by the court ordered, that for the causes set forth in said rule, the name of Mr. Bradley be stricken from the roll of attorneys, solicitors, etc., authorized to practice in this court."

The order, or judgment, seems to be in strict conformity to the offense charged in the rule to show cause, namely: for contempt of court.

We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein. If guilty of fraud against their clients, or of stirring up litigation by corrupt devices, or using the forms of law to further the ends of injustice; in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court. Indeed, in every instance where an attorney is charged by affidavit with fraud or malpractice in his profession, contrary to the principles of justice and common honesty, the court, on motion, will order him to appear and answer, and deal with him according as the facts may appear in the case. But, this is a distinct head of proceeding from that of contempt of court, or the members thereof, committed in open court, or in immediate view and presence, tending to interrupt its proceedings, or to impair the respect due to its authority. This distinction is recognized in the Act of 1831, already referred to, which, after providing for personal contempt in presence of the court, authorizes attachments to issue, and summary punishment to be inflicted, for "the misbehavior of the officers of said courts in their official transactions."

Without pursuing this branch of the case further, our conclusion is:

First. That the judges of the court below exceeded their authority in punishing the relator for a contempt of that court on account of contemptuous conduct and language before the Criminal Court of the District, or in the presence of the judge of the same.

Second. That they possessed no power to punish him, upon an *ex parte* proceeding, without notice or opportunity of defense or explanation for misbehavior, or for any particular instance of the same generally in his office as attorney of the court, as claimed in the words of

the return: "irrespective of the doctrine of contempts."

The only remaining question is, whether or not a writ of *mandamus* from this court is the appropriate remedy for the wrong complained of. This question has already been answered by Chief Justice Marshall, who delivered the opinion of the court in *Ex parte Crane*, 5 Pet., 190. That was an application for a *mandamus* to the Circuit Court of the United States for the Southern District of New York, commanding the court to review the settlement of several bills of exceptions. The learned Chief Justice observes: "A doubt has been suggested respecting the power of the court to issue the writ. The question was not discussed at the bar, but has been considered by the judges. It is proper," he observes, "that it should be settled, and the opinion of the court announced. We have determined that the power exists." He then refers to the definition and office of the writ as known to the common law in England, and to the language of Blackstone in speaking of it, as follows: "That it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or the Legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence, and obviating the denial of justice." The Chief Justice then refers to the 13th section of the Judicial Act, which enacts that the Supreme Court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding offices under the authority of the United States. "A *mandamus* to an officer," he observes, "is held to be the exercise of original jurisdiction; but a *mandamus* to an inferior court of the United States is in the nature of appellate jurisdiction."

Two of the judges dissented, and one of them, Mr. Justice Baldwin, delivered an elaborate opinion adverse to the decision, in which every objection to the jurisdiction is very forcibly stated. Since this decision the question has been regarded at rest, as will be seen from many cases in our reports, to some of which we have referred. 7 Pet., 634; 8 Pet., 301; 17 How., 275 [58 U. S., XV., 101]; 3 Wall., 752 [70 U. S., XVIII., 212].

This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right, without any existing legal remedy. It is upon this ground that the remedy has been applied from an early day, indeed, since the organization of courts and the admission of attorneys to practice therein down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counselors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will

lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress. The attorney or counselor, disbarred from caprice, prejudice or passion, and thus suddenly deprived of the only means of an honorable support of himself and family, upon the contrary doctrine contended for, would be utterly remediless.

It is true that this remedy, even when liberally expounded, affords a far less effectual security to the occupation of attorney than is extended to that of every other class in the community. For we agree that this writ does not lie to control the judicial discretion of the judge or court; and hence, where the act complained of rested in the exercise of this discretion, the remedy fails.

But this discretion is not unlimited, for if it be exercised with manifest injustice, the Court of King's Bench will command its due exercise. Tapp. *Mand.*, 14. It must be a sound discretion, and according to law (p. 18). As said by Chief Justice Taney, in *Ex parte Secombe*, 19 How., 13 [60 U. S., XV., 565]: "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility." And by Chief Justice Marshall, in *Ex parte Burr*, 9 Wheat., 530: "The court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper."

We are not concerned, however, to examine in the present case how far this court would inquire into any irregularities or excesses of the court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. Whatever views may be entertained concerning it, they are wholly immaterial and unimportant here. The ground of our decision upon this branch of the case is, that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. The contrary must be maintained before this order can be upheld and the writ of *mandamus* denied. No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non jure* and void. Now, this want of jurisdiction of the inferior court in a summary proceeding to remove a officer of the court, or disbar an attorney or counselor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen, from the definition and office of it, that it is issued to the inferior courts "to enforce the due exercise of those judicial or ministerial powers with which the Crown or Legislature have invested them; and this, not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice." 3 Bl. Com., 111. The same principle is also found stated with more fullness in Bacon's Abr., tit. *Mandamus*, let. D, 273, "to restrain them (inferior courts) within their bounds, and compel them to execute their jurisdiction, whether such jurisdiction arises by charter, etc., being in *subsidium justitie*." See, also, Bacon, let. E, 278; also, Tapp., *Mand.*, 105, and the cases there cited.

The same principle is also stated by Chief
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Justice Marshall in *Ex parte Burr*. "There is, then," he observes, "no irregularity in the mode of proceeding which would justify the interposition of this court. It could only interpose on the ground that the circuit court had clearly exceeded its powers, or had decided erroneously on the testimony." The case of *Burr* was malpractice and stirring up litigation, to the disturbance and oppression of the community. The jurisdiction was unquestionable. So, in *Ex parte Secombe*, Chief Justice Taney, after showing that the question was one of judicial discretion, observes, "We are not aware of any case where a *mandamus* has issued to an inferior tribunal, commanding it to reverse or amend its decision, when the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion." The case of *Secombe* was for a contempt in open court, and the jurisdiction undoubted. So was the case of *Tillinghast v. Conkling*, referred to by the Chief Justice in his opinion. This writ has been issued in numerous cases by K. B., in England, to inferior courts to restore attorneys wrongfully removed. The cases are collected by Mr. Tapping on *Mandamus*, 44. One of them was the case of an attorney suspended from practicing in the courts of the county palatine of Chester. The reason given for issuing this writ is, that the office is of public concern, and regards the administration of justice; and because there is no other remedy. 6 Mod., 18, per Holt; *Leigh's case*, 3 Mod., 385; *Lee's case*, Carth., 169.

Cases are found, also, in many of the courts of the States. Among the more recent are three cases in California (1 Cal., 143, 188, 190); in New York (1 Johns. Cas., 181); in Pennsylvania, Virginia, and Alabama. In several of the cases the remedy failed, as in *Ex parte Burr*, *Secombe*, and *Tillinghast*, the court having held, in the cases, that the questions involved were of judicial discretion. But the proceeding is admitted to be the recognized remedy when the case is outside of the exercise of this discretion, and is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction.

It will be seen that this opinion is wholly irrespective of the merits of this unhappy controversy between the relator and Judge Fisher, as the view we have taken of the case does not in any respect involve this question. We can only regret the controversy, as between gentlemen of the highest respectability and honor, and express the hope that reflection, forbearance and the generous impulses that eminently belong to the members of their profession, may lead to their natural fruits—reconciliation and mutual and fraternal regard.

Our conclusion is, that a peremptory writ of *mandamus* must issue.

Mr. Justice MILLER, dissenting:

I am of opinion that this court has no jurisdiction of the case in which it has just ordered the writ of *mandamus* to issue.

There are in the reports of our decisions, three applications before this for the writ of *mandamus* to be issued by this court to restore attorneys to places at the bar from which they had been expelled by Federal Courts. The first of these is the case of *Burr*, 9 Wheat., 529. The opinion delivered by Chief Justice Marshall ex-

presses great doubt on the part of the court as to its right to interfere, and resting mainly on that doubt, and partly on the fact that the exclusion from practice was temporary, and would soon expire, the application was refused.

In the other two cases, namely: *Tillinghast v. Conkling* [not reported], and *Ex parte Secombe*, 19 How., 9 [60 U. S., XV., 565], the application was denied, and the denial placed explicitly on the ground that this court has no power to revise the decisions of the inferior courts on this subject by writ of *mandamus*.

In delivering the opinion of the court in the latter case, Chief Justice Taney said, that "In the case of *Tillinghast v. Conkling*, which came before this court at the January Term, 1837, a similar motion was overruled. The case is not reported, but a brief written opinion remains in the files of the court, in which the court says that the motion is overruled upon the ground that it had not jurisdiction of the case." In the principal case the court said: "It is not necessary to inquire whether this decision of the territorial court (disbarring Secombe) can be revised here in any other form of proceeding. The court are of opinion that he is not entitled to a remedy by *mandamus*. * * * It cannot be reviewed or reversed in this form of proceeding, however erroneous it may be, or supposed to be. And we are not aware of any case where a *mandamus* was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature judicial, and within the scope of its jurisdiction and discretion."

The attempt to distinguish the case now under consideration from those just cited, on the ground that in the present case the Supreme Court of the District of Columbia was acting without jurisdiction, is, in my judgment, equally without foundation in the fact asserted, and in the law of the case if the fact existed.

1. That court had jurisdiction of the person of Mr. Bradley, because he was a resident of the District of Columbia, and because he received notice of the proceeding, and submitted himself to the court by defending on the merits.

2. It had jurisdiction of the offense charged, namely: a contempt of the court whose judgment we are reviewing. I say this advisedly, because the notice which called upon him to answer charged him in distinct terms with a contempt of the Supreme Court of the District, though much of the argument of counsel goes upon the hypothesis that the offense for which he was disbarred was an offense against the criminal court, and not the Supreme Court.

3. That court had undoubted authority to punish contempt by expelling the guilty party from its bar.

If the court had jurisdiction of the party and of the offense charged, and had a right to punish such offense by the judgment which was rendered in this case, what element of jurisdiction is wanting?

But if we concede that the Supreme Court of the District exceeded its authority in this case, I know of no Act of Congress, nor any principle established by previous decisions of this court, which authorizes us to interfere by writ of *mandamus*. The argument in favor of such authority is derived from the analogy supposed to exist between the present case and others in which

the court has held that the writ may be issued in aid of its appellate jurisdiction, as *Ex parte Crane*, 5 Pet., 193; *Ex parte Hoyt*, 13 Pet., 291, and by the practice in the Court of King's Bench, in England, and in some of our state courts.

In regard to the practice in the King's Bench and in the state courts, I shall attempt to show presently that this court possesses no such general supervisory power over inferior Federal Courts as belongs to the King's Bench, and as belongs generally to the appellate tribunals of the States. The appellate power of this court is strictly limited to cases provided for by Act of Congress.

The case of *Crane*, (*supra*), was one which this court had an undoubted right to review. It was alleged that this right was obstructed by the refusal of the judge of the circuit court to sign a bill of exceptions, and the court held that in such a case he might be compelled, by the writ of *mandamus*, to sign a truthful and proper bill of exceptions.

It was not necessary to cite this case and others, in which the court refused to grant the writ of *mandamus*, to show that under proper circumstances it may issue. In *Ex parte Milwaukee R. R. Co.*, 5 Wall., 825 [73 U. S., XVIII., 676], the court ordered a writ of *mandamus* to issue to the judges of the circuit court, because, in the language of the court, "The petitioner has presented a case calling for the exercise of the supervisory power of this court over the circuit court, which can only be made effectual by a writ of *mandamus*." And this is the true doctrine on which the use of the writ is founded; and the sound construction of the 13th section of the Judiciary Act.

The case of *Hoyt* (*supra*), cited by counsel for petitioner, is in strong confirmation of this. Referring to the language of that section the court says: "The present application is not warranted by any such principles and usages of law. It is neither more nor less than an application for an order to reverse the solemn judgment of the district judge in a matter clearly within the jurisdiction of the court, and to substitute another judgment in its stead." Precisely what is asked in the present case.

The case of *Tobias Watkins*, 8 Pet., 193, is very analogous to the one before us, and in construing the power of this court in regard to the writ of *habeas corpus*, decides principles which appear to me to be in direct conflict with the views advanced by the court in the opinion just read. In that case, Watkins had been indicted, tried and sentenced to imprisonment by the Circuit Court of the District of Columbia. An application was made to this court for a writ of *habeas corpus*, on the ground that the indictment charged no offense of which that court had cognizance. But, conceding this to be true, and answering the case made by the petition, the court, by Marshall, Ch. J., asks: "With what propriety can this court look into the indictment? We have no power," he says, "to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our reach. An imprisonment under a judgment cannot be unlawful unless that judgment be an

absolute nullity; and it cannot be a nullity if the court has general jurisdiction of the subject, although it be erroneous." "The law trusts that court with the whole subject, and has not confided to this court any power of revising its decisions. We cannot usurp that power by the instrumentality of the writ of *habeas corpus*." And, finally, after examining the cases in which this court had previously issued the writ of *habeas corpus*, he says that they are "no authority for inquiring into the judgments of a court of general criminal jurisdiction, and regarding them as nullities, if, in our opinion, the court has misconstrued the law, and has pronounced an offense to be punishable criminally, which we may think not."

The case made by Mr. Bradley is much weaker than the case of *Watkins*, because, in the latter, the court was only asked to determine, on the face of the indictment, whether the offense charged was cognizable by the circuit court. Here the charge of a contempt of which the court below had jurisdiction, is clear; but we are told that, on looking into the testimony, we shall find that the petitioner was not guilty of a contempt of that court, but of another court. Judge Marshall and the court over which he presided refused to look beyond the judgment, even at the indictment. Here the court looks beyond the judgment, and beyond the notice which charges the offense, and inquires into the evidence on which the party is convicted; and because that is, in the opinion of this court, insufficient, it is held that the court which tried the case had no jurisdiction. This is to me a new and dangerous test of jurisdiction.

But with all due respect to my brethren of the majority of the court, it seems to me that their judgment in this case is not only unsupported by the cases relied on, and in conflict with the cases of *Tillinghast* and *Secombe*, decided by this court directly on the same point, but it is at war with the settled doctrine of the court on the general subject of its appellate jurisdiction.

The Constitution declares that the appellate power of this court is subject to such exceptions, and is to be exercised under such regulations as Congress shall make. Art. III., sec. 2.

Chief Justice Ellsworth, construing this clause of the Constitution, in the case of *Wiscart v. Dauchy*, 3 Dall., 321, said: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it." And the court afterwards, by Chief Justice Marshall, said in substance, that if Congress in establishing the Supreme Court, had not described its jurisdiction, its general power in reviewing the decisions of other Federal courts could not be denied. But the fact that Congress had described its jurisdiction by affirmative language, must be understood as a regulation under the Constitution, prohibiting the exercise of other powers than those described. *U. S. v. More*, 3 Cranch, 159; *Duroseau v. U. S.*, 6 Cranch, 307.

In *U. S. v. Nourse*, 6 Pet., 470, a case of summary proceedings before the district judge under the revenue law, which provided that an appeal might be allowed to claimant by a judge of the Supreme Court, it was said that, "as this

special mode is pointed out by which an appeal may be taken, it negatives the right of an appeal in any other manner;" and it was further said that the United States had no right of appeal, because none was given by the Act which authorized the proceeding.

And finally, in the case of *Barry v. Mercein*, 5 How., 108, this court, by Chief Justice Taney, declared emphatically that, "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case unless conferred upon it by Act of Congress; nor can it be exercised in any other mode of proceeding than that which the law prescribes." This case and the case of *U. S. v. More* were decided in direct reference to the jurisdiction of this court over those of the District of Columbia; and in the latter, Judge Marshall uses this unmistakable language: "This court, therefore, will only review those judgments of the Circuit Court of Columbia, a power to re-examine which is expressly given by law."

Let us see, then, what regulations Congress has made in regard to our jurisdiction over the courts of the District of Columbia.

The Supreme Court of the District, whose judgment is attempted to be brought into review here, was established by the Act of March 3, 1863 (12 Stat., 762). The only clause looking to a revision of the decisions of that court is section 11, which enacts "that any final judgment, order, or decree of said court may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as is now provided by law in reference to final judgments, orders, and decrees of the Circuit Court of the United States for the District of Columbia." The Act on which our jurisdiction over this circuit court depended is that of February 27, 1801. (2 Stat. at L., 108). The 8th section of that Act provides that "any final judgment, order or decree of said circuit court, wherein the matter in dispute shall exceed the value of \$100" (now \$1,000), "may be re-examined and reversed or affirmed in the Supreme Court of the United States by writ of error or appeal."

Here, then, is no provision for any other modes of review than by appeal and by writ of error; but there is a limitation of the use of these modes to cases in which the matter in dispute shall exceed \$1,000. Where, then, is there any authority for a review by writ of *mandamus*? And where there is any regulation authorizing a review of this case by any mode whatever?

For the counsel of petitioner in this case does not claim that the matter in dispute exceeds \$1,000, or has any moneyed value. Such a claim would be fatal to the relief he asks, because it would show that it is a proper case for a writ of error and, therefore, a *mandamus* will not lie.

We have repeatedly held that the writ of *mandamus* cannot be made to perform the functions of a writ of error.

In the recent case of *The Commissioner v. Whiteley*, 4 Wall., 524 [72 U. S., XVIII., 385], the following language was used without dissent: "The principles of the law relating to the remedy by *mandamus* are well settled. It lies when there is a refusal to perform a ministerial

act involving no exercise of judgment or discretion. * * * It lies when the exercise of judgment and discretion are involved, and the officer refuses to decide, provided that if he decided, the aggrieved party could have his decision reviewed by another tribunal. * * It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error."

And to the same purpose are *Ex parte Hoyt*, 18 Pet., 279, and *Ex parte Taylor*, 14 How., 8.

Cited—11 Wall., 258; 13 Wall., 245; 19 Wall., 513, 514; 100 U. S., 324, 330; 107 U. S., 318; 12 Kan., 405, 409; 64 Ind., 496; 82 N. Y., 166; 41 Am. Rep., 242 (131 Mass. 376); 21 Mich., 566.

DENNIS MULLIGAN, *Piff. in Err.*,

v.

JOHN CORBIN, MARTHA A. CORBIN,
AND MARTHA CORBIN, JR.

(See S. C., 7 Wall., 487-491.)

Act of Legislature, when does not impair contract.

An Act of the Legislature of Kentucky releasing the interest of the State in escheated lands does not, either in terms or by necessary implication, impair the obligation of the Auditor's contract to concede a moiety of the lands to an attorney for their recovery.

[No. 114.]

Argued Mar. 23, 1869. Decided Apr. 5, 1869.

IN ERROR to the Court of Appeals of the State of Kentucky.

This case arose upon a petition filed in the Fayette Circuit Court, in the State of Kentucky, by the plaintiff in error, to recover a certain house and lot in Lexington, Kentucky. The said court entered judgment in favor of the plaintiff. The Court of Appeals, on appeal, having reversed this judgment, the plaintiff sued out this writ of error.

A very full statement of the case appears in the opinion of the court.

Messrs. Garret Davis and R. T. Merrick, for plaintiff in error.

Messrs. J. B. Beck, J. W. Moore, and Bright, for defendants in error.

(The argument, being confined to the facts, is not here given.)

Mr. Justice Davis delivered the opinion of the court:

The only question that arises in this case, which it is competent for this court to decide, is, whether the Act of the Legislature of Kentucky, passed on the 4th day of April, 1861, is repugnant to the Constitution of the United States, because it impairs the obligation of a contract.

That Act is as follows: "Be it enacted by the General Assembly of the Commonwealth of Kentucky, that whatever interest in a small house and lot on Upper Street, in the City of Lexington, which was conveyed in the year 1808, by Thomas Bodley to Solomon Brindley, may rightfully belong to the State by escheat or otherwise since the death of the said Brind-

ley without known legal heirs, be, and the same is hereby released to and vested in Martha Ann Corbin, for her life, and her daughter, Martha Ann, absolutely after her said mother's death. The said property having been bought in the year 1843, as the property of William C. Barry, claiming and possessed of it after said Brindley's death, and conveyed in 1844 to the said mother and daughter, and who have occupied it as theirs ever since said sale and conveyance."

A short history of the circumstances which led to this piece of legislation is necessary in order to understand the position taken by the plaintiff in error. The record disclosed that Solomon Brindley, a free colored man, was the owner, in 1808, of a small house and lot, of trifling value, in the City of Lexington, and is dead. It does not appear when he died, or that he ever transferred the title to the property; but at a very early day William T. Barry occupied it, and this occupancy was continued after his death by his legal representative until 1843, when it was sold as Barry's property, on an execution in favor of the old Bank of Kentucky, and purchased for two of the defendants in error, who occupied and claimed it until November, 1855.

At this date Thomas B. Monroe, Jr., an attorney at law, was employed by the Auditor of Public Accounts, in conformity with the statutes, by a written contract, to sue for and recover the property as having escheated on the death of Solomon Brindley, and Monroe was to have an equal moiety of the property recovered for his compensation. Monroe, in the execution of his employment, prosecuted a suit in the name of Baxter, the agent appointed to take charge of escheated estate, and procured a judgment of eviction, and afterwards undertook to sell the property to Mulligan, the plaintiff in error, and to deliver possession to him. At this point of time the Legislature stepped in and passed the Act in question.

Mulligan insists that this Act is inhibited by the Constitution of the United States because it impairs the obligation of the contract which the auditor made with Monroe. The correctness of this position is the point to be decided.

If the Legislature had the power to release to the defendants in error the right of the State to the property in controversy, both common justice and the good name of the Commonwealth demanded the exercise of that power, under the circumstances of this case. It appears that the affairs of the old Bank of Kentucky were substantially under the control of the State when the house and lot were seized as the property of Barry, and sold. The purchasers at that sale had a right to conclude that the State would never interfere to their prejudice, and no other party could, if Brindley died without heirs. The Legislature, after the facts were known, would have been guilty of a great wrong if it had refused to pass an Act to give validity, as far as it had power to do so, to a sale of which the State derived the benefit.

The general power of the Legislature to grant to individuals the lands belonging to the State is not denied; but it is claimed there was a restraint in this instance, on account of the previous contract concerning the property, between the auditor and Monroe.

NOTE.—What laws are void as impairing obligation of contracts. See note to *Fletcher v. Peck*, 10 U. S. (6 Cranch), 87.

It is charitable to suppose that the auditor would never have employed Monroe to dispose the Corbins, had he known the manner in which they acquired possession, and that his proceedings were prompted by a commendable zeal for the true interests of the State.

But, after all, did the contract with Monroe have the effect claimed for it by the plaintiff in error? It certainly did not vest in him the title to the property. If, as is admitted, the auditor had the authority to contract with an attorney at law to give him one half the escheated estate, as compensation for its recovery, still, this contract did not confer on him a license to sell the property after it was recovered, or to make any disposition of it that would bind the government.

The Legislature had intrusted the management of escheated property with bonded officers, and confided to them the exclusive power of selling, under the written directions of the auditor. 1 Stanton, Stat. Ky., ch. 34, p. 459. In no other mode could the legal title of the State be divested, and it nowhere appears that Baxter, in whose name the suit against the Corbins was prosecuted, and who was the agent for escheated estates in Fayette County, where the property is situated, was a party to the sale to Mulligan, or that he ever sanctioned it. Viewing the transaction in the aspect most favorable to Mulligan, it is apparent that his rights, under this contract, are those which belonged to Monroe, and that he has no other or better rights than Monroe had. The case, then, resolves into this question: What were the rights of Monroe, and how are they affected by the Act of the Legislature? The answer to this question is very plain, and relieves the proceeding of any difficulty.

When the escheat was perfected, the legal title to the entire property was vested in the State; but as the State, through its auditor, had bargained with Monroe to concede a moiety to him for his services, it follows that the State was under obligation to convey, in some proper form, this moiety to him. This left the State the undisputed owner of one half the property, with such power of disposition as the Legislature, in its wisdom, should see proper to give it. The Act in question does not attempt to interfere with any privilege which belonged to Monroe, and we have no right to presume it was passed with any such intention. It does not profess to grant to the Corbins any particular estate, but simply releases to them whatever interest the State had to the property they occupied, and as the State undoubtedly had an interest in it to the extent of one moiety, how can it be said that the obligation of the contract between the auditor and Monroe was impaired by this statute?

The statute operated rightfully on the moiety owned by the State, and there is no authority for saying the Legislature meant to do anything more.

It is not our province to decide any other point in this case, and as the Act of the Legislature of Kentucky does not, either in terms or by necessary implication, impair the obligation of the auditor's contract with Monroe, it follows that the judgment of the Court of Appeals must be affirmed.

See ? WALL.

GEORGE S. TWITCHELL, *Petr.*,

v.

THE COMMONWEALTH of PENNSYLVANIA.

(See 8 C., 7 Wall., 321-327.)

Writ of error in a criminal case—to state courts—practice on—Amendments of Constitution.

It is no objection to the allowance of a writ of error that the judgment, to be reviewed, was rendered in a criminal case.

Writs of error to state courts have never been allowed as of right.

The practice is to submit the record of the state court to a judge of this court to ascertain whether the case will justify the allowance of the writ.

The 5th and 6th amendments of the Constitution of the United States do not apply to state governments; they were designed exclusively as restrictions upon federal power.

Motion argued Apr. 2, 1869. Decided Apr. 5, 1869.

PETITION for a writ of error.

This case arose upon a petition for leave to file a motion for a writ of error to the Court of Oyer and Terminer, of the City and County of Philadelphia, and the Supreme Court of Pennsylvania. The prayer of the petitioner was granted Mar. 31, 1869, with directions to serve notice of argument on the Attorney-General of Pennsylvania.

A further statement of the case appears in the opinion of the court.

Mr. W. W. Hubbell, for petitioner.

No counsel appeared for the respondent.

Mr. Chief Justice Chase delivered the opinion of the court:

This is an application for a writ of error to the Court of Oyer and Terminer of the City and County of Philadelphia and the Supreme Court of Pennsylvania, with a view to the revision here of a judgment of the former court, affirmed by the latter court which condemns the petitioner to suffer death for the crime of murder.

The application is made under the 56th section of the Judiciary Act of 1789, which makes provision for the exercise of the appellate jurisdiction of this court over judgments and decrees of the courts of the States.

Neither the Act of 1789, nor the Act of 1867, which in some particulars supersedes and replaces the Act of 1789, makes any distinction between civil and criminal cases in respect to the revision of the judgments of state courts by this court; nor are we aware that it has ever been contended that any such distinction exists. Certainly none has been recognized here. No objection, therefore, to the allowance of the writ of error asked for by the petition can arise from the circumstance that the judgment which we are asked to review was rendered in a criminal case.

But writs of error to state courts have never been allowed, as of right. It has always been the practice to submit the record of the state courts to a judge of this court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the State, and whether the case upon the face of

the record will justify the allowance of the writ.

In general, the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or decided; and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court.

In the case before us we have permitted the motion for allowance to be argued before the full bench because of the urgency of the case, and the momentous importance of the result to the petitioner.

It is claimed that the writ should be allowed upon the ground that the indictment upon which the judgment of the state court was rendered was framed under a statute of Pennsylvania in disregard of the 5th and 6th Amendments of the Constitution of the United States, and that this statute is especially repugnant to that provision of the 6th Amendment which declares, "that in all criminal prosecutions the accused shall enjoy the right" "to be informed of the nature and cause of the accusation against him."

The statute complained of was passed March 30, 1860, and provides that "In any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, willfully and with malice aforethought, kill and murder the deceased; and it shall be sufficient, in any indictment for manslaughter, to charge that the defendant did feloniously kill the deceased."

We are by no means prepared to say, that if it were an open question whether the 5th and 6th Amendments of the Constitution apply to the state governments, it would not be our duty to allow the writ applied for and hear argument on the question of repugnancy. We think, indeed, that it would. But the scope and application of these amendments are no longer subjects of discussion here.

In the case of *Barron v. Baltimore*, 7 Pet., 243, the whole question was fully considered upon a writ of error to the Court of Appeals of the State of Maryland. The error alleged was, that the state court sustained the action of the defendant under an Act of the State Legislature, whereby the property of the plaintiff was taken for public use in violation of the 5th Amendment. The court held that its appellate jurisdiction did not extend to the case presented by the writ of error; and Chief Justice Marshall, declaring the unanimous judgment of the court, said:

"The question presented is, we think, of great importance, but not of much difficulty. * * * The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its par-

ticular government as it judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power if expressed in general terms, are naturally and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes."

And, in conclusion, after a thorough examination of the several amendments which had then (1833) been adopted, he observes:

"These amendments contain no expression indicating an intention to apply them to state governments. This court cannot so apply them."

And this judgment has since been frequently reiterated, and always without dissent.

That they "were not designed as limits upon the state governments in reference to their own citizens," but "exclusively as restrictions upon federal power," was declared in *For v. Ohio*, 5 How., 494, to be "the only rational and intelligible interpretation which these amendments can have." And language equally decisive, if less emphatic, may be found in *Smith v. Md.*, 18 How., 76 [59 U. S., XV., 271]; and *Withers v. Buckley*, 20 How., 90 [61 U. S., XV., 819].

In the views thus stated and supported we entirely concur. They apply to the 6th as fully as to any other of the amendments. It is certain that we can acquire no jurisdiction of the case of the petitioner by writ of error, and we are obliged, therefore, to refuse the writ.

Cited—9 Wall., 278, 783; 16 Wall., 125; 21 Wall., 557; 22 U. S., 552; 100 U. S., 284; 1 Dill., 14; 2 Am. Rep., 389 (19 Ohio, 184); 3 Am. Rep., 344 (101 Mass., 240); 5 Am. Rep., 143 (49 Mo., 496); 9 Am. Rep., 103 (28 Mich., 482); 15 Am. Rep., 228 (28 Mich., 533); 32 Am. Rep., 640 (6 Baxt., 567); 30 Mich., 206; 64 Mo., 572.

JAMES T. AUSTIN, *Pf. in Err.*,
v.

THE BOARD OF ALDERMEN OF THE
CITY OF BOSTON.

(See S. C., 7 Wall., 694-699.)

Review of state judgment—what questions arise.

In reviewing a state judgment, the only question of federal jurisdiction, and of which this court can take cognizance is, whether the plaintiff in error has been deprived of any right, contrary to the Act of Congress, upon which he relies for protection.

Where the facts bring the case within the terms of the Act according to the strictest construction which can be given to them, this is conclusive of the case.

[No. 123.]

Submitted Mar. 23, 1869. Decided Apr. 5, 1869.

IN ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts.

This is a writ of error to the Supreme Judicial Court of Massachusetts, to reverse its judgment, affirming, on *certiorari*, a tax assessed by the defendant in error upon certain shares in National Banking Associations situated in Bos-

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ton. The tax was assessed under the Massachusetts Statute of 1865, ch. 242, section 8, which is as follows: "The assessors of each city and town in which any shareholder in such associations resides, shall include all shares in such associations held by persons resident and liable to taxation in said city or town in valuation of the personal property of such person, for the assessment of all taxes imposed and levied in such town by authority of law, to be assessed at the same rate, and subject to the same deductions as shares of state banks and other moneyed corporations in the hands of the citizens of such city or town."

The plaintiff in error, who is a citizen of Boston, contends that this statute conflicts with the provisions of the United States Statute of 1864, ch. 106, section 41 (13 U. S. Stat. at L. 111, 112), as the proper construction of that Act requires that any tax assessed on such shares shall be assessed in the city or town where the bank is situated.

The decision of the Supreme Court of Massachusetts is reported in 14 Allen, 359.

A further statement of the case appears in the opinion of the court.

Mr. Ivers T. Austin, for plaintiff in error:

The question is: what did Congress intend by the phrase used in the 41st section of the Currency Act, "at the place where such bank is located, and not elsewhere?" Does "place" mean State, Territory or district in which a national bank is located, or does it mean the city, town or village of its location?

Stat. 1864, ch. 106; 13 Stat. at L., 112.

1. The statutes do not not and never did nor could possess, by virtue of their sovereignty, the power or right to tax the shares of the national banks. The first proviso of the 41st section of the Currency Act is a grant, or operates as a grant, to the States, of a new power or a new right to tax the shares. It is not the restriction of a power or right already possessed by them.

The right to tax the "means and instruments employed in the exercise of the functions of the Federal Government" is exclusive in Congress.

McCulloch v. Maryland, 4 Wheat., 316; *Osborn v. Bk. of U. S.*, 9 Wheat., 738; *Weston v. Charleston*, 2 Pet., 449; *Dobbins v. Erie Co.*, 16 Pet., 435-446 *Bk. of Com. v. N. Y.*, 2 Black., 620 (67 U. S., XVII., 451); *Bank Tax Case*, 2 Wall., 200 (69 U. S., XVII., 793).

2. Congress has the constitutional power to annex to its grant to the States of a right to tax the shares of national banks, any conditions, limitations and restrictions, which in its judgment may be deemed expedient; and the States are bound to comply with any and all such conditions, limitations and restrictions, if they undertake to exercise the power thus conferred.

The character of the States as sovereign, does not alter nor modify their obligation as grantees.

Bk. of U. S. v. Planters' Bk., 9 Wheat., 904; *Bk. of Kentucky v. Wister*, 2 Pet., 318; *Briscoe v. Bk. of Kentucky*, 11 Pet., 257-324.

The limitations in the proviso have been held to be binding upon the States by this court, and by every state court which has judicially considered the point.

Pa. v. Markoe v. Hartranft, 6 Am. Law Rep. (N. S.), 487; *N. H. v. Huntington v. Burt*, 18 N. Dec 7 WALL.

U. S., Book 19.

H., 276; *First Nat. Bk. of Portsmouth v. Portsmouth*, 47 N. H.; *Ind. v. Wright v. Stile*, 27 Ind., 838; *Ohio v. Fraser v. Seibern*, 6 Am. Law Rep. (N. S., 475); *Me. v. Opinion of the Justices*, 53 Me., 594-596; *Abbott v. Bangor*, 54 Me., 540.

3. The phrase used in the first proviso of the 41st section of the Currency Act, viz.: "place at which such bank is located and not elsewhere," was intended by Congress to mean the specific city, town or village in which a bank is located. It is not intended to mean, nor can it be so construed as to mean the State, Territory or district in which it is located.

Wherever the word "place" occurs in any section of the Act other than the 41st, it means clearly and distinctly, in all instances but one, either a city, town or village.

The meaning of the word having been ascertained from an examination of the whole statute, it must be held to have the same meaning everywhere in the same statute.

Bonham's case, 8 Co., 117; *Pennington v. Case*, 2 Cranch, 88; *U. S. v. Fisher*, 2 Cranch, 358; *Van Allen v. Assessors*, 3 Wall., 573 (70 U. S., XVIII., 229); *Rez v. Stoks Dameret*, 7 B. & C., 569; *Rez v. Ramsgate*, 6 B. & C., 719; *Rez v. Inhab. Great Bentley*, 10 B. & C., 527; *Samuel v. Nettleship*, 3 Q. B. (N. S.), 188.

4. If it be doubtful whether the construction contended for by the plaintiff in error be correct, the rule as to the construction of public grants should be applied in support of that construction, viz.: "Where two equally plausible constructions can be given to the same words of a grant, and no other motive intervenes, that construction is to be adopted which restricts the grant, in preference to that which extends it."

Ohio L. I. & T. Co. v. Debolt, 16 How., 416; *Charles Riv. Bridge v. Warren Bridge*, 11 Pet., 420-545; *U. S. v. Arredondo*, 6 Pet., 737-740; *Mills v. St. Clair Co.*, 8 How., 569; *Martin v. Waddell*, 16 Pet., 411; *Nagle v. Ahern*, 3 Irish Law Rep., 41; *Sewall v. Jones*, 9 Pick., 414; *Freeland v. Hastings*, 10 Allen, 575.

The construction of the plaintiff in error is supported by the Act of Feb. 10, 1868, and the following cases:

Opinion of the Justices of the Supreme Court of Maine, *supra*; *Abbott v. Bangor*, *supra*; *Huntington v. Burt*, *supra*.

Messrs. John P. Healey and Clement Hugh Hill, for defendant in error:

1. The right of the States to tax shares in national banks under the United States in the hands of their citizens (Stat. of 1864, ch. 106, section 41) has been fully established.

Van Allen v. Assessors, 3 Wall., 573 (70 U. S., XVIII., 229); *People v. Commissioners*, 4 Wall., 244 (71 U. S., XVIII., 844); *Bradley v. People*, 4 Wall., 459 (71 U. S., XVIII., 433).

2. The plaintiff in error resides in Boston, the place where the banks are situated, and admitting his construction of the above Act to be the true one, its terms have been literally complied with in his case.

3. But if the above position is wrong, the counsel for the defendant in error contend that the construction put upon the United States Statute of 1864, ch. 106, section 41, by the Supreme Court of Massachusetts, is the correct one.

It is a familiar principle of interpretation, that punctuation forms no part of a statute,

and that a limiting clause is confined to its next antecedent, unless the construction of the statute specially demands its being made an exception to this general rule.

Cushing v. Worrick, 9 Gray, 882; *Guiser's case*, Dyer, 46 b; Noy, Max., 2 Dwar. Stat., 2d ed, 590, 591, 601.

Applying this rule to the statute under consideration, and the more natural construction of it will be that the limiting clause, "at the place where such bank is located," designates the locality of the authority which is to impose the tax, and not the place in which the tax is necessarily to be assessed.

This construction effectuates the obvious intention of Congress, which was not to interfere with the inherent right of taxation in the States so long as it should be equitably imposed, but to prevent the shares in national banks from being unduly taxed, and thus impeded in their operations. This same section provides that the right of taxation shall not exceed that imposed upon banks organized under state authority, and allows the taxation of real estate owned by national banks.

See, also, Cong. Globe for 1863-4, pp. 1957, 1958, 1959, 2621, 2622.

It is apparent that there might be reasons why the shares in a national bank should not be taxed out of the State in which the bank is situated, because in that way, where the systems of taxation are different (as they are, for instance, in New York and Massachusetts), the shares would be liable to double taxation. But what conceivable interest can it be to anybody, except citizens of Massachusetts, whether shares owned by citizens of Springfield in a national bank established in Boston are taxed in Springfield or in Boston? And so long as the tax does not exceed that imposed upon other moneyed capital in the State, what interest is it to the bank itself or its shareholders?

The declaratory Act of Congress of Feb. 10, 1868, enacting that the words "at the place where the bank is located, and not elsewhere," shall be construed and held to mean the State within which the bank is located, is a legislative construction of this statute which this court will follow.

Mr. Justice Swayne delivered the opinion of the court:

This case is brought before us by a writ of error, issued pursuant to the 25th section of the Judiciary Act of 1789.

The Legislature of Massachusetts, by a Statute passed on the 15th of May, 1865 (ch. 242), provided for "the taxation of shares in associations for banking, established under the laws of the United States," and prescribed the mode of procedure for that purpose. The statute is confined to such associations in that State, and to shares held by persons living within its limits. The 3d section enacts that the assessment for taxation shall be made where the shareholders reside.

The proviso in the Act of Congress which permits the shares to be taxed by the States, requires them to be included "in the valuation of the personal property" of the holder, "in the assessment of taxes imposed by or under state authority, at the place where such bank is located, and not elsewhere." Act, June 8,

1864, ch. 106, sec. 41, 13 Stat. at L., 112. There are other regulations upon the subject, but they do not affect the point to be considered, and need not to be more particularly adverted to.

The plaintiff in error lived in Boston, and was the owner of stock in six national banks there situated, and the valuation and assessment were there made.

It is not denied that this was in conformity to the Act of Congress, but it is insisted that the taxes assessed were illegal and void, because the statute of the State requires that they shall be assessed at the place of the residence of the shareholder, without reference to the locality of the bank.

The only question of federal jurisdiction, and of which this court can take cognizance is, whether the plaintiff in error has been deprived of any right, contrary to the Act of Congress, upon which he relies for protection.

The facts bring the case within the terms of the Act, according to the strictest construction which can be given to them. This is conclusive of the case. Whether, in another case, arising upon a different state of facts, the statute may not produce results in conflict with the Act of Congress, and which this court will therefore be bound to revise and correct, is an inquiry upon which we are not called to enter. We can only consider the statute in connection with the case before us. Having ascertained that it has wrought no effect which the Act forbids, our jurisdiction is at an end. The 25th section of the Judiciary Act is explicit upon the subject.

The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

It is well settled that the States cannot exercise this authority in respect to any of the instrumentalities which the General Government may create for the performance of its constitutional functions. It is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the law making power of the nation; but the waiver must be clear, and every well grounded doubt upon the subject should be resolved in favor of the exemption.

In respect to the class of cases to which the one before us belongs, the waiver is expressed in clear and unmistakable language.

Important questions have arisen as to the construction and effect of the permission given to tax, by the Act of Congress under consideration, with reference to the national securities held by the banks. These questions have been settled by this court in repeated decisions. *Van Allen v. Assessors*, 8 Wall., 573 [70 U. S., XVIII., 229]; *People v. Commissioners*, 4 Wall., 244 [71 U. S., XVIII., 344]; *Bradley v. People*, 4 Wall., 459 [71 U. S., XVIII., 483].

In this case, the only question open for our examination must, for the reasons before stated, be resolved against the plaintiff in error.

The judgment of the Supreme Court of Massachusetts is affirmed.

Cited—105 U. S., 813; 3 Cliff., 394; 5 Bank. Reg., 249.

LOUIS F. GENERES, *Plff. in Err.*,

v.

LOUIS BONNEMER.

(See S. C., 7 Wall., 564, 565.)

Statement of facts by judge, when nullity.

A statement of facts by the judge after the case is removed to this court by the service of the writ of error, and filed without consent of the parties, must be treated as a nullity.

[No. 183.]

Argued Apr. 2, 1869. Decided Apr. 12, 1869.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was brought in the court below, by the plaintiff in error, to recover a certain sum of money, being the balance of an account stated. The defendant admitted the validity of the claim, but alleged that the plaintiff was bound to receive it in Confederate money.

On a trial below without a jury, the court entered judgment in favor of the plaintiff. Whereupon the defendant sued out this writ of error.

Mr. Louis Janin, for plaintiff in error.

Mr. Thomas J. Durant, for defendant in error:

The record shows no demurrer, ruling of evidence, or bill of exceptions.

There is a statement of facts so called, made by the judge of the court below, May 27, 1867.

This was eighty-three days after the writ of error was allowed, which was March 5, 1867, and it cannot be held by this court as part of the record.

U. S. v. King, 7 How., 846; *Snydam v. Williamson*, 20 How., 427 (61 U. S., XV., 978).

Moreover, it is not a statement of the facts, but a recapitulation and embodiment of the evidence, which is inadmissible.

Sec. 4, Act March 8, 1865, 13 Stat. at L., 501; *La. Mut. Ins. Co. v. Tweed*, decided 25 Jan., 1869.

Mr. Justice Miller delivered the opinion of the court:

In this case the only ruling of the court to be found in the record is the judgment rendered in favor of plaintiff for the recovery of a sum of money. There was no question raised on the pleadings. There is no bill of exceptions. There is no instruction or ruling of the court.

There is what purports to be a statement of facts signed by the judge, found in the record. It was filed more than two months after the writ of error was allowed and filed in the court, and nearly a month after the citation was issued by the judge.

To permit the judge to make a statement of facts, on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the judge, without hearing and without remedy. The statement of facts, filed without consent of the parties, must be treated as a nullity; and, as there is nothing on which error of the court below can be predicated, *the judgment must be affirmed.*

Cited—6 Wall., 376; 13 Wall., 8; 18 Wall., 252; 21 Wall., 552; 91 U. S., 251; 97 U. S., 320; 102 U. S., 364; 108 U. S., 10.

See 7 WALL.

THE STATE OF TEXAS, *Compt.*,

v.

GEORGE W. WHITE, JOHN CHILES, JOHN A. HARDENBERG, SAMUEL WOLF, GEORGE W. STEWART, THE BRANCH OF THE COMMERCIAL BANK OF KENTUCKY, WESTON F. BIRCH, BYRON MURRAY, JR., AND SHAW.

(See S. C., 7 Wall., 700-748.)

Action by State—attorney for—effect of secession by State—authority of attorney of—state Act as to transfer of property—contract of insurgent military board, or legislature void—purchaser of past due notes, rights of.

The Governor of a State may authorize an attorney to bring an action in its name.

When Texas became one of the United States, it entered into an indissoluble relation.

By the Ordinance of Secession, adopted by the Convention and ratified by a majority of the citizens of Texas, and the Acts of its Legislature intended to give effect to that ordinance, the State did not cease to be a State, nor its citizens to be citizens of the Union.

Where the provisional Governor of the State appointed by the President and a Governor elected by the people in 1861, and a Governor appointed by the Commander of the district, each has given his sanction to the prosecution of a suit, the suit was instituted and is prosecuted by competent authority.

If a State, by a public Act of its Legislature, imposes restrictions upon the alienation of its property, every person who takes a transfer of such property must be held affected by notice of them.

A contract made by an insurgent State Military Board in aid of the rebellion, is void.

An Act of an insurgent State Legislature intended to aid rebellion, can be given no effect, by this court.

Purchasers of notes or bonds past due, take nothing but the actual right and title of the vendors.

[No. 6. Original Bill.]

Argued Feb. 5, 8, 9, 1869. Decided Apr. 12, 1869.

THIS is an original suit in this court, in which the State of Texas filed a bill, Feb. 15, 1867, claiming certain bonds of the United States as its property. The bill prays an injunction to restrain the defendant from receiving payment from the National Government, and to compel the surrender of the bonds to the State.

The bill charges the possession of certain United States indemnity bonds, issued under the Compromise Acts of Sep. 9 and 25, 1850, which bonds bore date Jan. 1, 1851, and were payable to Texas or bearer, and redeemable after Dec. 31, 1854, with interests at the rate of five per centum per annum; that by the Act of the Legislature of Texas on the 10th of December, 1861, it was provided that no bonds issued as aforesaid, as a portion of said \$5,000,000.00 of stocks payable to bearer, shall be available in the hands of any holder until the same shall have been indorsed in the City of Austin by the Governor of Texas; that the bonds remained in the possession of Texas until sometime in 1861, or shortly thereafter, when they were seized and taken by certain unlawful combinations of individuals in armed hostility to the Government of the United States; that such organization, pretending to act in behalf of the State, establishing a certain Military Board for the purpose of accomplishing the overthrow of said Government of

the State of Texas under the Constitution of the United States, by withdrawing said State from the Federal Union, and for waging war against the Government of the United States, that said Military Board, Jan. 12, 1865, sold to the defendants 135 of said bonds and the coupons attached thereto, besides seventy-six other bonds then on deposit in England.

It is also charged that the contract is illegal and void, that it was never fulfilled by White & Chiles, and that Texas has the right to recover; that said bonds, or a portion thereof, were delivered to certain other of the defendants by White & Chiles; that said persons either hold the bonds for White & Chiles in trust, or else they were purchased with knowledge of the circumstances; that the bonds were not obtained in good faith; that they were purchased with notice of the title of the complainants; that they were never indorsed as required by law; that White & Chiles still hold a part of the bonds, and that they are unable to respond.

The charges, in short, are property in the complainant; unlawful possession by White & Chiles and their co-defendants; purchase with notice and after the bonds were overdue.

The contract of White & Chiles carries illegality on its face.

The defendant, John A. Hardenberg, admits the purchase of certain of the bonds, on the 6th and 8th of November, for \$32,475 and \$34,700, having purchased the same at \$1.15 and \$1.20 per dollar. Defendant denies all knowledge of the ownership of Texas, says that he purchased upon the information that a part of such bonds had been redeemed; denies any trust upon the part of White & Chiles, and all notice of the character of their ownership; alleges that he paid \$45,611.25 in good faith. The defendant is silent as to his purchasing them after they were due, but the date he gives shows that they were so purchased. The defendant, Chiles, first denies the authority of Texas to sue, and the ability of the State to maintain the action; insists upon an improper joinder of the parties; sets up a contract of White & Chiles with the State, and insists that the State is estopped from denying its validity. He denies the illegality of the contract; admits that the bonds were not indorsed, but insists that this was not necessary; says that he is unable to give further description than is found in the contract; states that \$3,000 were sold to Thomas Haas; that twelve of them were placed in the hands of Birch, Murray & Co., as collateral security for advances made to him; that four of them were placed in the hands of Edward A. Thornton, for collection; that one was placed in the hands of J. R. Barrett as a fee to procure the collection of the bonds; that five of them were sold by the defendant to Thomas J. Goff; that four were sold by him to a New York broker, name not recollected; that \$3,000 were paid by him to A. J. McKinley, on account of White.

He sets out dates which show that all these sold after they had matured; he sets up that he and White purchased about \$60,000 worth of cotton cards and medicines, in fulfillment of their contract; but that the same was seized by robbers *in transitu* from Mexico to Austin; and he claims the benefit of this casualty;

pleads a tender of the treasury warrants of Texas in discharge of their contract. He sets up an answer in the nature of a cross-bill. The defendants, Birch, Murray & Co., admit the possession of eight of the bonds; say that they received twelve bonds from John Chiles, as collateral security for \$5,000 loaned by them to Chiles; that, on the 15th of December, 1865, they were paid four of the bonds amounting to \$4,900; that the remaining eight are still held by the Treasury, "for the benefit of the parties entitled thereto;" that after the refusal of the Comptroller to pay, the defendants advanced Chiles \$4,185.25 more; that they did so upon the assurance of Chiles that he was the true owner of the bonds. He denies generally all bad faith. The defendant, White, admits the main charges in the bill, but attempts to justify under the Ordinance of Secession and the acts of the Military Board. He sets up his contract and claims under it; alleges that they purchased \$65,000 worth of supplies which were seized by robbers; sets up the tender, to Governor Hamilton, of the Texas securities. He alleges that he has disposed of all the bonds in his possession, and substantially states the same facts in regard to Birch, Murray & Co.

A fuller statement of the circumstances under which the transfer of the bonds in question to White & Chiles was made, seems desirable, and is here given.

In January, 1861, a call for a Convention of the people of Texas was issued, signed by sixty-one individuals.

The call was without authority and revolutionary.

The persons issuing the call were not acting by the direction nor with the sanction of the existing government, but in the capacity of private citizens.

Under this call delegates were elected from some sections of the State, whilst in others no vote whatever was taken.

These delegates assembled in State Convention, and Feb. 1, 1861, the Convention adopted an Ordinance: To Dissolve the Union between the State of Texas and the Other States United under the Compact styled "The Constitution of the United States of America."

The Ordinance contained a provision requiring it to be submitted to the people of Texas, for ratification or rejection by the qualified voters thereof, Feb. 23, 1861.

To avoid any internecine disturbance the irregular call of the State Convention might produce, Governor Houston convened the Legislature of the State in extra session at Austin, Jan. 22, 1861.

The Legislature passed an Act ratifying the election of delegates for the State Convention.

The Ordinance of Secession submitted to the people was adopted by a vote of 34,794 in favor of the ratification, to 11,285 against its ratification.

The Convention, which had adjourned immediately on passing the Ordinance, re-assembled. Mar. 14, 1861, it declared that the Ordinance of Secession had been ratified by the people, and that Texas had withdrawn from the Union of the States under the Federal Constitution. It also passed a resolution requiring the officers of the State Government to take an oath to support the provisional govern-

ment of the Confederate States, and providing as follows:

"Should any officer of the government refuse to take said oath or affirmation, in the manner and within the time prescribed, then and in that case, his office shall be deemed vacant, and the same filled and the duties thereof discharged as though he were dead or had resigned."

Mar. 16, the Convention passed an Ordinance, declaring that Whereas, Sam Houston, Governor of the State, and E. W. Cave, Secretary of State, had refused or omitted to take the oath prescribed, their offices were vacant; that the Lieutenant-Governor should exercise the authority and perform the duties appertaining to the office of Governor, and that the deposed officers should deliver and turn over to their successors in office the great seal of the State, and all papers, archives and property in their possession, belonging or appertaining to the State.

The Convention further assumed to exercise and administer the political power and authority of the State.

Thus was inaugurated the Rebel Government of Texas.

In many, if not all the other States that united in the league of "The Confederacy," the State Government organized under the Confederacy assumed the political power of the State, with the acquiescence and consent of the existing government. But in Texas the State Government was organized, not only without the consent of the existing government, but by the forcible ejection of its officers.

When the army of the Trans-Mississippi Department was surrendered, the civil officers of the usurping Government of Texas, including the Governor, Treasurer and Secretary of State, emigrated to Mexico. The State Government disappeared, and the State was disorganized and in a condition of anarchy.

Thereupon, June 17, 1865, the President issued his proclamation appointing a provisional Governor, and directed the formation by the people of a State Government in Texas.

Under the Provisional Government thus established, the people proceeded to make a Constitution and reconstruct their State Government.

It is under the authority of this government, so organized, that these proceedings are instituted, to vacate and set aside the proceedings and contracts of the Revolutionary Government in question.

Jan. 11, 1863, the Legislature of the usurping Government of Texas passed an Act:

"To Provide Arms and Ammunition, and for the Manufacture of Arms and Ordnance for the Military Defenses of the State;" and by said Act created a Military Board, with certain powers, to carry out the purpose indicated in the title.

On the same day the Legislature passed a further Act entitled "An Act to Provide Funds for Military Purposes," and therein directed the Board, which it had previously organized, to dispose of any bonds and coupons which may be in the Treasury on any account, and use such funds or their proceeds for the defense of the State; further providing, that "Any bonds so

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disposed of under the provisions of this Act, shall be substituted by an equal amount of bonds of the Confederate States of America."

Under the authority of the Act last referred to, the Military Board executed the above mentioned contract with White & Chiles, which this proceeding is instituted to vacate.

By this contract it appears that the bonds in question, belonging to the State of Texas, were transferred to White & Chiles, upon certain terms and conditions; and the question now arises: what title, if any, was vested in White & Chiles under the contract, and what in their assignees?

A further statement appears in the opinion of the court.

See, also, a subsequent decision by this court in one branch of the case (*post*.)

Messrs. J. B. Brent, R. T. Merrick, Geo. W. Paschal, George Taylor, and B. H. Ep-person, for the complainant:

Upon the whole case made by the bill, answers and evidence, the defense rests entirely upon the validity of the possession of the bonds by White & Chiles; for no defendant stands in any better position than these original possessors. In none of the original answers is there a real attempt to rest the possession upon color of law. But in a supplemental answer of Chiles, he invokes the Act of Jan. 11, 1863, found on the 55th page of the Session Laws of that year. It creates a Military Board, and gives the right to defend the State "By means of any bonds and coupons which may be in the Treasury on any account, and may use such funds or their proceeds, and, therefore, may sell, hypothecate or barter such bonds and coupons, provided such disposal shall not exceed the amount of \$1,000,000 of such bonds and coupons," etc.

But to this Act we answer:

1. That it cannot reasonably be construed to relate to the bonds in question.

2. For previous Acts of the same Legislature clearly show what was intended.

3. That if such could be the construction, the 2d section of the Act itself would make any such use void, for that declares that "Any bonds which may be disposed of under the provisions of this Act, shall be substituted by equal amounts of the bonds of the Confederate States of America," etc.—thus showing the illegal purpose.

This Act cannot be construed to change the special dedications of the bonds to school purposes.

Act of the Legislature of Texas, approved Jan. 31, 1854; Pasch. Annot. Dig., art., 3434, p. 571; *Idem*, arts. 3434, 3498; Act of the 18th of August, 1856; Pasch. Annot. Dig., art. 3499.

It cannot be pretended that, by a general law created for rebel purposes, it was intended to repeal the dedication and to destroy the Military Board. In contemplation of law, the bonds were not in the Treasury for the purposes of the Act of the 11th January, 1863. The State Constitution forbids this.

A *de facto* government is vested with certain political powers, which it may lawfully exercise; but does it acquire rights of property by reason of its overthrow of the government *de jure*?

What are its powers, is impossible to determine by any rule which will be applicable to

any case and all conditions. They are limited by necessity, and it is difficult, if not impossible, to give them any precise definition.

It is contended in the brief of the counsel for the defendant, that unless the government *de facto* possessed the power of making the contract in question in this case, it could possess no legislative nor executive nor judicial authority whatever; and that all it did on the assumption of such authority is absolutely null and void; that marriages solemnized during its existence should be held null; that the judgments of the courts in civil and criminal cases should be held null, and all concerned in their execution responsible, civilly and criminally, for an usurpation of power. Such consequences are not the logical result of the position. Whatever was necessary to be done in order to preserve the social community from anarchy, and to guard and protect its members in their intercourse with each other, might lawfully be done by such a government. Amidst all the mutations that have occurred in France, where the government has passed from one revolutionary hand to another in the sudden and rapidly succeeding convolutions of society, the judicial hierarchy has remained undisturbed. And even when revolutionary tribunals were at times executing the wrath of a faction, the judicial officers, as far as circumstances would permit, administered the law.

But whatever is not necessary for the preservation of the order and peace of the community, and especially whatever is done for the purpose of strengthening the *de facto* government in the contest with the government *de jure*, cannot be held valid in the courts of the *de jure* government, after it has been restored to lawful authority in the State.

The Acts of sovereignty exercised by the usurper may have been in obligatory force, not by virtue of his right, for he had none; but because it is very probable that the lawful sovereign, whether it be the People themselves or a King or a Senate, chooses rather that the usurper should be obeyed during the time, than that the exercise of the laws and justice should be interrupted, and a State thereby exposed to the disorder of anarchy. But in those things which are not so necessary for the public good, and which contribute toward establishing the usurper in his unjust position, if by disobedience we run no great hazard, we must not obey." Grotius, *De Bello ac Pace*, L. I., ch. 4, sec. 15.

The acts of sovereignty done by the usurping government which will be recognized as obligatory by the restored government, are such only, therefore, as are necessary to protect the community from anarchy; and the recognition of these, even, is within the discretion of the restored government *de jure*. For, as Grotius says, the usurping government does not act by virtue of right, for it has none; but by permission or sufferance of the lawful sovereign, whether it be King, People or Senate.

Shortridge v. Mason, 2 Am. Law Rev., 95; *Keppell v. Petersburg E. R. Co.*, 3 Am. Law Rev., 889.

That all acts done by the rebel authorities which were in contravention of the Constitution, laws and policy of the United States, or in aid of the rebellion are void, has generally been de-

cided by the Supreme Courts of the seceded States themselves.

Thus all these courts have held, that contracts founded upon Confederate Treasury Notes come under the maxim, *ex dolo malo non oritur actio*; and that such contracts are void because issued to aid the rebellion, and upon their faces expressly look to dissolving the Union. For this reason their vicious character adhered to every contract which they touched, not alone because of the illegal dealing of the parties, but because the thing dealt in could not be permitted to have any value.

Potts v. Long, 40 Mo., 536; *Schmidt v. Barker*, 17 La. Ann., 264; *Stillman v. Looney*, 3 Cold. (Tenn.), 20; *Thornburg v. Harris*, Id., 157; *Gill v. Creed*, Id., 295; *Schurer v. Green*, Id., 419; *Potts v. Gray*, Id., 468; *Henly v. Franklin*, Id., 472; *Linder v. Barbee*; *Smith v. Smith*, cited in 80 Tex., 754; and *McGehee v. Goodman*, unpublished, in Texas.

These cases have generally proceeded upon the analogies of illegal dealings against public policy, and dealings between alien enemies.

Kennett v. Chambers, 14 How., 88; *Scholesfield v. Eichelberger*, 7 Pet., 586-593; *Grinwald v. Waddington*, 16 Johns., 439; *Musson v. Fales*, 16 Mass., 832; *White v. Burnley*, 20 How., 249 (61 U. S., XV., 889); *The Price Cases*, 2 Black, 668 (69 U. S., XVII., 477); *Mrs. Alexander's Cotton*, 2 Wall., 419 (69 U. S., XVII., 919); and the war cases generally.

While this is the case of *White & Chiles*, we maintain that under the case made and proved, those who hold under them are in no better condition than themselves. This is irresistibly so from the very nature of the case, from the notice necessarily carried home, and from the possession obtained after the bonds had become due and had been dishonored. It is not the case of ordinary dealings between the parties. It is an effort to appropriate a fund dedicated by public law to a charitable use. On their faces, the bonds payable in coin were overdue; and when purchased they were bought at a price which showed a knowledge of the fact that payment was disputed.

It is a sound legal principle, that where the parties purchased the bonds after their maturity being due by a government which punctually pays all its bonds, against which there is no valid objection, such purchasers took them subject to all the equities existing between the original parties and to all the claim of legal ownership by the original payee. And notwithstanding some seeming conflict, *Herdenberg* got no better title than *White & Chiles* held.

Murray v. Lardner, 2 Wall., 110 (69 U. S., XVII., 857); *Thompson v. Lee Co.*, 3 Wall., 330 (70 U. S., XVIII., 178); *Swift v. Tyson*, 16 Pet., 1; *Andrews v. Pond*, 18 Pet., 65; *Goodman v. Simonds*, 20 How., 365 (61 U. S., XV., 941); *Brown v. Davies*, 8 T. R., 83; *Boehm v. Sterling*, 7 T. R., 426; *Brown v. Turner*, 7 T. R., 630; *Armory v. Merryweather*, 4 Dow. & R., 86; 2 B. & C., 578; *Down v. Halling*, 4 B. & C., 333; *Crosley v. Hom*, 13 East, 498; *Bridge v. Hubbard*, 15 Mass., 96; *Root v. Godard*, 8 McLean, 102; *Governor v. Fox*, 3 Eng. L. & E., 430; *Chit. Bills*, 95; *Weathered v. Smith*, 9 Tex., 625; *Whitish v. McAdams*, 18 Tex., 551.

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claim to be *bona fide* purchasers of these bonds without notice, and set up in their answers that they purchased them in the market of New York for value, ignorant that they had ever been the property of the State of Texas.

That the bonds purchased by them were the same as those transferred to White & Chiles by the *de facto* government of Texas, is admitted.

It appears, then, that Hardenberg purchased the bonds of the United States nearly two years after their maturity, with overdue coupons attached; paid for the same much less than their face, and he now asks from this court that he may be protected as a purchaser, in good faith, of commercial paper, without notice of the invalidity in the title of the party from whom he bought.

Overdue paper is withdrawn from the protection of commercial law, and thrown back into the mass of ordinary property subject to common law rules.

A bond may be negotiated after its maturity; but the party who takes it can derive no better title than that of the party from whom he received it. The party who sells thereby warrants his title, and if it is defective, the purchaser may have recourse for any loss against the vendor, but cannot defeat the claim of the rightful owner.

In this case there can be no better title in any of these parties than there was in White & Chiles, the other defendant having purchased the bonds after their maturity.

Goodman v. Simonds, 20 How., 365 (61 U. S., XV., 941), where the cases of *Andrews v. Pond*, 18 Pet., 65, and *Swift v. Tyson*, 16 Pet., 1, are considered and approved; *Murray v. Lardner*, 3 Wall., 121 (69 U. S., XVII., 859); *Brown v. Davies*, 3 T. R., 80; *Down v. Halling*, 4 Barn. & C., 383.

The proof in the case affects Hardenberg with actual notice.

The court, to the which question of good or bad faith is submitted as a question of fact, cannot fail to perceive that Hardenberg must have bought the bonds and coupons with knowledge of the defective title of the vendor, and trusted to the chances of overcoming that defect by representing himself at the Treasury Department as a *bona fide* purchaser, and obtaining payment by successful negotiation.

It is objected in his behalf that the bonds have been paid and, therefore, cannot be reached by any decree that may be passed in this case. He so avers in his answer.

1. If the bonds have been paid and he has received the proceeds, the complainant is entitled to a personal decree against him.

Messrs. Albert Pike, Robert W. Johnson, and James Hughes, for Chiles, defendant:

If Texas is not a State, or, being a State, is not in the Union, it is not competent to sue here. If it be a State, it is not one of the United States because it is not permitted to be represented in Congress and to have a voice in the legislation of the country. No State can, without its consent, be deprived of its equal suffrage in the Senate. Every State included within this Union is entitled to be represented; and if deprived of representation, is excluded from the Union.

It is not one of the United States, because it is not permitted to have a voice in the election of President and Vice-President of the United States; a right of which, like that of representation, a State of the Union cannot be deprived.

It is not one of the United States, because it is held and governed by the other States as a conquered province. It ceased to be a State upon its conquest. The States of the Union are sovereign, at least as to all their reserved rights and powers. So this court has again and again decided. A subjugated State held in bondage, governed by a military proconsul, declared by Congress to have no legal government, and its actual government subordinate to the military power, to be merely provisional, is no longer a State, any more than California was, after it was conquered by the United States; or Ireland, after it was subjugated by England; or Poland, after it was partitioned. The Act of Congress of March 25, 1867, declared Texas to be a rebel State, and provided for its government until a legal and republican state government could be legally established. It constituted Louisianians and Texas, the 5th military district, and made it subject, not to civil authority, but to the military authority of the United States. Over each military district an officer, not below the rank of Brigadier-General, was placed in command, with power to protect all persons in their rights of person and property, to suppress insurrections, disorder and violence, and punish, or cause to be punished, all criminals and disturbers of the public peace. He might allow the local civil tribunals to take jurisdiction of, and try offenders, or organize military commissions and tribunals for that purpose. This provision abrogated the Constitution of the State, in respect to the judicial power, and deprived the people of their dearest right—that of trial by jury. It excluded Texas from the Union, because it deprived the people of that State of the benefits of the first and sixth amendments of the Constitution.

If the court should determine that Texas is still a State in the Union, competent to sue here, it will then become necessary to inquire as to the validity of the contract made with White & Chiles, by the Military Board, under the authority of the acting Legislature. The court must determine whether the State existed and acted during the war, and if so, what acts done by it were valid.

How could the secession or revolt of Texas as a State, destroy its existence as a State? It did not derive that existence from the United States. The people did not cease to exist; they did not become a disorganized mob; the government remained unchanged; the State made war and was completely independent of the United States for four years, in fact exercising all the prerogatives of internal sovereignty. If it ceased to be a State, how could it, if it had succeeded, not merely have become a State upon that success, but all the time have been so?

If we concede that the formal and deliberative attempt of eleven of the States of the Union to dissolve the political bonds that had connected them with the other States; if we concede that a movement of such magnitude, so almost unanimous and made with so much coolness and deliberation, was not in law the movement and action of the States in question, but only of so many of their people as united in it, still we invite the earnest attention of the court

to the grave and serious question, whether the action of the people of each State could be treated as a rebellion, and in point of law was such, after it had assumed the proportions of a great public war.

No tribunal ever had before it for its decision a question of greater gravity and importance; for it not only affects vast numbers of men and concerns their rights of property, and their civil and political franchises, but also communities and States, their contracts, their laws, the judgments of their courts, their good faith and honor.

It is insisted that all Acts done by the State of Texas or the government *de facto* of the State during the war which were contrary to the Constitution of the United States, were void. It was not contrary to that Constitution to sell the bonds in question, nor was it contrary to that instrument to buy cotton cards and medicines for the people, with the proceeds of the bonds or with the bonds themselves.

If the contract in question was invalid as contrary to the Constitution of the United States, it must be on the naked ground that secession made the government of the State unlawful, and that all it did was void. The allegation of the bill and its ground for relief is, that, for want of authority to make the contract and because it was contrary to law and done for the unlawful purpose alleged, it did not affect the title of Texas to the bonds, or transfer any right or title to White & Chiles.

Such Acts and contracts on the part of a revolutionary government, are never void. They are done for the benefit of the people of the State, and that people, when the government changes, cannot repudiate them. Nor, indeed, was the Government of the State revolutionary, in any true sense of that word, because it was the same government as before, and there was no internal change whatever in the State.

If it should, contrary to our hope, be thought that in regard to the *status* of the State of Texas and its people during the war, this court is bound to be governed by the action and decision of the political power of the government, and must, therefore, enunciate as applicable here, the doctrines laid down by Mr. Dana, then we shall with great deference submit that the political power is estopped, by its own declaration and action, to apply these doctrines; and that this court has so decided in the *Price Cases* and the case of *Mrs. Alexander's Cotton*.

The people of Texas, who, in the language of *Mr. Justice Iredell*, in *Chisholm v. Georgia*, 2 Dall., 448, created the State, their voluntary and deliberate choice being the pure and sacred source from which the State derives its authority; the people of that State to whom, in the words of *Mr. Justice Wilson*, in the same case (*Id.*, 456), the State is subordinate; the people, the complete body of whom united together in the State and cannot be denied to be so, nor their deliberate act not to be its act without striking a blow at the very foundation of all republican or otherwise free government, having sold these bonds to persons not shown to have been incompetent or disqualified to contract with the *de facto* government of the State to furnish for the use of its citizens articles not contraband of war, now comes here to demand of loyal citizens of the United States the bonds

which it was thus instrumental in putting upon the market, in order that it may be repaid by the United States what otherwise, by the fortune of war, it would have lost.

If, as the bill alleges, the purpose of the sale was to procure means with the aid whereof to carry on the war and the contract, was, therefore, an unlawful one, then the case is all the worse, since the purpose of the bill is to enable the people of Texas to reclaim from the United States the amount of their bonds which the same people had put in circulation to injure the United States.

Will that people be allowed to use the fiction that the State and people, the corporation and the corporators, are different in law, for the purpose of compelling the United States or their loyal citizens to pay, to the amount of the bonds reclaimed, with interest, the expenses incurred by the people of Texas in carrying on the war. We say their loyal citizens, because the bill does not impeach the loyalty of either White or Chiles, or of these purchasers of the bonds.

If these bonds had been disposed of by faithless agents against the will or against the consent of the people of the State, the case would be very different; but it neither was so, nor is any such allegation made to the bill; and what is not alleged cannot be proven.

Again; if the contract was an unlawful one, made by the people, through the agency of the government, created and sustained by them, and thus made by the State, will the court, in the exercise of its equitable jurisdiction, give the same people or State any assistance or relief, to enable them to avoid the consequences of a contract made in violation of law or against public policy, or contrary to the laws of nations, which invalidate dealings with the enemy?

The general principle, for which we need not cite authorities, is, that where a contract is contrary to law or public policy, neither party to it can have any remedy against his *particeps criminis* in a court of justice. No relief in regard to it will be given, either in law or in equity. If the contract is already executed, it cannot be set aside as illegal or immoral; for it is a maxim that *in pari delicto, melior est conditio defendentis*. There is no fraud or mistake in this case. The State and people of Texas were equally *in delicto* with those to whom they sold the bonds. Texas has chosen to allege that the purpose was unlawful, and it cannot have relief on the ground that its own allegation is untrue. Can any such fiction as that there was a State of Texas in January, 1865, distinct and different from the people of Texas, and from the State of Texas actually existing and waging war, contracting and legislating, and that this State did not make the contract, but now comes here to repudiate it? Can such a fiction of a mere imaginary being relieve the actual, living, palpable State, if it is still a State, and not a Province, from the application of the principle which we have stated?

It is upon this fiction that the people of Texas are now presented here in the humiliating attitude of repudiating a contract entered into by their chosen and trusted officers, while they are engaged in a war for independence.

It is upon it that they seek to be saved from the loss otherwise to be borne by them in consequence of acts which they allege to have been

unlawful, and which were yet done by their authority. It is not a fiction of law that the people of a State are not that State, so as to be responsible for the acts of the government of the State; but a mere fiction without the law, and one which is very far from being in furtherance of justice.

Mr. J. M. Carlisle, for Hardenberg, defendant:

Mr. Hardenberg's case is wholly unconnected with that of either of the other defendants, except by the fact that, as to all the bonds purchased by him except one, they were at the time held by White and Chiles, under the contract of January, 1865, exhibited with the bill. Under this title, or as the complainant must admit, at least color of title and possession, followed the contract. It now appears that White and Chiles disposed, among others, of the Hardenberg bonds; but when, where, and to whom, or what consideration is not alleged or proven, or possible to be inferred from the record. That they treated the bonds as their own under the contract, and did dispose of them, and have now no pretense of claim to the Hardenberg bonds, is admitted by them in this suit.

Hardenberg knew nothing of the bonds, except what appeared on their face and from the published official Treasury Report, that similar bonds of the same issue had been paid and redeemed at the Treasury of the United States, notwithstanding the secession of Texas, and the civil war and rebellion, which had been suppressed, in point of fact, more than a year and a half before his purchase. He had no knowledge or information that Texas had, at any time, assumed to alter the terms of the contract of the United States, as expressed on the face of the bonds, so as to expunge from them the express declaration that they were payable to "bearer," and the repeated declaration to the same effect, that the bonds passed "by delivery." He, therefore, was not affected by the fact that the bonds were not indorsed by the Governor of Texas (if that alteration of the tenor of the bonds had any legal efficacy), and was wholly ignorant that such indorsement had been authorized or required by Texas for its security against fraud, or for any other purpose.

He had no knowledge or information that the bonds purchased by him had ever been held or claimed by White and Chiles, or either of them; or that any such contract as that set up by the bill had been made. In brief, he was a perfect stranger to all and singular the matters alleged by the bill as affecting the title to the bonds.

He found them in open market, in the City of New York, in November, 1866, and bought them in good faith and for their full market value, of brokers and others of high standing, in the usual and regular course of business, not only without knowledge or notice, but without suspicion, or reason to know or suspect that there was any infirmity in the title of his respective vendors, or any of them.

It is a misnomer and a confusion of ideas to call the Government of Texas at the date of the contract with White and Chiles, a *de facto* government. It was the Government of the State; the only embodiment of the abstract idea of a State which had ever given it existence for an instant, since its admission into the Federal Union.

But if it were the case of a contract made by

a usurped or revolutionary government, which for four years had been, as the bill itself shows and the public history attests, in the firm and exclusive possession and exercise of all the attributes of state sovereignty, there can be no doubt or question in the mind of any publicist that such a contract was valid and binding upon the State so governed, and is valid and binding on the government when restored. It would be a vain parade of learning to cite authorities for a proposition so universally admitted in the public law of nations.

The complainant's second proposition surrenders the first, *argumenti gratia*, and founds itself upon the contract, affirming its original validity, and pretending in matter of fact, that White and Chiles failed to perform its stipulations on their part.

Their second proposition is, then, in effect, the want of consideration for the transfer. At most, the fact of the transfer of a bill or note when overdue, is to subject it, in the hands of the holder, to all its equities; to all the equities with which it is incumbered at the time of the transfer.

An original absence of consideration is not one of those equities which attach on an instrument and defeat the title of an indorsee for value of an overdue bill, although with notice of the fact. *Charles v. Marden*, 1 Taunt., 324; *Sturtevant v. Ford*, 4 M. & G., 101; *Lazarus v. Gowie*, 8 Q. B., N. S., 459; *Stein v. Iglesias*, 1 C. M. & R., 565.

Mr. P. Phillips, for White, defendant:

We are first to inquire as to the *status* of the complainant.

This question involves the consideration, whether at the filing of the bill Texas was a State, within the meaning of that clause of the Constitution which confers original jurisdiction in this court, where a State is a party.

In *Hepburn v. Ellzey*, 2 Cranch, 452, it was strenuously contended that a citizen of this District was a citizen of a State in the constitutional sense, so far as to enable him to maintain a suit in the circuit court; that Columbia was a distinct political society and, therefore, a State, according to the definition of writers on general law.

This definition is declared by *Judge Marshall* not applicable to the Constitution, which, by its several provisions, shows that those political bodies only who were entitled to representation in the Senate and House of Representatives, and the appointment of electors, were intended.

This doctrine was applied in the case of *New Orleans v. Winter*, 1 Wheat., 91, to a citizen of a Territory; the court holding, that though a Territory may differ from the District of Columbia in many respects, neither of them is a State in the sense in which the term is used. 5 How., 379.

Now, what is the condition of Texas? It is denied the right of representation in Congress, and all power to appoint electors. Its State Government is declared to be illegal. All authority to govern it is lodged in a military commander; civil tribunals are made subservient to his dictation; the regulation of the right of suffrage is assumed by Congress; a provisional governor is appointed by the President to act in subservency to military authority. This condition of things is wholly inconsistent with the idea that

there remains with the people of Texas any political power whatever, or that they are entitled to any of the guaranties of the Constitution of the United States.

Our next inquiry is, as to the terms of the agreement.

The bill alleges that, admitting that the contract was made with a *de facto* government—yet, as its conditions and stipulations were not performed, the complainant is entitled to a restoration of the bonds.

The answer is:

1. This is not a case of dependent covenants. There was an absolute sale and delivery of the bonds. Then the other side stipulates to deliver certain commodities. These are two separate contracts. 2 Pars. Cont., 40.

2. For the performance of this contract, security was given according to the stipulation of the parties.

3. The parties agreed upon the mode by which a default should be paid.

Invalidity of the Agreement.

First. It is alleged that the contract is illegal, the object being to overthrow the Government of the United States.

On its face, there is nothing illegal nor immoral in the agreement. To supply a State with cotton cards and medicines is not only innocent but legitimate.

But it is sought to attach an illegal intent to what is fair in itself.

It is not sufficient that in such a case the illegal motive should have existed on the part of the State of Texas, but to affect the defendant, it must be clearly established that it entered into his intention and design; that the articles furnished should be used for an illegal purpose and that, in point of fact, they were so used. *Hodgson v. Temple*, 5 Taunt., 181.

Bare knowledge on the part of the vendor, that the vendee intends to put the goods or money to an illegal use will not vitiate the sale or loan and deprive the vendor of a remedy for the purchase money. *Dater v. Earl*, 3 Gray, 483.

A contract is, therefore, not void, because there may be in its surroundings or connection something illegal, though it is void when the consideration is illegal.

The distinction may be illustrated by two cases:

Goods were sold to one who intended to smuggle them, and the vendor, who knew of the design, recovered the price. *Holman v. Johnson*, Cowp., 341.

But where goods were sold, and the vendor not only knew that they were to be smuggled, but put them up in a particular manner so as to enable it to be done, it was held that the price could not be recovered. *Biggs v. Lawrence*, 8 T. R., 454.

But, assuming the illegality, what is the position of the complainant in a court of justice?

1. If the bill can be maintained on the assumption that Texas is a State, then, for the purposes of the case, it is the same State that existed when this contract was entered into.

The State being essentially the same, has no standing in court to assert the invalidity of its own agreement.

2. "*In pari delicto, melior est conditio possi-*

dentis," is a maxim of public policy, equally respected in courts of law and equity.

Thus no recovery can be had for premium paid for insurance to cover a trading with the enemy; nor for property placed in the hands of another to be smuggled. *Broom*, Leg. Max., 585, 586, 587; *Adams v. Barrett*, 5 Geo., 404.

Second. The right to recover those bonds is based upon the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion.

This proposition maintains that from the date of the Ordinance of Secession to the adoption of the present Constitution, there existed no competent public authority capable of entering into a contract. If this be true, there was no power of legislation, no executive or judicial authority; and all that has been done on the assumption of such authority is absolutely null and void. No contract, however solemn in its nature, which depends for its consummation on official sanction, can be sustained.

Marriages are to be held null because the marriage ceremony was performed or the marriage license granted by an officer without authority; judgments of courts, in civil and criminal cases to be held for naught for the like reason, and all concerned in their execution to be made responsible, civilly and criminally, as for usurpation of power.

The shocking consequences of such a doctrine is itself its best refutation. The civilized world recognizes the necessity of government at all times; and no authority on the law of nations holds any language inconsistent with this necessity.

A State can only act through its agents, and it would be absurd to say that any act was not done by the State which was done by its authorized agents. *Briscoe v. Bk. of Ky.*, 11 Pet., 518.

Having thus disposed of the question of ownership in the State, we now call attention to the second point of the complainant, who, "admitting the ownership of the State, denies that it could transfer a valid title by such a contract as that set out in this case."

The bill charges that the contract was without authority, contrary to law, and contemplated and proposed as part of the consideration an unlawful object, to wit: the overthrow of the Government of the United States.

There is no allegation that the illegal intent was shared in by the defendant. There is not a tittle of evidence to establish that fact, and there is the sworn statement in the answer: "The contract was made for the express benefit of the people of Texas, and not for the purpose of aiding the Confederate Government."

But whatever was the motive which actuated the Board, whether legal or illegal, the defendant cannot be affected by it. Even his knowledge of such intention, if he were not a sharer in the transaction and did not enter into it for the very purpose of accomplishing the illegal design, could not deprive him of his rights under the contract.

Hodgson v. Temple, 5 Taunt., 181, 508; *Carman v. Bryce*, 8 B. & Al., 179; *Holman v. Johnson*, Cowp., 341; *Dater v. Earl*, 3 Gray, 483.

But if the contract were illegal, and both parties were involved in the illegality, then it would follow that if the bonds had not been de-

livered, the court, on this ground, would refuse to enforce the delivery, and if delivered, the court would, on the same ground, refuse to decree their restoration. *Barile v. Coleman*, 4 Pet., 188; *Oreath v. Sims*, 5 How., 204; *Randall v. Howard*, 2 Black, 588 (87 U. S. XVII., 270).

The effect of this principle is sought to be avoided by distinguishing the State from the State Government. The contract, it is said, is made by the State Government and not by the State, but we have already shown that there is no such distinction.

The uniform decisions of this court apply to contracts of a State the same rules they apply to contracts of individuals. I know of no case where a distinction has been made.

Bank of U. S. v. Planters' Bank, 9 Wheat., 904; *Brice v. Bk. of Ky.*, 11 Pet., 324; *U. S. v. Bk. of Metropolis*, 15 Pet., 392; *Bk. of U. S. v. U. S.*, 2 How., 732.

When, therefore, the State comes into court with the allegation that the contract, which it seeks to set aside, was entered into by it for the purpose of obtaining means to overthrow the Government of the United States, it states a transaction which at once deprives it of all aid from courts of justice.

Messrs. S. S. Cox and J. W. Moore, for Weston F. Birch, Byron Murray, and others, defendants.

Mr. Chief Justice Chase delivered the opinion of the court:

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National Government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers and proofs, that the United States, by Act of September 9, 1850, offered to the State of Texas, in compensation of her claims connected with the settlement of her boundary \$10,000,000 in five per cent. bonds, each for the sum of \$1,000; and that this offer was accepted by Texas. One half of these bonds were retained for certain purposes in the National Treasury, and the other half were delivered to the State. The bonds thus delivered were dated January, 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the Comptroller of Public Accounts, under authority of an Act of the Legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the Governor of the State.

After the breaking out of the Rebellion, the insurgent Legislature of Texas, on the 11th of January, 1863, repealed the Act requiring the indorsement of the Governor (Acts of Texas, 1863, p. 45), and on the same day provided for the organization of a Military Board, composed of the Governor, Comptroller, and Treasurer; and authorized a majority of that Board to provide for the defense of the State by means of any bonds in the Treasury, upon any account, to the extent of \$1,000,000. Texas Laws, 55. The defense contemplated by the Act was to be made against the United States by war. Under

See 7 WALL.

this authority the Military Board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale of them of one hundred and thirty-five of the bonds, then in the Treasury of the State, and seventy-six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the Board a large quantity of cotton cards and medicines. This agreement was made on the 13th of January, 1865. On the 12th of March, 1865, White and Chiles received from the Military Board one hundred and thirty-five of these bonds, none of which were indorsed by any Governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by counsel arose upon the allegations of the answer of Chiles (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and Government of the United States, has so far changed her status as to be disabled from prosecuting suits in the national courts.

The first of these allegations is disproved by evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected Governor under the constitution adopted in 1866, and proceeding under an Act of the State Legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional Governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual Governor. If Texas was a State of the Union at the time of these acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit and it is our duty to dismiss it.

We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the

conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser or less definite relations, constitute the State.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge, *Mr. Justice Paterson*, in *Penhallow v. Doane*, 8 Dall., 93, in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

In the Constitution the term "state" most frequently expresses the combined idea just noticed of people, territory and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties on tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the words seems to be that primary one to which we have adverted, of a people or po-

litical community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word "state" is employed in the Constitution, we will proceed to consider the proper application of what has been said.

The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this Act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her Senators and Representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February (Paschal, Dig., Laws of Texas, 78), a Convention, called without authority, but subsequently sanctioned by the Legislature regularly elected, adopted an Ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be "a separate and sovereign State," and "her people and citizens" to be "absolved from all allegiance to the United States, or the government thereof."

It was ordered by a vote of the Convention (Paschal, Dig., 80), and by an Act of the Legislature (Laws of Texas, 1859-61, p. 11), that this Ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the Convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the Convention of seceding States at Montgomery, "in order," as the resolution declared, "that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said Convention."

Before the passage of this resolution the Convention had appointed a committee of public safety, and adopted an Ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the national troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State. (Paschal, Dig., 80). Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment

of the purposes of the committee. A military force was organized in support of these demands and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the Commissioners. Tex. Rep. of the Committee (Lib. of Cong.), p. 45.

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the Ordinance of Secession was taken on the 28d of February. It was ratified by a majority of the voters of the State.

The Convention, which had adjourned before the vote was taken, re-assembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the Confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State Constitution which this adhesion made necessary. The words "United States" were stricken out wherever they occurred, and the words "Confederate States" substituted; and the members of the Legislature, and all officers of the State, were required by the new Constitution to take an oath of fidelity to the Constitution and laws of the new confederacy.

Before, indeed, these changes in the constitution had been completed, the officers of the State had been required to appear before the committee and take an oath of allegiance to the Confederate States.

The Governor and Secretary of State, refusing to comply, were summarily ejected from office.

The members of the Legislature, which had also adjourned and re-assembled on the 18th of March, were more compliant. They took the oath, and proceeded on the 8th of April to provide by law for the choice of electors of President and Vice-President of the Confederate States.

The representatives of the State in the Congress of the United States were withdrawn, and as soon of the seceded States became organized under a constitution, Texas sent Senators and Representatives to the Confederate Congress.

In all respects, so far as the object could be accomplished by ordinances of the Convention, by Acts of the Legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other state officer in Texas, who recognized the national authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National Government within the limits of the State, except under the immediate protection of the national military forces.

Did Texas, in consequence of these Acts, cease to be a State? Or, if not, did the State

cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States?

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." *Lane Co. v. Oregon* [*infra*, 101]. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into a indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The Act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete as perpetual, and as indissoluble as the Union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered, therefore, as transactions under the Constitution, the Ordinance of Secession, adopted by the convention and ratified by a ma-

majority of the citizens of Texas, and all the Acts of her Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, must have become a war for conquest and subjugation.

Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National Government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State Government, competent to represent the State in its relations with the National Government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at naught. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, Senators chosen by her Legislature, or Representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the Rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National Government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee

to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that Act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative Acts of like tendency, must be complete enfranchisement. Wherever the national forces obtained control, the slaves became freemen. Support to the Acts of Congress and the Proclamation of the President, concerning slaves, was made a condition of amnesty (18 U. S. St., 737), by President Lincoln, in December, 1863, and by President Johnson, in May, 1865. 18 U. S. St., 738. And emancipation was confirmed, rather than ordained, in the insurgent States, by the Amendment of the Constitution prohibiting slavery throughout the Union, which was proposed by Congress, in February, 1865, and ratified, before the close of the following autumn, by the requisite three fourths of the States. 13 Stat. at L., 774, 775.

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

There being, then, no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old Constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no

acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the Executive and Legislative Departments of the National Government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smoldered in Texas, the President of the United States issued his Proclamation appointing a provisional Governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended Constitution, and to the restoration of the State to her proper constitutional relations. A Convention was accordingly assembled, the Constitution amended, elections held, and a State Government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as Commander-in-Chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the national forces, or take measures, in any State, for the restoration of State Government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. "Under the 4th article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not."

This is the language of the late *Chief Justice*, speaking for this court in a case from Rhode Island (*Luther v. Borden*, 7 How., 42), arising from the organization of opposing governments in that State. And we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and in that light it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for re-organization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the Acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these Acts.

But, it is important to observe that these Acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the Act of March 2, 1867 (14 U. S. St., 428), the first of the series, these governments were, indeed, pronounced illegal, and were subjected to military control, and were declared to be provisional only; and by the supplementary Act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the Act of March 2, that the governments then existing were not legal State Governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the Acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional Governor of the State was appointed by the President in 1865; in 1866 a Governor was elected by the people under the constitution of that year; at a subsequent date a Governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the Executive Department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence.

And the first question to be answered is, whether or not the title of the State to the bonds in controversy was divested by the contract of the Military Board with White and Chiles.

That the bonds were the property of the State of Texas on the 11th of January, 1862, when the Act Prohibiting Alienation Without the Indorsement of the Governor, was repealed, admits of no question, and is not denied. They came into her possession and ownership through public acts of the General Government and of the State, which gave notice to all the world of the transaction consummated by them. And, we think it clear that, if a State, by a public

Act of her Legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation, in disregard of such restrictions, can convey no title to the alienee.

In this case, however, it is said that the restriction imposed by the Act of 1851 was repealed by the Act of 1862. And this is true if the Act of 1862 can be regarded as valid. But was it valid?

The Legislature of Texas, at the time of the repeal, constituted one of the departments of a State Government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful Legislature, or its Acts as lawful Acts. And yet it is an historical fact that the Government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such, would be effectual and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary as to the United States.

It is not necessary to attempt any exact definitions, within which the Acts of such a state Government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example, as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void.

What, then, tried by these general tests, was the character of the contract of the military Board with White and Chiles?

That Board, as we have seen, was organized, not for the defense of the State against a foreign invasion, or for its protection against domestic violence, within the meaning of these words as used in the National Constitution, but for the purpose, under the name of defense, of levying war against the United States. This purpose was, undoubtedly, unlawful, for the Acts which it contemplated are, within the express definition of the Constitution, treasonable.

It is true that the Military Board was subsequently re-organized. It consisted, thereafter, of the Governor and two other members, appointed and removable by him; and was, therefore, entirely subordinate to executive control.

Its general object remained without change, but its powers were "extended to the control of all public works and supplies, and to the aid of producing within the State, by the importation of articles necessary and proper for such aid."

And it was insisted in argument on behalf of some of the defendants, that the contract with White & Chiles, being for the purchase of cotton cards and medicines, was not a contract in aid of the rebellion, but for obtaining goods capable of a use entirely legitimate and innocent and, therefore, that payment for those goods by the transfer of any property of the State was not unlawful. We cannot adopt this view. Without entering, at this time, upon the inquiry whether any contract made by such a Board can be sustained, we are obliged to say that the enlarged powers of the Board appear to us to have been conferred in furtherance of its main purpose, of war against the United States, and that the contract, under consideration, even if made in the execution of these enlarged powers, was still a contract in aid of the rebellion and, therefore, void. And we cannot shut our eyes to the evidence which proves that the Act of repeal was intended to aid rebellion by facilitating the transfer of these bonds. It was supposed, doubtless, that negotiation of them would be less difficult if they bore upon their face no direct evidence of having come from the possession of any insurgent state government. We can give no effect, therefore, to this repealing Act.

It follows that the title of the State is not divested by the act of the insurgent government in entering into this contract.

But it was insisted further, in behalf of those defendants who claim certain of these bonds by purchase, or as collateral security, that however unlawful may have been the means by which White & Chiles obtained possession of the bonds, they are innocent holders, without notice, and entitled to protection as such under the rules which apply to securities which pass by delivery. These rules were fully discussed in *Murray v. Lordner*, 2 Wall., 118 (69 U. S., XVII., 858). We held, in that case, that the purchaser of coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller, and that the burden of proof in respect to notice and want of good faith, is on the claimant of the bonds as against the purchaser. We are entirely satisfied with this doctrine.

Does the State, then, show affirmatively notice to these defendants of want of title to the bonds in White and Chiles?

It would be difficult to give a negative answer to this question if there were no other proof than the legislative Acts of Texas. But there is other evidence which might fairly be held to be sufficient proof of notice, if the rule to which we have adverted could be properly applied to this case.

But these rules have never been applied to matured obligations. Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors. *Brown v. Davies*, 3 T.R., 80; *Goodman v. Simonds*, 20 How., 366 (61 U. S., XV., 941).

The bonds in question were dated January 1, 1851, and were redeemable after the 31st of

December, 1864. In strictness, it is true they were not payable on the day when they became redeemable; but the known usage of the United States—to pay all bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law and shown on the face of the bonds—requires the application of the rule respecting overdue obligations, to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made.

Now, all the bonds in controversy had become redeemable before the date of the contract with White and Chiles; and all bonds of the same issue which have the indorsement of a Governor of Texas made before the date of the Secession Ordinance—and there were no others indorsed by any Governor—had been paid in coin on presentation at the Treasury Department; while, on the contrary, applications for the payment of bonds, without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied.

As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought, in fact, and under the circumstances could only have been bought, upon speculation. The purchasers took the risk of a bad title, hoping, doubtless, that through the action of the National Government, or of the Government of Texas, it might be converted into a good one.

And it is true that the first provisional Governor of Texas encouraged the expectation that these bonds would be ultimately paid to the holders. But he was not authorized to make any engagement in behalf of the State and, in fact, made none. It is true, also, that the Treasury Department, influenced, perhaps, by these representations, departed to some extent from its original rule, and paid bonds held by some of the defendants without the required indorsement. But it is clear that this change in the action of the department could not affect the rights of Texas as a State of the Union, having a government acknowledging her obligations to the National Constitution.

It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the State, purchasers could acquire none through them.

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

Mr. Justice Grier, dissenting, delivered the following opinion:

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case.

The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on

them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by *Chief Justice Marshall*, in the case of *Hopburn v. Illiey*, 2 Cranch, 452. As the case is short, I hope to be excused for a full report of the case, as stated and decided by the court:

"The question," says *Marshall, Ch. J.*, "is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the Act of Congress describing the jurisdiction of that court. The Act gives jurisdiction to the circuit courts in cases between a citizen of the State in which the suit is brought and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been argued that Columbia is a distinct political society, and is, therefore, a 'State' according to the definition of writers on general law. This is true; but as the Act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one Representative. 'The Senate of the United States shall be composed of two Senators from each State.' Each State shall appoint, for the election of the Executive, a number of electors equal to its whole number of Senators and Representatives. These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

Now, we have here a clear and well defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two Senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The Act of Congress of March 28th, 1867, declares Texas to be a "Rebel State," and provides for its government until a legal and republican State Government could be legally established.

It constituted Louisiana and Texas the 5th military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dakota is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting as a fact the present *status* of Texas as a State not in the Union politically, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her a conquered province, to subject her to military domination, and keep her in pupillage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court.

But conceding the fact to be as judicially assumed by my brethren, the next question is, whether she has a right to repudiate her contracts. Before proceeding to answer this question, we must notice a fact in this case that was forgotten in the argument. I mean that the United States are no party to this suit, and refusing to pay the bonds because the money paid would be used to advance the interests of the rebellion. It is a matter of utter insignificance to the Government of the United States to whom she makes the payment of these bonds. They are payable to the bearer. The government is not bound to inquire into the *bona fides* of the holder, nor whether the State of Texas has parted with the bonds wisely or foolishly. And although by the Reconstruction Acts she is required to repudiate all debts contracted for the purposes of the rebellion, this does not annul all Acts of the State Government during the Rebellion, or contracts for other purposes, nor authorize the State to repudiate them.

Now, whether we assume the State of Texas to be judicially in the Union (though actually out of it) or not, it will not alter the case. The contest now is between the State of Texas and her own citizens. She seeks to annul a contract with the respondents, based on the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion. Having relied upon one fiction, namely: that she is a State in the Union, she now relies upon a second one, which she wishes this court to adopt, that she was not a State at all during the five years that she was in rebellion. She now sets up the plea of insanity and asks

the court to treat all her Acts, made during the disease, as void.

We have had some very astute logic to prove that judicially she was not a State at all, although governed by her own Legislature and Executive as "a distinct political body."

The Ordinance of Secession was adopted by the Convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign Act of a sovereign State, and the verdict on the trial of this question, "by battle" (*Pries Cases*, 2 Black, 673 [67 U. S., XVII., 478], as to her right to secede, has been against her. But that verdict did not settle any question not involved in the case. It did not settle the question of her right to plead insanity and set aside all her contracts, made during the pending of the trial, with her own citizens, for food, clothing or medicines. The same "organized political body," exercising the sovereign power of the State, which required the indorsement of these bonds by the governor, also passed the laws authorizing the disposal of them without such indorsement. She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions, that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be "an organized political body," exercising all the powers and functions of the independent sovereign State. Whether a State *de facto* or *de jure*, she is estopped from denying her identity in disputes with her own citizens. If they have not fulfilled their contract, she can have her legal remedy for the breach of it in her own courts.

But the case of Hardenberg differs from that of the other defendants. He purchased the bonds in open market, *bona fide*, and for a full consideration. Now, it is to be observed that these bonds are payable to bearer, and that this court is appealed to as a court of equity. The argument to justify a decree in favor of the Commonwealth of Texas as against Hardenberg is simply this: these bonds, though payable to bearer, are redeemable fourteen years from date. The government has exercised her privilege of paying the interest for a term without redeeming the principal, which gives an additional value to the bonds. *Ergo*, the bonds are dishonored. *Ergo*, the former owner has a right to resume the possession of them, and reclaim them from a *bona fide* owner by a decree of a court of equity.

This is the legal argument, when put in the form of a logical *sorites*, by which Texas invokes our aid to assist her in the perpetration of this great wrong.

A court of chancery is said to be a court of conscience; and, however astute may be the argument introduced to defend this decree, I can only say that neither my reason nor my conscience can give assent to it.

Of course I am justly convicted by my brethren of an erroneous use of both, but I hope I may say without offense, that I am not convinced of it.

Mr. Justice Swayne delivered the following opinion:

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the Legislative Department of the Government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother Miller unites with me in these views.

DECREE.

It is adjudged, ordered and decreed, as follows:

That the objection interposed by way of plea, and the answer of defendants to the authority of the solicitors of the complainant, to institute this suit, and to the right of complainant as one of the States of the National Union to bring a bill of complaint in this court, be, and the same is hereby overruled.

That the contract bearing date the 12th January, 1865, purporting to have been executed between the Military Board of the State of Texas and Geo. W. White and John Chiles, and signed by said White and Chiles and by P. Murrah, J. S. Holman, and N. B. Pearce, members of the said Military Board, and which said contract is set forth as exhibit "A" to the complainant's bill of complaint, is null, void and of no effect, and that the said White and Chiles, their agents and attorneys, and all others claiming to act in their behalf, be perpetually enjoined from asserting any right or claim under the same; and that the complainant is entitled to recover and receive the bonds and coupons mentioned in said contract as having been transferred or sold to the said White and Chiles, which, at the several times of service of process in this suit, were in the possession or under the control of the defendants respectively, and any proceeds thereof, which have come into such possession or control, with notice of the equity of the complainants.

That George W. White, John Chiles, John A. Hardenberg, Weston F. Birch, Byron Murray, Jr., George W. Stewart, and Charles P. Shaw, and each of them be hereby perpetually enjoined from setting up any claim or title to any of the bonds and coupons attached, which are described in the first article of said contract, filed as exhibit "A" to the bill of complaint, and that the above complainant is entitled to restitution of such of the bonds and coupons and proceeds as have come into the possession or control of the said defendants respectively and as aforesaid.

And the court proceeding to determine upon the pleadings and proofs in the cause, for which and how many of said bonds the said defendants are respectively accountable to the complainants to make restitution thereof, or make good the proceeds thereof, doth order, adjudge and decree, that the defendants, Weston F. Birch, and Byron Murray, Jr., are so accountable to the complainant for and in respect of eight of said United States Texas indemnity bonds, numbered from 4916 to 4923, inclusive, with coupons attached; and the defendant, George W. Stewart, is so accountable to the complainant for and in respect of four other of said United States Texas indemnity bonds, 4230, 4231,

4235 and 4236, with coupons attached; and accordingly it was ordered and adjudged and decreed that the said defendants, Birch and Murray, do forthwith surrender and deliver to the complainants the said bonds numbered from 4916 to 4923, inclusive, with coupons attached, and for that purpose shall make all necessary and proper transfers and assignments, and execute all necessary instruments and powers, and that payment of said bonds or any of them by the Secretary of the Treasury to the said complainant shall be an acquittance of said Birch and Murray to that extent under this decree, and for such payment this decree shall be sufficient warrant to the said Secretary.

And it is further ordered, adjudged and decreed, that the said defendant, George W. Stewart, do forthwith surrender and deliver to the complainant the said bonds, numbered 4230, 4231, 4235 and 4236, with coupons attached, and for that purpose shall make all necessary and proper transfers and assignments, and execute all necessary instruments and powers, and that payment of said bonds or any of them by the Secretary of the Treasury to the said complainant shall be an acquittance of said defendant, Stewart, to that extent under this decree, and for such payment. This decree shall be sufficient warrant to the said Secretary.

And it appearing upon the pleadings and proofs in this cause, that before the filing of the bill in this cause, said defendants, Weston F. Birch and Byron Murray, Jr., had received and collected from the United States the full amount of four others of said United States Texas indemnity bonds numbered 4897, 4898, 4914 and 4915; and that the defendant, John A. Hardenberg, before the commencement of this suit, deposited thirty four of said United States Texas indemnity bonds, numbered 4777, and from 4237 to 4248, inclusive, and from 4930 to 4947, inclusive, and from 4232 to 4234, inclusive, in the Department of the Treasury of the United States, according to their tenor, of which bonds the said Hardenberg claims to have received payment from the Secretary of the Treasury before the service of process on him in this suit, in respect to which payment, and the effect thereof, the counsel for the said Birch and Murray, and for the said Hardenberg, respectively, desiring to be heard, it is ordered that time for said hearing be given to said parties on the first Friday of October next, or some convenient day thereafter.

And it is further ordered, adjudged and decreed, that the complainant and the defendants respectively, be at liberty to apply to the court at the foot of this decree for further direction in respect to the execution of the same, if they shall be so advised.

And it is further ordered, that the complainant shall recover from the defendants its costs, to be taxed by the clerk of this court.

Cited—9 Wall., 133; 12 Wall., 345, 357, 554; 16 Wall., 225, 410; 20 Wall., 82, 83, 464; 21 Wall., 145; 22 Wall., 102, 165, 490; 91 U. S., 596; 92 U. S., 249; 96 U. S., 195; 97 U. S., 460, 461, 462, 464, 474, 475; 99 U. S., 190; 100 U. S., 355, 357, 358; 102 U. S., 418; 1 Wood, 438, 445, 607; Chase, Dec., 315; 2 Dill., 227; 10 Blatchf., 286, 289; 6 Am. Rep., 700, 701, 714, 716 (45 Ala., 103); 9 Am. Rep., 67 (35 Ind., 183); 12 Am. Rep., 355 (47 Miss., 680); 30 Am. Rep., 239 (78 Ky., 332).

H. F. HALL AND B. L. MANN, *Plffs. in Err.*,
v.

GEORGE COPPELL.

(See S. C. 7 Wall., 542-559.)

Contract by British Consul, to protect cotton of insurgents, is void—consular certificates, nullities—waiver by defendant.

Contract by British Consul at New Orleans made during the late civil war, to cause cotton to be protected and transported from places within the insurgent lines to New Orleans, is void.

Consular certificates, that the cotton which they covered respectively was the property of a British subject, were nullities.

Consent of the defendant to waive the objection is tainted with the vice of the original contract and void for the same reasons.

[No. 53.]

Argued Apr. 1, 1869. Decided Apr. 12, 1869.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The petition in this case was filed in the court below by the defendant in error, to obtain certain bales of cotton alleged to be due him upon a contract. Judgment having been given in that court for the petitioner, the respondent sued out this writ of error:

The case is fully stated by the court.

Messrs. Wm. M. Evarts and J. Hubley Ashton, for plaintiffs in error:

The ruling of the court, as stated in the bill of exceptions, exhibits a total misapprehension of the character, foundation and policy of the rule *ex turpi causa non oritur actio*.

Every contract stipulating for the performance of an illegal act or founded upon an illegal consideration, is rendered void by the power, and to conserve the policy of the law; and this altogether independently of the will or wish of the parties concerned. An English judge declared: "You shall not stipulate for iniquity."

Lord Mansfield said that "It is not for the sake of a defendant that the objection is ever allowed, that a contract is immoral or illegal, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice of the case."

The defendant was not able, by any act of his, to give validity and vitality to a contract which the law pronounced void and without legal obligation; and the court should so have instructed the jury. *Craig v. Missouri*, 4 Pet., 486.

But upon the pleadings of the defendant, which deny the plaintiffs' cause of action and require its proof, and decide, as a further defense, to set up recoupment or reconvention, in case the plaintiffs' cause of action should be made out, it is absurd to impute to this second defense the effect of a waiver of the first.

The court, in effect, instructed the jury:

1. That a British subject, domiciled at New Orleans, could make a valid contract during the war with a citizen of the United States, by which such British subject should agree to cover and protect with his neutral British name, cotton situated in a hostile country within the rebel lines; and,

NOTE.—What contracts are void as against public policy, or as illegal; illegal consideration, when a defense; agreement not to bid; for lobby services; for contingent fees; to prevent competition. See note to *Bartie v. Nutt*, 29 U. S. (4 Pet.), 184.

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2. That a contract between such citizen and a British Consul at New Orleans, by which the latter agreed to issue false certificates that such cotton was British property, with a view to its protection within the rebel lines, was a valid contract, enforceable in a court of the United States by that British Consul.

We should suppose no one would have the hardihood to doubt that such a contract was absolutely void as against public policy, and as in contravention of the belligerent rights of the United States. *Patton v. Nicholson*, 3 Wheat., 204.

Nor do we believe that this court will tolerate for one moment the monstrous doctrine that the issuing, by a British Consul residing within our jurisdiction, of false and fraudulent papers, asserting that property in the enemy country belonged to British subjects, is a consideration which will sustain a contract between a Consul and a citizen of the United States.

Bartie v. Coleman, 4 Pet., 187.

1. The principal prayer for instructions contained in this bill of exceptions was: that the military orders therein mentioned did not authorize the contract sued on; and no officer of the government, save the President, had any authority to permit such intercourse to be carried on by the plaintiff; and therefore, no authority, except that of the President, could take from such a contract as this the stain of disability.

The Reform, 8 Wall., 632 (70 U. S., XVIII., 110); *The Sea Lion*, 5 Wall., 647 (72 U. S., XVIII., 622); *The Ouachita Cotton*, 6 Wall., 521 (73 U. S., XVIII., 935).

The contract being thus in contravention of the laws of war and the municipal laws of the country, no rights accrued to the plaintiff by or under it and no action was sustainable against the defendants or either of them, to enforce it.

Armstrong v. Toler, 11 Wheat., 258; *Kennett v. Chambers*, 14 How., 38; *Patton v. Nicholson*, 3 Wheat., 204.

This should have been the instruction of the court to the jury.

It is plain upon the face of the contract, that payment by the plaintiff to the defendant, Hall, at Arcola, of the amount of the interest of the latter in the cotton under the contract, was intended to be a condition precedent to the accruing of the defendant's liability to deliver the cotton to the plaintiff. The paper provides that "George Coppel will pay the said H. F. Hall, or cause to be paid to him at Arcola, a sum or sums approximating his interest, as the cotton is removed."

The law is well settled, that in the case of a condition precedent, the plaintiff must aver and prove either his performance of such condition, or an offer to perform it, which the defendant rejected; and in the case of concurrent considerations, that is, where the acts to be done by each party are to occur at the same period, neither party can sue on the contract without showing that he was ready and willing to perform his part thereof, or a discharge of such performance by the other party. And where there has been such discharge, the plaintiff must show notice to the other side, of his readiness and willingness to perform the contract.

Doogood v. Rose, 9 C. B., 132; *Smith v. Lewis*, 26 Conn., 110.

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Messrs. Thomas J. Durant, J. P. Sullivan, Hughes, Denver and Peck, for defendant in error:

The plaintiffs in error had, by their conventional demand, taken the position of plaintiffs in the suit and invoked the vigor of the contract, and claimed \$70,000 as damages for its alleged violation. Both parties, therefore, stood before the court under the contract, and the plaintiffs in error, by taking that attitude, had waived their exception on the ground of alleged illegality.

1 Story, Eq. Jur., sec. 296; *Batty v. Chester*, 5 Beav., 103.

It is submitted, if this charge is maintained, that it disposes of any question of alleged illegality presented in the other bills of exceptions.

The request to charge contained in the 7th and 8th bills of exception, presents the question whether the defendant in error could, as British Consul, by direct communication with the enemies, protect the cotton in question; and, also, whether he could, without such communication, protect the cotton.

First, had he the right, as a member of the community of New Orleans, to enter into this contract?

We take it to be settled beyond controversy, that two members of the same community may make any transfer of personal property within the enemy's lines, not based upon nor looking communication with the enemy.

Second, had the defendant in error, as British Consul or British subject, the right to enter into this contract?

It must be observed here, as in the other branch of this question, that communication with the enemy is, by the express terms in which the court charged, laid out of the question, as being negatived by the evidence, as well as by the presumption of law which presumes the protection to be legal when it was legally possible. The military occupation of the region in which this cotton was situated, frequently and rapidly changed, so that communication with persons in charge of the cotton would be strictly lawful at one time, and the effect of that communication might be, at another time, to prevent the destruction of the cotton by the enemy's forces.

The restraints upon the defendant in error, as British subject or Consul, were even less than those springing from those of his domicile, *i. e.*, viewed as a member of the community of New Orleans; for the announced attitude of his government in the Proclamation of Her Majesty of May 31, 1861 (*Law. Wheat. Int. Law*, 698), had not in the least added to the duties of neutrals, nor imposed any additional restraints upon her subjects. One of the rights of neutrals is freedom to trade with the respective belligerents in articles not contraband, and with places not under blockade.

1 Pars. Mar. Ins., 127; *Bell v. Reid*, 1 M. & S., 726.

The question presented in this bill of exceptions is, whether, when a party has actively violated a contract, he must be put *in mora* by an actual demand of the other party, before he can bring his suit to enforce the contract or to recover damages. So correct is the charge of the court, that we shall simply give the charge and refer to an article of the Civil Code of

Louisiana. The charge was in these words: "It is necessary that a party desiring to be released from a contract should put the other party in delay. But there is no evidence in the case that the defendants (plaintiffs in error) ever made a demand upon the plaintiff (defendant in error), to carry out the contract at any specified time. Indeed it appears that both parties were waiting for the time to arrive when it could be most securely done. Further, it appears that the first notice plaintiff (defendant in error) had of an intention to put aside the contract, was the act of the defendants (plaintiffs in error), in bringing in and selling a portion of the cotton embraced in the contract, contrary to its provisions.

Civ. Code of La., art. 1926, provides:

"Where there is an active violation of the contract * * * the creditor is under no obligation to put the debtor in default, in order to entitle him to his action." The ruling of the court here, then, was manifestly correct.

Mr. Justice Swayne delivered the opinion of the court:

It appears from the record that this action was founded upon a contract entered into on the 14th of September, 1863, between Hall, one of the plaintiffs in error, and Coppel, the defendant in error. It was agreed that Hall should furnish Coppel 1,169 bales of cotton—789 bales at B. L. Mann's place, about one mile from Arcola station on the Jackson Railroad, 47 bales at Gilman's, near Tangemahow, and the residue in the Parish of St. Helena, East Feliciana, and in Williamson and Amity Counties, Mississippi. Coppel agreed to cause the cotton to be "protected" and transported to New Orleans, and disposed of to the best advantage, paying to Hall the actual cost of the cotton and two thirds of the net profits, "after deducting freights, taxes, etc.," without commissions, retaining one third of the profits as his compensation. It was further agreed, that if any of the cotton should be stolen, burned, or otherwise destroyed, Hall should be exonerated to that extent; and that Coppel should pay Hall, or cause him to be paid at Arcola, sums approximating to the value of his interest, as the cotton was removed; such sums to be indorsed on the notes given by Coppel to Hall; one for \$318,350, and the other for \$57,000, both bearing even date with the contract.

Coppel was the plaintiff in the court below. His petition avers: that he is a subject of Great Britain, and a resident in that kingdom; that Hall, the plaintiff in error, resides in the City of New Orleans, and Mann, the other plaintiff in error, at Arcola Station, in Louisiana; that Hall and Mann delivered to him 1189 bales of cotton, of which 789 bales were on the plantation of Mann, at Arcola, and the remainder at various other places mentioned in a schedule annexed to the petition; that he caused the 789 bales to be branded with his initials and his private mark, that he had appointed Mann his agent to take charge of the cotton in his name and for his benefit, and that Mann acted as his agent accordingly; that, by reason of the war, he was unable to bring the cotton to market, but that he had expended large sums and much time and labor in "protecting" it; that, at the time of entering into the contract, he executed the two

notes mentioned, which were to be held by Hall as security for the proceeds of the cotton, and that these notes were still in the possession of Hall; that he was then able and desirous to bring the cotton to New Orleans for sale, and had made a demand for it on Hall and Mann, but that they had neglected and refused to deliver it, to his damage in the sum of \$50,000.

He subsequently filed an amended petition, in which he sets forth: that the contract between himself and Hall was entered into by the permission of the Major-General commanding the Department of the Gulf, expressed in general orders—Coppell being then engaged in business in New Orleans, and Hall living in that city; that the notes, mentioned in the contract, are held by Hall and Mann, or have been transferred by them to other parties; that, on the 14th of September, 1863, Mann sold and delivered to Hall 1,169 bales of cotton, then on the plantation of Mann; and that Hall, in part execution of his contract, designated and transferred this cotton to Coppell; that Coppell "protected" the cotton, and that Mann continued to hold it in trust for him and Hall, until the Confederate armies, under the command of General Richard B. Taylor, surrendered to the forces of the United States, when Mann and Hall, colluding to defeat the trust, refused to allow Coppell to bring the cotton to New Orleans, according to the contract; that this cotton is the same which was sequestered in this suit, and that he is entitled to the possession of it.

The original and supplemental answers of Hall and Mann set up the following defenses: That the cotton was situated in territory under the control of the rebel authorities, and that the contract was entered into there; that the object of the contract was the protection of the cotton, within the rebel lines, by Coppell, as the British Consul, and its transportation to New Orleans during the war then raging; that the contract was thus in violation of the law of the United States; of the neutral obligations of the plaintiff, as British Consul and a resident of the United States; and of public policy; and was null and void; that the plaintiff lost all right and interest in the contract by leaving Louisiana before the restoration of peace and that the defendants were thereby released from all liability upon the contract; that, if the contract should be held valid, the defendants claimed damages, by way of reconvention, for breach of the contract by the plaintiff, in neglecting to remove the cotton to New Orleans, and to sell it as he had agreed to.

In reply to the reconventional demand, the plaintiff replied that he was the Consul of Her British Majesty; that he did protect the cotton from all seizures which his agreement included; and that, as soon as the military situation permitted, he was ready and willing to perform all the stipulations of his agreement, and tendered the necessary means for the transportation of the cotton to New Orleans; which tender the defendants declined.

Upon this state of the pleadings the cause proceeded to trial. The parol evidence is not as fully set out as should have been done; but the controlling facts sufficiently appear.

The plaintiff gave in evidence the military orders of the department commander of the 7th of March, and the 3d of September, 1863. By these orders the trade of the Mississippi, within

the Department of the Gulf, was permitted, subject to such restrictions only as should be necessary to prevent the supply of provisions and munitions of war to the enemy. The products of the country were authorized to be brought to New Orleans, and other designated points within the military lines of the United States, and to be sold by the proprietors or their factors "for the legal currency of the United States, without restriction or confiscation." New Orleans was then in the military possession of the United States.

The cotton was all within the rebel lines. This state of things continued until the surrender of the rebel forces under General Taylor. Consular certificates were given by the plaintiff each setting forth that the cotton therein referred to was "the property of a British subject."

In the progress of the trial numerous exceptions were taken by the defendants. Some of them relate to the rejection of testimony; the residue to instructions given or refused. The view which we take of the case renders it necessary to consider only those which relate to the legality of the contract. They are the 2d, 7th, 8th and 9th. The 2d, 8th and 9th, taken together, show that the court, in instructing the jury, substantially affirmed the following propositions:

That the demand for reconvention, set up by the defendants, "cured any nullity or illegality in the contract, if any existed; and that, under the pleadings, the plaintiff might recover, notwithstanding such illegality."

That the military orders, then in force, authorized and gave validity to the contract.

That Hall and the plaintiff both residing in New Orleans, the contract was valid under the law of nations.

It appears, by the 7th bill of exceptions, that the defendants prayed the court to instruct the jury that—if the cotton, referred to in the contract, was at the time of its sale situated in territory which was under the permanent control of the Confederate forces—the same was enemy property; and that if it was in the contemplation of the parties that the plaintiff, acting as British Consul at New Orleans, or as a British subject resident in New Orleans, should extend British protection over said cotton, should "issue his official certificates, as British Consul, that the cotton was the property of a British subject, for the protection of the same within lines occupied by the enemy during the war; and that such protection formed a part of the consideration of the contract; then the contract was contrary to the laws of the United States, to the law of nations, to public policy, and to good morals, and that said contract was, therefore, null and void." The court refused to give this instruction. The reason assigned for the refusal was, "that the proof was that both parties were residents and domiciled in New Orleans; and that the court could not charge upon a supposed case which did not exist."

It does not appear to us that this objection to giving the instruction asked was well taken. Conceding the fact that the parties did both reside in New Orleans, the instructions met exactly the exigencies of the case. If the defendants were right as to the legal views upon which they insisted, the instruction should have

been given. If they were wrong in those views, it was properly refused. The point thus presented will be considered in connection with those arising upon the instructions which were given.

Consuls are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the *exequatur* which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the State. *Dana Wheat.*, sec. 249; 1 Kent, Com., 53. A trading consul, in all that concerns his trade, is liable in the same way as a native merchant. 2 Phil. Int. Law, ccli. The character of consul does not give any protection to that of merchant when they are united in the same person. *The Indian Chief*, 3 Rob. Adm., 27; *Arnold v. United Ins. Co.*, 1 Johns. Cas., 363.

By the terms of the contract, Hall was to "furnish" the cotton to Coppell. It was all within the rebel lines, and was, therefore, enemy property. Coppell was to cause it to be "protected." If there could be any doubt about the meaning of this phrase as used in the contract, it is dispelled by the conduct of Coppell in issuing the consular certificates, that the cotton which they covered respectively was "the property of a British subject." He was to receive the cotton in the rebel territory, to make an advance upon it there, to transport it to New Orleans, and there to sell it for the benefit of the contracting parties. The contract was one of factorage. Aside from the question of illegality, it is clear that no title passed to Coppell. He was to have and had no share in the acquisition of the cotton by Hall. His duties were to protect it; to receive it; to advance money upon it; to transport it; to sell it, and to account to Hall for his share of the proceeds.

It was doubtless expected that the insurgent authorities and the insurgent population would respect the rights of the "British subject." If the surging tide of war should sweep back the rebel arms, and the national forces should penetrate to the localities of the cotton, the custodian would be ready, in every instance, to produce the consular certificate.

These certificates, even if issued in good faith, were nullities, and could give no immunity; yet it might well be hoped that the authorities of the United States, instead of seizing the cotton *jure belli* and disposing of it according to the Act relating to captured and abandoned property, would *ex gratia* waive their rights, and yield up the property to the ostensible British owner, whose claim was fortified by such a muniment of title. The parties intended to delude and defraud the United States. The means used were the certificates issued by the Consul.

When the contract was entered into, the rebellion had become a civil war of large proportions. Important belligerent rights were conceded to the insurgents by the government of the nation. The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy. *Prize Cases*, 2 Black, 637 [67 U. S., XVII., 423]; *Mrs. Alexander's Cotton*, 2 Wall, 417 [69 U. S., XVII., 919]; *Mauran v. Ins. Co.*, 6 Wall., 1 [73 U. S., XVIII., 836].

See 7 WALL.

When international wars exist, all commerce between the countries of the belligerents, unless permitted, is contrary to public policy, and all contracts growing out of such commerce are illegal. Such wars are regarded not as wars of the governments only, but of all the inhabitants of their respective countries. The sovereign may license trade, but in so far as it is done, it is a suspension of war, and a return to the condition of peace. It is said there cannot be, at the same time, war for arms and peace for commerce. The sanction of the sovereign is indispensable for trade. A state of war *ipso facto* forbids it. The government only can relax the rigor of the rule. *Dana, Wheat.*, sec. 316; 1 Kent, Com., 68; *The Hoop*, 1 Wm. Rob., 196.

During the late civil war the subject was regulated by Congress. The 5th section of the Act of July 16th, 1861, authorized the President to proclaim any State, or part of a State, in a condition of insurrection, and it declared that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States should be unlawful so long as hostilities should continue, and that all goods and merchandise, coming from such territory into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, should be forfeited. It was enacted in a proviso that the President might permit commercial intercourse with any part of such territory "in such articles, and for such time, and by such persons" as he might deem proper, and that "such intercourse, so far as by him licensed," should be "carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

On the 10th of August, 1861, the President issued a Proclamation declaring the inhabitants of the rebel States—including Louisiana and Mississippi—in a state of insurrection. Certain local exceptions, not necessary to be stated, were made.

By a proclamation of the 31st of March, 1863, it was declared that the inhabitants of the same State, with certain local exceptions, of which New Orleans was one, where in a state of insurrection, and that all commercial intercourse, not licensed according to the Act before mentioned, "between those States, the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States," was unlawful, and that all products, goods and chattels coming from any of the insurrectionary States, "with the exceptions aforesaid," or proceeding to "any of said States, with the exceptions aforesaid, without the license and permission of the President through the Secretary of the Treasury, would, together with the vessel or vehicle conveying the same, be forfeited to the United States."

By a circular from the Treasury Department of the 8d of July, 1863, it was declared to be the purpose of the department: "8d, to allow no intercourse at all beyond the national and within the rebel lines of military occupation; across these lines there can be no intercourse, except that of a character exclusively military."

Amongst the treasury regulations framed under the Act of 1861, in force when the contract was entered into, was the following:

"VII. Commercial intercourse with local-

titles beyond the lines of military occupation by the United States forces, is strictly prohibited; and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States."

The military orders set forth in the record were unwarranted and void. The President alone could license trade with the rebel territory, and when thus licensed, it could be carried on only in conformity to regulations prescribed by the Secretary of the Treasury. The subject was wholly beyond the sphere of the power and duties of the military authorities. *The Reform*, 3 Wall., 632 [70 U. S., XVIII., 110]; *The Sea Lion*, 5 Wall., 647 [73 U. S., XVIII., 622]; *Ouachita Cotton*, 6 Wall., 521 [73 U. S., XVIII., 935]. These orders may be laid out of view. They can in nowise affect the case.

The stipulations in the contract as to everything Coppel was to do in the rebel territory was contrary to public policy, to the law of nations, to Act of Congress, to the Proclamation of the President, and to the regulations of the Treasury Department.

The protection to be given, if effectual, might have deprived the United States of pecuniary means to the extent of the value of the cotton. Withholding from one scale affects the result as much as putting into the other. The objection rests upon the same principle as insuring enemy property. This is condemned by all publicists who have written upon the subject, including as well the earliest as the latest. Valin (liv. 3, tit. 6, art. 8), Emerigon (tom. 1, 128), and Bynkershoek (2 Juris. Pub., ch. 21), are no less emphatic than Wheaton (Dana, Wheat., sec. 317), and Phillimore (V. 3, 109). Such, also, is the rule of the common law. *Brandon v. Nesbitt*, 6 T. R., 23; *Potts v. Bell*, 8 T. R., 584; *Furtado v. Rogers*, 3 Bos. & P., 191. Such contracts are not only illegal and void, but repugnant to every principle of public policy. The law will not permit the citizen, in the perils of war, to subject himself to such a temptation to swerve from his duty to his country. In *Bell v. Potts*, it was held to be illegal for a British subject, in time of war, without a license, to bring, even in a neutral ship from an enemy's port, goods purchased by his agent resident in the enemy's country after the commencement of hostilities. In *Antoine v. Morehead*, 6 Taunt., 237, an alien in an enemy's country during war, drew a bill on a British subject, resident in England, and, after peace, sued for the amount of the bill. The same rule was reluctantly applied by Chief Justice Gibbs. It was held that the plaintiff could not recover. If the course of the transaction had been reversed, the result would have been the same. The same rule would have been applied in the British courts.

The payment of money by a subject of one of the belligerents, in the country of another, is condemned, and all contracts and securities looking to that end are illegal and void. *Griswold v. Waddington*, 16 Johns., 459.

The adjudications of this court have always proceeded upon the same principles.

In the case of *Brown v. U. S.*, 8 Cranch, 110, Mr. Justice Story said that "no principle was better settled than that all contracts made with an enemy during war were utterly void."

In the case of *The Rapid*, 8 Cranch, 155, the

facts were, that an American citizen bought English goods in England before the war, and deposited them on an island belonging to the English, near the Province of Maine. Upon the breaking out of the war he sent *The Rapid* from Boston to the island, to bring away the goods. Upon her return she was captured by an American privateer. The goods were condemned as lawful prize. It was held that the vessel, while thus engaged, was trading with the enemy, and that the goods had acquired the character of enemy's property. Mr. Justice Story, in delivering his opinion in the court below, said: "That not only all trading, in its ordinary acceptation, but all communication and intercourse with the enemy were prohibited. That it was in nowise important whether the property engaged in the inimical communication be bought or sold, or merely transported and shipped. That the contamination of forfeiture was consummate the moment the property became the object of illegal intercourse."

In the case of *The Julia*, 8 Cranch, 181, the vessel was condemned only because, on sailing from Baltimore to Lisbon, and returning, she had carried a license from a British admiral, issued within our territory by a British agent.

In *Griswold v. Waddington*, 16 Johns., 452, Kent, Ch. J., said: "The law had put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and to prolong the calamities of war."

The instruction given to the jury, that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation. *Mock v. Abel*, 3 Bos. & P., 35; *Armstrong v. Toler*, 11 Wheat., 258; *Collins v. Blantern*, 1 Smith, L. C., 630, and notes.

The court below erred in refusing to instruct as prayed, and in the instructions given.

The judgment below is reversed and the cause will be remanded to the Circuit Court, with directions to issue a venire de novo.

Cited—17 Wall., 439; 21 Wall., 97, 352; 26 U. S., 612; 101 U. S., 111; 103 U. S., 268; 1 Dill., 321, 322, 576, 578; 7 Blatchf., 409; 15 Blatchf., 88; 3 Abb. U. S., 432; 1 Flupp., 311; 37 N. J. L., 499; 20 Minn., 244; 74 U. S.

Am. Rep., 196 (32 Iowa, 302); 13 Am. Rep., 739 (73 Pa. St., 300); 13 Am. Rep., 708; (72 Pa. St., 456); 56 Mo., 444.

THE UNITED STATES, *Appl.*,

v.

THEODORE ADAMS.

(See S. C., 7 Wall., 463-482.)

Power of Secretary of War to suspend payment of contract—to appoint Commissioners—power of—Court of Claims cannot revise their decision.

If the Secretary of War become satisfied that contracts are being fraudulently executed within a military district, in disregard of the rights of the government, he may issue an order to suspend their payment.

He may appoint a Board of Commissioners, to speedily hear and decide upon the claims.

Such Board possesses no judicial power, and the claimants are left free to present or withhold their claims.

But when the investigation is voluntarily submitted to, the amount adjusted and payment accepted by the claimant, the proceeding is final.

It would be an error in the Court of Claims to hear and revise the allowance of such a claim so heard and decided upon.

[No. 124.]

Argued Mar. 31, 1869. Decided Apr. 12, 1869.

APPEAL from the Court of Claims.

This case arose upon a petition filed in the court below by the appellee, to recover balances alleged to be due him on certain contracts for the construction of mortar boats, steam tugs, etc., made with him, on the part of the United States, by order of Maj. Gen. Frémont while in command of the military department of the west.

The said court having entered a decree in favor of the petitioner for \$112,748.76, the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty-Gen., T. L. Dick-ey, Asst. Atty-Gen., and E. P. Norton, for appellant:

1. The United States was never party to these Frémont contracts, nor bound thereby.

It is provided by statute of May 1, 1820 (3 Stat., 568), that no contract shall hereafter be made by the Secretary of the War Department and other heads of departments, except under a law authorizing the same, or under an appropriation adequate to its fulfillment. (As to the construction of this statute, 4 Ops. Attys-Gen., 490, 600). The object and effect of this statute was, to prohibit the Executive Department of our Government from involving the government in contracts for the payment of money beyond the extent provided for by the law making power.

These Frémont contracts with Adams were not only made by Frémont without lawful authority, but were forbidden by statute, and, therefore, void.

The majority of the Court of Claims do not place their judgment upon the idea that General Frémont's contracts were in any way binding upon the United States, but by implication they concede that said contracts were illegal and void. They seem to rest their judgment upon a supposed legal presumption that the Secretary of War ratified, or, as the court says, adopted the Frémont contracts (see 2 Nott and

Hunt., 86), where, in the opinion of the majority of the court, it was held that the Secretary of War "acquired to the United States the mortar-boats and tug-boats in January, 1862, by ordering that the mortar-boats should be completed, and by taking them and the tug boats into the service of the United States, and thereby bound the United States to pay for them the price specified in the contracts."

We insist that no such presumption of law can properly be held to arise upon the facts in the record, as found by the court below.

2. Mr. Adams is concluded and barred from recovering anything further from the United States, by the award of the Davis, Holt and Campbell Commission; by his stipulation that he would accept said sum (when paid) in full of his entire claim; and by afterwards accepting the same, in pursuance of the resolution of March 11, 1862.

The proceedings of the Commissioners combine all the elements of an arbitration, by arbitrators proposed by the Secretary of War and accepted by Mr. Adams, and the requirement on the part of the Commission that Adams should sign the receipt and stipulation set forth in the record, was no more than a demand that he should put in writing, before the rendering of the award, what was necessarily the understanding of the parties during the investigation, viz.: that the government would pay, and the claimant would accept, as full satisfaction, whatever the Commission should award.

If, however, the Commissioners are regarded merely as the agents of the government, who, after informing themselves of the facts, so as to be able to act advisedly, proposed in behalf of the United States to Adams, to agree to pay Adams a certain specified balance if he would accept the same in full of his entire claim, and Adams did accept the proposition, and Congress ratified the action of the Commissioners, provided for the payment of the sum agreed upon, and it was paid and so accepted, this is a good satisfaction at law of the whole claim, and can be sustained as such, as payment of an account stated, or as a fair compromise of a controverted claim.

McGlynn v. Billings, 16 Vt., 329; *Curtis v. Martin*, 20 Ill., 577; *McDaniels v. Lapham*, 21 Vt., 222; S. C., 29 Vt., 230; 2 Pars. Cont., 180, 131; *Wilkinson v. Byers*, 1 Ad. & Ell., 106; *Palmerton v. Huxford*, 4 Den., 166; *Tuttle v. Tuttle*, 12 Met., 551.

It does not matter whether the claim is controverted on a question of law or on a question of fact. *Longridge v. Dorville*, 5 B. & Ald., 117; *Atlee v. Backhouse*, 3 Mees. & W., 633.

Appellee cannot avoid the effect of his action in this regard by his protest or his allegations of duress. *Atlee v. Backhouse*, 3 Mees. & W., 642; *Fleetwood v. City of N. Y.*, 2 Sant., 475, 481; *Chase v. Dwinall*, 7 Me., 184; *Elliot v. Swartwout*, 10 Pet., 187; *Clinton v. Strong*, 9 Johns., 870.

Messrs. B. R. Curtis, Matt. H. Carpenter, John A. Wills, Louis Janin, R. M. Corwine, and James Hughes, for appellee:

1. The first general question is this:

Is the United States bound by the contracts under which these mortar-boats and tug-boats were built and delivered by the claimant, and accepted by the United States?

We maintain, in point of law:

1. That as alleged in claimant's petition, General Frémont, by virtue of his office as commanding General of the Western Military Department, was invested, by the law of war, with authority to contract with the claimant, on behalf of the United States, to build the boats in question.

2. That, if not so authorized, Frémont had an implied authority, derived from the Secretary of War, under the special facts and circumstances of the case, to make these contracts.

8. That if the contracts were not fully authorized by either of the previous sources of power, then they were adopted, ratified and confirmed by the joint action of Congress and the Secretary of War, by and under the special Act of Dec. 24, 1861, in connection with the facts and circumstances attending the passage of that Act, and the admission contained in the Act transferring these mortar-boats, as part of the gun-boat fleet, to the Navy Department.

Had General Frémont power, under his authority as commanding general, to make these contracts?

In attempting to solve this question of power, it is in vain for the counsel of the government to seek the full measure of the authority of the authority of the commander of a military department, in time of war, either in the statutes of the United States or in the regulations of the army; for neither of them have attempted to define his powers.

It is true, that Acts of Congress, and the Regulations of the Army for the year 1861, define duties of the Ordnance and Quartermaster's Departments; that it is declared, "The Ordnance Department has charge of the arsenals and armies, and furnishes all ordnance and ordnance stores for the military service" (Rev. Reg., for 1861, art. 47, sec. 1375); and that "The Quartermaster's Department provides the quarters and transportation of the Army." etc. (*Id.*, art. 42, sec. 1064); and that these Regulations prescribe the details of the method in which their business shall be conducted. But they are silent and forever must be, from the very nature of the case, on the great and essential points in time of war; of the plan of campaign; the ends to be attained; the ways and means of their attainment; and when and where, and to what extent, the services of these subordinate departments shall be required. The truth is, they are but instruments—mere means to ends.

In the eye of reason and common sense, it can make no difference whether a contract is made by the commanding general himself, directly or through a subordinate by his order, or whether he approves it after it has been made by his subordinate. In either case, the contract is, in effect, made by him.

On the contrary, we must seek for the full measure of the authority of the commanding general of a military department in time of war, in the law of war, as a branch of our constitutional law, which is the paramount law, overriding and nullifying all conflicting subordinate laws.

By the Constitution of the United States, the war powers of Congress and of the President, as Commander-in-Chief of the Army and Navy, and (as a necessary consequence) of his subor-

dinate commanding generals, in their several military departments, are unlimited in time of war, except by the law of war itself.

The fundamental and comprehensive principle of this law of war, when stated in general terms, appears to be this: that the power which may be exercised by an acting power, in pursuit of any legitimate object, is unlimited, and is always equal to and is measured by the demands of the occasions; and that, from the necessity of the case, the actor must always be the judge of the necessity and propriety of using it. This is equally true within the province of each, whether the actor be Congress or the President, or his subordinate agent, the commanding general of the Military Department.

The rationale of this principle may be stated in the language of Alexander Hamilton: "It rests upon two axioms, simple as they are universal: the means ought to be proportioned to the end; the persons from whose agency the attainment of the end is expected, ought to possess the means by which it is attained."

On this point, the authority of the Supreme Court in the masterly judgment of *Chief Justice Marshall*, is most explicit:

"The government, which has the right to do an act and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is expected, take upon themselves the burden of establishing that exception. * * * Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat., 316.

These words of the *Chief Justice* are re-enforced by a kindred declaration from another great authority, *Mr. Justice Story*, speaking also for the Supreme Court on an important occasion:

"The Constitution unavoidably dealt in general language. It was not intended merely to provide for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. Hence, the Constitution leaves it to the legislative power, from time to time, to adopt its own means to effect legitimate objects. *Martin v. Hunter*, 1 Wheat., 335.

Apply these words to the present question, and the conclusion is irresistible. The authorities on the subject, and numerous illustrations of this principle, will be found collected in *Whiting, War Powers under the Constitution*, 10th ed., pp. 35, 77, 81, notes 82, 83, 167, 168, 270, 307, 308.

In view of this principle and of its application to the facts of this case, the simple question is, whether mortar-boats and tug-boats were means appropriate to the accomplishment of the great end of General Frémont's campaign, viz.: the descent of the Mississippi River, then well known to be strongly fortified by numerous batteries, from point to point along its course. Whether, in view of the testimony of General Frémont, of the Secretary and Assist-

ant Secretary of War, this leading object of the campaign being settled, the procurement of these boats was one of the details of its accomplishment, which was left to his judgment and discretion.

The mortar-boats were designed for the double purpose of pontoons for moving armies across rivers, and of floating batteries for dislodging the enemy from fortified points on the river.

The contracts made by General Frémont, in order to procure them, were clearly within the scope of his authority as the Commanding General of the Western Military Department, and the government is bound by his action. If any authorities shall be demanded in support of a proposition so self-evident, they are at hand, and are as old as the modern law of war itself.

See 2 Vatt. Law, Nat., 218, ch. 14, sec. 207; 3 *Id.*, 209, 800, ch. 2, secs. 19, 20; 3 Grotius, Rights of War and Peace, ch. 22; Evans, Translation, 1683, p. 563; 8 Puff. Law Nat., ch. 7, of Compacts that relate to War, sec. 15; Babryzac's *note*, *Id.*, Kennet, Translation, 3d ed., London, 1717, p. 106.

The most recent case in our jurisprudence illustrating the authority of a commander in time of war, is *The Venice*, 2 Wall., 276, 279 (69 U. S., XVII., 867), in which the authority of law is given to the proclamation of General Butler.

The second leading inquiry is this:

Has the claimant done anything to preclude him from recovering in a court of justice the balance due on these contracts thus ratified and confirmed; or, in fewer words, is he bound by the receipt in full given for a part, extorted from him without authority by the Commission?

It is found by the Court of Claims as a fact.

"That on his said claims the said petitioner received from said commissioners vouchers for the said sums of \$95,929.24, and \$20,196, and signed a receipt for said two vouchers in the words following, viz.: 'The undersigned acknowledges to have received the vouchers referred to and described below, which, when paid, will be in full of all demands against the United States on account of the respective claims set opposite their several names.' And the petitioner was not allowed by the commissioners to receive said vouchers until he had signed the said receipt; and he protested against such action of the commissioners, and signed the receipt and agreement under said protest."

It is not found by the court, nor was there any evidence given to show that any other receipt was given by the claimant for the vouchers or money received by him.

These facts raise the questions as to the legal validity of the proceedings of the St. Louis Commission in this case, and of the receipt in full given by the claimants, after the ratification and confirmation of his contracts by Congress and the Secretary of War, on the inextinguishable condition demanded of that Commission, of receiving even a part of what was due to him under his contracts.

It is contended here by the Assistant Attorney-General: 1. That the action of that Commission was in the nature of an award. 2. That if its action cannot be sustained on that basis, what was done on both sides may be regarded as a compromise of a doubtful claim, See 7 WALL.

of which the receipt in full is the evidence; and 3. That the Joint Resolution of Congress, dated March 12, 1868, and the receipt of the money directed to be paid by it, preclude the claimant from recovering the balance due on his contracts.

1. There was no "award," because there was no tribunal mutually constituted which could bind either party by its action.

It was a mere committee of investigation, appointed *ex parte* by the Secretary of War for his own information, "to examine and report to him upon certain unsettled claims." It had no judicial authority. By its action it could not bind even the government, much less the citizen, who had no voice in its appointment nor any control in determining the nature and extent of its action. This suggestion is so feebly pressed by the Assistant Attorney-General, that it is evident he has no faith in it himself.

The assumption of judicial authority by the Commission was a clear usurpation, and there is no evidence in this case to show that its action was ever ratified or approved by the Secretary of War.

2. There was no compromise and could be no compromise of a doubtful claim, which a court of justice can respect or enforce, because, assuming that the Commission had authority to represent the United States, the parties did not stand upon an equal footing.

This is a condition essential to all compromises.

In regard to settlements made with the government and its official action with its dependents, even in the ordinary course of official business, when there is no question of the authority of its officers to represent the government, the Supreme Court of the United States, in the case of *U. S. v. Dickson*, 15 Pet., 161, 162, uses this language:

"The construction given to the laws by any Department of the Executive Government is necessarily *ex parte*, without the benefit of an opposing argument in a suit, where the very matter is in controversy; and when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers, deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity, when there is no choice but obedience as a matter of policy or duty. But it is not to be forgotten that ours is a government of laws, and not of men; and that the Judicial Department has imposed upon it by the Constitution the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or waive it."

The principle thus declared is specially applicable in this case; and we invoke its protection against the usurpation of power, which first extorts a receipt in full as the condition of partial payment, and then presents it in a court of justice as evidence of full payment on a compromise freely and voluntarily made.

The law on the subject of such receipts may be summed up in this general proposition:

A receipt in full, given but for part, is only *prima facie* evidence of full payment, and as such is liable to be explained by extrinsic evidence, and to be set aside on proof of but partial payment, duress, unjust advantage, or other equitable grounds, showing that it was not given as the result of a fair and deliberate compromise.

The authorities on this point are numerous and decisive.

1. As to the character of a receipt as evidence, etc.

"A receipt for money is peculiarly open to evidence. It is only *prima facie* evidence, either that the sum stated has been paid, or that any sum whatever was paid."

2 Pars. Cont., ed. of 1855, p. 67.

"A receipt is merely *prima facie* evidence of the fact and is not conclusive and, therefore, the fact which it recites may be contradicted by oral testimony."

1 Greenl. Ev., sec. 805.

"A receipt is *prima facie* evidence of payment. A general receipt in full of all demands is presumed to be given on an adjustment of all transactions between the parties; but such a receipt is subject to explanation, and may, upon satisfactory proof, be restrained in its operation. It may be shown that the settlement was in fact but a partial one, or, though intended to be general, that a particular transaction was not taken into consideration."

Walrath v. Norton, 5 Gill., (10 Ill.), 441., Treat. Ch. J.

It is erroneous to instruct a jury that a receipt for \$3.25, stated to be "in full of all accounts, notes whatsoever," is *prima facie* evidence of the payment of three notes given for a much larger amount, expressed on their face to have been given in trust for the benefit of another party.

Bartholomew v. Bartholomew, 24 Ill., 199.

When a receipt is offered in evidence, it is proper that the jury should take into consideration all the circumstances that took place when it was given.

Reed v. Phillips, 4 Scam., 40.

2. As to part payment.

Many of the authorities hold that part payment of a debt will not discharge the whole, because there is no new consideration moving between the parties.

See *Reeside's case*, 2 Ct. of Claims, 54; *Livingston's case*, 3 Nott. & H., 184; *Warren v. Skinner*, 20 Conn., 559; 1 Bac. Abr., 43; *Whitehill v. Wilson*, 8 Pa., 405; *Campbell's Est.*, 7 Pa., 101; *Kennedy v. Ware*, 1 Pa., 445; 2 Pars. Cont. (1855), p. 67; Greenl. Ev., sec. 805; *Walrath v. Norton*, 5 Gill., 441; *Bartholomew v. Bartholomew*, 24 Ill., 199; *Reed v. Phillips*, 4 Scam., 40; *Kidder v. Kidder*, 38 Pa., 268; *Pinnel's case*, 5 Coke, 117; *Cumber v. Wane*, 1 Str., 426; *Fitch v. Sutton*, 5 East, 232; *Sigourney v. Sibley*, 21 Pick., 101; *Miller v. Hemler*, 5 W. & S., 486; *Lawrence v. Schuytkill Nav. Co.*, 4 Wash. (C. C.), 562; *Moss v. Miller*, 1 Wash. (C. C.), 328; *Hope v. Johnston*, 11 Rich., 199; *Pabodie v. King*, 12 Johns., 426; *Cushing v. Wyman*, 44 Me., 121; *Ryan v. Rand*, 6 Fost. (N. H.), 12; *Prink v. Bolton*, 15 Ill., 343; *Jones*

v. Ricketts, 7 Md., 108; *Hardy v. Coe*, 5 Gill, 189; *Bailey v. Day*, 26 Me., 88; *Müller v. Holden*, 18 Vt., 337; *Mason v. Peters*, 4 Vt., 101; and *Wheeler v. Wheeler*, 11 Vt., 80.

Other authorities hold differently where a compromise is intended and is fairly and freely made.

3. As to part payment and compromise.

It has been said that payment of part of a debt or of liquidated damages, is no satisfaction of the whole debt, even when the creditor agrees to receive a part of the whole and gives a receipt for the whole demand; and a plea of payment of a small sum in satisfaction of a larger is bad even after verdict. But this rule must be so far qualified as not to include the common case of a payment of a debt by a fair and well understood compromise, carried faithfully into effect, even though there were no release under seal.

2 Pars. Cont., ed. of 1855, pp. 129, 130, and notes; *Curtiss v. Martin*, 20 Ill., 577; *Fisher v. Willard*, 20 N. H., 421.

When there has been no compromise; when there has been an entire mistake of right, or unobserved comprehensiveness in the language, reaching beyond the matter under settlement, there would be gross injustice in refusing the injured party an equitable relief.

See, Tenny, J., in *Cunningham v. Batchelder*, 32 Me., 318; *Harden v. Gordon*, 2 Mas., 541; also, collection of authorities in Chit. Cont., 9th Am. ed. of 1855, n. 4, p. 767 (655).

4. As to duress and unjust advantage.

The general theory of the law in regard to acts done and contracts made by parties, affecting their rights and interests, is, that in all such cases there must be a full and free consent to bind the parties. Consent is an act of reason accompanied by deliberation, the mind weighing as in a balance, the good and evil on each side; and, therefore, it has been well remarked by an able commentator upon the law of nature and of nations, that every true consent supposes three things: first, a physical power; second, a moral power; third, a serious and free use of them. And Grotius has added, that what is not done with a deliberate mind, does not come under the class of perfect obligations. Story, Jur., 261, sec. 222, 4th ed.

Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the court in setting aside the contract by made him, on account of some oppression, or undue advantage, or imposition attendant upon it. *Ibid.*, sec. 238.

If the contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by the plea of duress, and it is requisite to the validity of every agreement, that it be the result of a free and *bona fide* exercise of the will. Kent, Com., 453.

Compulsory receipts in full, given by a party to obtain his official vouchers and a partial payment thereon, may be set aside and disregarded for the same reasons that compulsory payments may be recovered back by a suit at law.

For a collection of cases on this point, see 3 Freem. Ill. Dig., Payment, p. 1230, under the

head of compulsory payments, 1 *Id.*, Evidence, 8; Prima Facie Evidence, sec. 10.

So on the other hand:

"Where money is paid on a fair and deliberate compromise of a doubted and doubtful right, both parties standing on equal rights terms, and respectively taking their chances of the result, it cannot and it ought not to be recovered back.

A payment cannot be voluntary, unless it be made in the exercise of a free will.

Surges v. U. S., Dev. (Ct. of Cl.), 181; see, also, *Broom, Leg. Max., Eng. ed.*, pp. 203, 204.

The appellee confidently submits to the judgment of this court, that he has fully established his two main propositions:

1. That the contracts on which he claims to recover were made or ratified by competent legal authority, and that the government is bound by the terms of those contracts, as found by the judgment of the Court of Claims.

2. That the receipt of the claimant is no bar to the recovery of the balance due on those contracts, under the facts found in this case; and that, therefore, the judgment of the Court of Claims must be affirmed.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Court of Claims.

The suit is founded on a petition of Adams, claiming a balance against the government on contracts with General Frémont, commanding the Western Military District, for the construction of a certain number of mortar-boats and steam tug-boats to be used on the western rivers in the late civil war. The contracts are alleged to have been made on or about the 24th of August, 1861, for the mortar-boats, at a cost of \$8,250 each, and on or about the 10th September following, for the steam tug boats, at the cost of \$2,500 each. The petitioner was also to build cabins and pilot houses, and construct steering apparatus and windlasses on said steam tugs, for which he was to receive the sum of \$1,800 in addition for each boat.

After these boats were constructed, they were received into the service of the government by the orders of the Secretary of War. This was the latter part of November, 1861. Previous to this, on the 14th October of that year, General Frémont was superseded in his command. And, in consequence of representations of frauds and irregularities committed by General McKinstry, the chief quartermaster of the army of this military district, who had charge of making the contracts for supplies and materials necessary for equipping the troops for the expedition contemplated, and who made the contracts, among many others in question, the Secretary of War, by order of the President, suspended payments upon all contracts within the department, until an investigation could be had into the charges thus made.

This officer was afterwards dishonorably dismissed the service for frauds found to have been committed against the government, while serving as chief quartermaster of this army, and after his suspension, on the 35th October, 1861, the Secretary, by like order, appointed a Board of Commissioners "To examine and report to the Secretary of War upon all unsettled claims against the military department of the west, that had originated prior to the 14th October, 1861,

See 7 WALL.

the day General Frémont had been superseded." This Board, composed of three gentlemen of the highest intelligence and character, without delay met at the City of St. Louis, the head-quarters of the military department in which the irregularities and frauds in its administration, as charged, had been committed, and entered upon their duties; first giving notice to all persons holding claims against the government, to present them for examination, with such proofs and explanations as the claimant might think proper to exhibit.

Under this notice the petitioner, on the 10th December, 1861, presented his claims, which were as follows:

<i>United States to Theodore Adams,</i>	<i>Dr.</i>
For building 38 mortar-boats for the United States, as per order of Major-General Frémont herewith attached, dated August 24, 1861....	\$813,500.00
Deduct this amount paid by Major McKinstry on the — day of —.....	\$75,000
Deduct this amount paid by Major A. Allen, Quartermaster, 7th to 12th November.....	\$55,000
Total to be deducted,.....	\$180,000.00
Balance due.....	\$183,500.00

On this account the Commissioners allowed the petitioner..... \$75,959.24

<i>United States to Theodore Adams,</i>	<i>Dr.</i>
For building 4 hulls for tug boats for the United States, as per contract herewith, dated September 10, 1861, by Major McKinstry, Quartermaster, at \$2,500 each, ...	\$10,000.00
For building 4 hulls for tug-boats for the United States, as per contract herewith, by Major McKinstry, Quartermaster, dated September 21, 1861, at \$2,500 each,.....	\$10,000.00
For building 8 cabins for tug-boats for the United States, as per contract herewith, dated September 20, 1861, by Major McKinstry, Quartermaster, for \$1,800 each,.....	\$14,400.00

	\$34,400.00
Deduct amount already paid.....	\$ 9,000.00
Balance.....	\$25,400.00

On this account the said Commissioners, deducting therefrom \$5,204 from the charge for tug-boats, allowed the petitioner..... \$20,196.00

For these several sums, \$75,959.24 and \$20,196.00, this Board gave vouchers to the claimant as due from the government on these contracts, and received from him a receipt in full of all demands, which he signed under protest. When the papers were exchanged, does not appear; but not long afterwards, on the 11th March, 1862, Congress passed the following Joint Resolution:

"Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, that all sums allowed to be due from the United States to in-

dividuals, companies or corporations by the Commission heretofore appointed by the Secretary of War (for the investigation of military claims against the Department of the West) composed of David Davis, Joseph Holt, and Hugh Campbell, now sitting at St. Louis Missouri, shall be deemed to be due and payable, and shall be paid by the disbursing officer, either at St. Louis or Washington, in each case upon the presentation of the voucher with the Commissioners' certificate thereon, in any form plainly indicating the allowance of the claim, and to what amount. This Resolution shall apply only to claims and contracts for service, labor or materials, and for subsistence, clothing, transportation, arms, supplies and the purchase, hire and construction of vessels."

Under this Resolution the claimant, now petitioner, presented his vouchers and received payment of the several sums allowed by the Board.

As has already been seen, the present suit was brought by the petitioner against the government, to recover the balance of the contract price of these mortar and steam tug-boats, with their fixtures, over and above the amount allowed by the Board, after an investigation into the merits, and the payment of the same under this Joint Resolution.

There has been a good deal of discussion between the learned counsel upon the questions, whether or not General Frémont possessed competent power, as commander of the military department, to make a valid contract with the petitioner for the construction of the boats, in the absence of any authority from the Quartermaster General or Secretary of War; and if not, whether the delivery of the boats, acceptance by the Secretary, and employment in the service of the government, did not operate as a ratification of the same? In the view the court have taken of the case, it is not material how these questions are answered. For the purposes of the decision, we may admit the competency of the power.

The Secretary of War, subject to the authority of the President, is at the head of the department of the government on whom the duty devolved to provide these boats for the military expedition in contemplation by General Frémont, after their construction had been determined on. The head of the appropriate bureau of this branch of the service is the Quartermaster-General, who is under the direction of the Secretary. 1 Stat. at L., 696; 4 *Ib.*, 173; 5 *Ib.*, 257; Reg., 1861, art. 1064. And whether the contracts for the construction were made by General Frémont or by the Quartermaster-General, the source of the authority is the head of the War Department. And whether he makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed; and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or those made by others were made in disregard of the rights of the government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates. This duty is too plain and imperative to call

for comments. As the head of the department under whose charge the contracts were made and were being carried into execution, and over which he had the superintendence and control, he was responsible to the government for any detriment to its interests which it was reasonably within his power to prevent or remedy. We do not agree, therefore, that there was anything unusual, harsh or unjustifiable on the part of the Secretary, if there existed well grounded suspicions or facts unexplained, tending strongly to the conclusion that contracts had been entered into, and debts incurred, within this military district, in disregard of the rights of the government, in issuing the order to suspend the payment of all claims against it. This was a proper if not an indispensable step to prevent the consummation of the frauds. He would have been recreant to his duty if he had acted otherwise; and after having thus suspended these claims upon grounds and for the reason stated, which we are of opinion fully justified him, unless some provision had been made affording an immediate opportunity to the claimants to exhibit their claims, and establish their justice and integrity, their only remedy would have been an appeal to Congress or to the Court of Claims, which, as then organized, had no power to render judgment against the Government. Both these bodies were soon to be in session at Washington, so that, without any great delay, they could have been presented there, examined and allowed or rejected. But these tribunals were distant from the place where these contracts had been made and were being carried into execution, and a resort to them would have occasioned delay and involved much expense. Under these circumstances, although they were the appropriate and, we may say, only legal tribunals to investigate and adjust claims that the heads of departments had felt it their duty to suspend or reject, it was fit and commendable in the Secretary, to appoint this Board of Commissioners to meet at once at a place where all the transactions had occurred out of which the claims and demands in dispute originated. It was impracticable for the Secretary himself to hear and adjust them, even if the parties had desired it. The only immediate relief, therefore, within his power to provide, consistent with his duty under the circumstances, was to appoint persons to represent him.

We agree that this Board possessed no authority, nor would the Secretary, if he had appeared in person, have possessed any, to compel a hearing and adjustment of the claims, nor did they hold themselves out as possessing any such authority. The Board were constituted for the simple purpose of affording to such claimants as might desire a tribunal to speedily hear and decide upon their claims, without the delay and expense of resorting to those which the law had recognized or provided. It was to relieve them from the hardship resulting from the suspension of the payment, so far as was in the power of the Secretary; a suspension which he had felt compelled to order, under the circumstances, from a sense of duty to government. We cannot, therefore, appreciate the force of the argument that has been urged on behalf of these claimants, that the facility thus furnished by the Board to hear and pass upon

their claims, in some way operated compulsorily, to submit them for investigation; not legally but morally; and that their necessities compelled them to seek this early opportunity to have them heard and adjusted. This, we think, a misapprehension. It was not so much the presence of this board that compelled the submission, if any compulsion existed, but the certainty, if the opportunity was not accepted, they would be obliged to encounter the delay and expense of an application to Congress or the Court of Claims. The constitution of the Board presented simply a choice of tribunals to hear these claims. It was their preference for the tribunal sitting in their midst, and the high character of its members, that controlled the choice. This tribunal also afforded an additional advantage over the others, namely: that if after the hearing and adjustment of the claims the claimants were not satisfied, they were free to dissent, and look for redress to the only legal tribunals provided in such cases.

It has been strongly argued that the receipt in full of all demands, which the Board exacted from the claimant before the delivery of the voucher, or finding, was unauthorized; or, if authorized, that it is no bar to that portion of the original claim rejected by the Board, as it is an instrument subject to an explanation; that a receipt for payment in full, when only part of the debt is paid, is no defense to an action for the balance; and, further, that it was signed under protest. In the view we have taken of the case, the giving of this receipt is of no legal importance. The bar to any further legal demand against the government does not rest upon this acquittance, but upon the voluntary submission of the claims to the Board; the hearing, and final decision thereon; the receipt of the vouchers containing the sum or amount found due to the claimant; and the acceptance of the payment of that amount, under the Act of Congress providing therefor. From the time the Secretary issued his order, suspending the payment, and which we have held was well justified, under the circumstances, they must be regarded as claims disputed by the government; and unless this Board had been constituted, could have been adjusted only by Congress or the Court of Claims. They fell within that mass of claims which the heads of the several departments had refused to adjust according to the views of the claimants, and this was the character that attached to them when presented before the board. We do not doubt but that there have been, and may be hereafter, cases where payments have been mistakenly or wrongfully withheld, and the claimant compelled either to give up his claim or seek redress before the appropriate tribunals, existing at the time, to hear and determine them. But this is no argument against the power or right of the heads of the departments to refuse the payment. What other remedy has the government to arrest the execution of fraudulent contracts, made by its subordinates, or the unfaithful execution of them? In such cases the courts are open to protect the rights of private individuals, but this remedy is unavailable to the government. The multitude of agents, official and otherwise, which it is obliged to employ in conducting its affairs, render this remedy utterly impracticable. Unless, therefore, some power exists in

the government, summarily, to interfere, and arrest the frauds and irregularities committed against it, they must be allowed to go on to consummation. No one, we think, on reflection, will deny this power.

A good deal of the argument on the part of the claimant in support of the right to recover the contract price of these boats, is placed upon the ground of the absence of any authority in the Board of Commissioners to pass, *in invitum*, upon the claims. We have conceded this want of authority. They possessed no judicial power, nor did they claim to exercise any. The government having suspended all payment upon the contracts upon allegations of frauds and irregularities, until an inquiry could be had in respect to them, appointed this Board as a favor to its creditors, to enable those who might desire it to have an immediate investigation. It was an act of kindness to them. They were left free, however, to present or withhold their claims. But we find nothing in the constitution of the Board, or in its proceedings, or in the proceedings on the part of the government, indicating expressly, or by implication, that when the investigation was thus voluntarily submitted to, the amount adjusted, and the acceptance of payment by the claimant, the proceeding was not to be final. It could hardly have been supposed or believed by the claimants themselves, that the government would have gone to the expense of furnishing them a tribunal in their midst for this investigation, and subject itself also to the expense of carrying it on in the cases submitted to its cognizance as a matter of mere preliminary inquiry to adjust parts or portions of a contract, and make advances thereon, leaving the residue for further litigation before Congress or the Court of Claims. This is not the course of litigation between private parties. They are not allowed to split up an entire contract or demand into several parts; and we are not aware of any reason for an exception to the rule in a proceeding against the government. We cannot think that a further hearing before any other tribunal of the same matters was within the contemplation of either party.

The hearing before this Board was had more than a year before the present Court of Claims was established, under the Act of Congress of March 3, 1863, which authorizes suits and judgments against the government. Previously, the only remedy of the creditor was by an application to Congress or to the Court of Claims, which was established in 1855, but possessed no authority to render judgment against it. It was was but a commission appointed by the government to hear and pass upon claims, but whose determination had no force till confirmed by Congress. It differed from the commission in the present case, as it was established by law, and had general authority to hear all claims; but, so far as respects the cases of voluntary submission before the Board, we regard the finding, followed by acceptance of payment, as conclusive upon the claim as if it had been before this first Court of Claims, and heard and decided there, and the amount found due paid by the government. Now, we suppose that it would be an error in the Court of Claims, as at present constituted, with power to render judgment against the government, to hear and revise the allowance of a claim already heard and

decided upon by Congress, or by the former Court of Claims, and payment made, even if the claimant was not satisfied. And, we think, it is equally error, in the present case, upon the same principle and for the same reasons.

Indeed, unless the claimant is barred, under the circumstances stated, it would be difficult for the government to determine when there would be an end to claims put forth against it, as there is no Statute of Limitations, of which we are aware, applicable to them before this court.

The judgment of the court is, that the decree must be reversed, and the cause remanded, with directions to enter a decree dismissing the petition.

S. C.—6 Wall., 101; 9 Wall., 554.
Cited—15 Wall., 245; 14 Wall., 550; 17 Wall., 73; 108 U. S., 595.

THE UNITED STATES, *Appt.*,

v.

ALBERT L. MOWRY.

Award of Commissioners a bar to further claim.

U. S. v. Adams, *ante*, 249, followed.
Acceptance of an award of a Board of Commissioners, upon a claim against the government, is a bar against any further allowance by the Court of Claims.

[No. 186]

Argued Mar. 31, 1869. Decided Apr. 12, 1869.

APPEAL from the Court of Claims.

The case is stated by the court. See, also, the preceding case of *U. S. v. Adams*.

Messrs. E. R. Hoar, Atty-Gen., T. L. Dickey, Asst. Atty-Gen., and E. P. Norton, for appellants.

Messrs. R. M. Corwine and J. M. Carlisle, for appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Court of Claims. The petition of Mowry sets forth that railroad cars were needed on the Pacific Railroad in Missouri, for the transportation of men and supplies in the Military Department of the West, then in command of General Frémont; and that, on the 22d September, 1861, he made a contract with Chief Quartermaster McKinstry, at the head of that department under General Frémont, to construct fifty box cars and fifty platform cars, the former for \$825 each, and the latter for \$700 each. These cars were afterwards constructed, approved and taken into the service of the government.

The payment of the price on this contract, was, among many others within that military district, suspended upon allegations of fraud and irregularities committed therein, and a Board of Commissioners appointed to investigate them and report to the Secretary of War. The petitioner presented his claim before this Board, charging the contract price, amounting to \$76,250. This Board, after investigation, allowed to the petitioner \$58,750, and gave him a voucher for that amount, the payment of which was accepted by him from the government, as provided for by an Act of Congress. The Court

of Claims allowed the balance of the contract price, \$17,250.

The case falls within the decision of this court just rendered in the case of *U. S. v. Adams*, [*ante*, 249]. Under the circumstances, the petitioner is concluded by the finding of the Board and acceptance of payment.

The decree must be reversed, and the cause remanded, with directions to enter decree dismissing the petition.

UNITED STATES, *Appt.*,

v.

SAMUEL J. MORGAN;

SAME v. JONATHAN P. BURTON;

SAME v. OLIVER H. GEFFROY;

AND

SAME v. BENJAMIN HIGDON.

U. S. v. Adams, ante, 249, followed.

Acceptance of an award of less than the amount of a claim against the government, made by a Board of Commissioners, is a bar to further claim. [Nos. 191, 192, 193, 197.]

Argued Mar. 29, 1869. Decided Apr. 12, 1869.

APPEALS from the Court of Claims.

The facts of these cases sufficiently appear in the opinion of the court. See, also, the report of the case of *U. S. v. Adams*, just preceding the last case above.

Messrs. E. R. Hoar, Atty-Gen., T. L. Dickey, Asst. Atty-Gen., and E. P. Norton, for appellant.

Messrs. J. M. Carlisle, J. D. McPherson, and R. W. Corwine, for appellees.

Mr. Justice Nelson delivered the opinion of the court:

[in No. 191 as follows]:

This is an appeal from the Court of Claims.

The petition in this case sets forth that Morgan, under a contract with the government, in September, 1861, purchased 522 horses, for which he was to receive \$190 each; that the government has refused to pay the price according to the contract, and that a balance remains of \$7,880. This contract was made with the petitioner by Reeside, an agent of General Frémont, who had been authorized to purchase two thousand horses for his military department, at the price stated above.

The claim was presented to the Board of Commissioners appointed to investigate contracts made in this department and, after an examination into the claim, it was reduced \$7,880, the Board allowing only \$115 per head for the horses instead of \$190, the contract price; and gave to the claimant a voucher for the amount at this rate, \$60,076, payment of which was afterwards accepted by him from the government.

The Court of Claims decreed in his favor the contract price, deducting the above payment. The case falls within the decision of *U. S. v. Adams* [*ante*, 249], and this decree must, therefore, be reversed.

The case is remanded, with directions to dismiss the petition.

Nos. 192, 193, 197.

Mr. Justice Nelson delivered the opinion in these cases, as follows:

These are in cases of contracts made by Reeside with the claimants for the purchase of horses, under the same circumstances as stated in the case of *U. S. v. Morgan*, and must follow the same result.

The decrees of the Court of Claims in each case must be reversed, and the causes remanded, with directions to dismiss the petitions.

THE CITY OF CHICAGO, Appt.,

v.

BIGELOW, Admr. of SAMUEL NICHOLSON.

Motions to dismiss and for certiorari, denied—
omission in record, how supplied.

This court will not dismiss, because the record shows no allowance of appeal, when it is shown by affidavit that an appeal was actually allowed.

Time will be given to move for an entry *nunc pro tunc*, in the circuit court, of the allowance of appeal.

A motion for a certiorari will not be granted when it appears that nothing is omitted from the record, which is of record in the court below.

If an entry of the allowance of the appeal shall be made by the circuit court, the motion for certiorari may be renewed.

[No. 183.]

Argued Apr. 9, 1869. Decided Apr. 12, 1869.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below by the appellee, to recover damages resulting from an alleged infringement of certain letters patent, and for an injunction.

The court below having entered a decree in favor of the complainant, the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

On a motion for a certiorari by the appellant, and a motion to dismiss by the appellee.

Messrs. B. R. Curtis and S. A. Irvin, for appellant.

Messrs. Goodwin & Larned and M. H. Carpenter, for appellee.

Mr. Chief Justice Chase delivered the opinion of the court:

The record shows no allowance of appeal in the court below, and this is usually a sufficient ground for dismissal.

But it appears from affidavits, that an appeal was in fact prayed and allowed; and that the condition of the record is due to the omission of the clerk below to make the proper entry.

Under these circumstances we think that neither the motion of Mr. Carpenter to dismiss nor the motion of Mr. Irvin for a certiorari should be allowed.

We cannot dismiss for the want of an allowance of an appeal, when it is satisfactorily shown by the affidavits that an appeal was actually allowed, without giving the appellant the opportunity to make record proof of the fact. Nor can we allow a certiorari, when it appears that nothing is omitted from the record which is of record in the court below.

The cause will be passed until the second
See 7 WALL. U. S., BOOK 19.

Monday of October, that the counsel for the appellant may move upon proper showing for an entry, *nunc pro tunc*, of the prayer and necessary allowance of appeal, in the circuit court.

If such an entry shall be made by direction of the Circuit Court, the motion for certiorari may be hereafter renewed.

JESSE RIDDLESBARGER, *Piff in Err.*,

v.

THE HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

(See S. C., 7 Wall., 386-392.)

Limitation clause in policy, valid—second action—
statute of State, inoperative upon.

A condition in a policy of insurance against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid.

The condition is not affected by the fact that a previous action, which was dismissed, had been commenced within that period.

The statute of a State, which allows a party who suffers a nonsuit in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in such case.

[No. 126.]

Argued Mar. 29, 1869. Decided Apr. 12, 1869.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This case arose upon a petition filed in the St. Louis Court of Common Pleas, by the plaintiff in error, to recover on a certain policy of insurance.

On motion of the defendant, the case was removed into the court below. Judgment having been entered by said court in favor of the defendant, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. Hughes, Denver & Peck, and L. Janin, for plaintiff in error:

1. Parties cannot by a contract agree upon a limitation different from the statutes within which suit shall be brought, or the rights to sue shall be barred.

This would be in conflict with the law and its policy. *French v. Lafayette Ins. Co.*, 5 McLean, 461; 9 Ind., 443; 2 Ind., 102.

This is an attempt to bar or discharge a right of action before the right accrues. It is a well settled principle, that a release can only operate upon an existing claim.

Co., 265; 4 Mass., 688; 7 Mass., 155; 15 Mass., 110; 4 Pick., 368.

Why has a condition or agreement in a policy, providing that all disputes arising under it shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the courts.

2 Arn., 1,245; 1 Phil. Ins., 23; 5 Ohio St., 134; 1 Wils., 129; 4 Watts, 41; 6 Har. & J., 413.

The contract was made at Kansas City, in the State of Missouri, and was made with reference to the then existing laws of that State.

That law became a part of the contract itself, and to that law we must look in giving a construction to the contract; and, so far as the remedy is concerned, when suit is brought in

that State to enforce a right growing out of that contract, the law of that State must alone govern and determine.

By the Statute of Limitations (page 1048) it was provided that actions of this kind should be brought within five years next after the cause of action accrued, and by the 8d section of the 8d article it is provided, that if any action shall have been commenced within the times respectively prescribed by the preceding articles, and the plaintiff therein suffers a nonsuit, etc., such plaintiff may commence a new action, from time to time, within one year from the time of such nonsuit suffered.

It is believed the point now under consideration has never been adjudicated and settled in this court.

In 1848 the precise question came up for adjudication in the Circuit Court of the United States, in the case of *Gray v. Hartford Ins. Co.*, before Mr. Justice Nelson, reported in 1 Blatchf. C. C., 280; and he decided that, where a policy of insurance provided that no action should be sustained against the insurer founded thereon, unless brought within twelve months after the cause of action accrued, the lapse of time in such case of such suit should be deemed conclusive evidence against the claim set up; and he held that such a provision was valid and binding between the parties, and was a good defense to a suit brought on the policy more than twelve months after the cause of action accrued.

In 1858 the same question came up again in the Circuit Court of the United States, before Mr. Justice McLean (see 5 McL., 463), and he decided and held, "That parties cannot by a contract agree upon a limitation different from that in the statute within which suit shall be brought, or the right to sue be barred;" and that such a provision was no bar to an action brought after the expiration of twelve months from the time the cause of action accrued.

There seems to be a conflict of opinion between these two eminent judges, and the question is still an open one in this court.

There is also a conflict of opinion in the state courts, but the weight of authority would seem to be in favor of the validity of such contracts.

But it is also understood that this court does not feel itself bound by the decisions of state courts in cases like the one at bar.

But those decisions show that the validity of such a contract as we are now considering, is still an open question in the state courts.

Dutton v. Vermont Ins. Co., 17 Vt., 889; *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 81 Conn., 525; *Ripley v. Aetna Ins. Co.*, 29 Barb., 552; 5 McLean, 462; 9 Ind., 443; 2 Ind., 102.

2. But if the limitation contract in the policy, as to the time of bringing the suit, is valid, and binds the plaintiff to commence his action within twelve months after the loss accrued, then it is insisted, that inasmuch as plaintiff did commence his action against defendant within the prescribed time, to wit: June 10, 1862, in the Kansas City Court of Common Pleas, in which he sought to recover for the same cause of action, and none other than he seeks to recover for in this suit, to which defendant appeared and filed an answer to the

merits; that said suit was pending and undecided in said court, until June 8, 1864, when plaintiff suffered a nonsuit therein, and the present cause of action commenced in the St. Louis Court of Common Pleas, July 23, 1864, and within one year after such nonsuit suffered; plaintiff has complied with the condition of said contract as to time, and is entitled under said contract, and the then existing laws of the State of Missouri, to maintain this action.

Haymaker v. Haymaker, 4 Ohio, St. 274; *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 81 Conn., 517.

Messrs. Hubbard and McFarland, for defendant in error:

It has been well established by repeated judicial decisions, that conditions like the one in question are valid in law.

Peoria Ins. Co. v. Whitehill, 25 Ill., 466; *Williams v. Mutual Ins. Co.*, 20 Vt., 223; *Wilson v. Aetna Ins. Co.*, 27 Vt., 99; *N. W. Ins. Co. v. Phoenix Oil Co.*, 81 Pa., 448; *Brown v. Savannah Ins. Co.*, 24 Ga., 101; *Portage Ins. Co. v. West*, 6 Ohio, St., 602; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 603; *Fullam v. N. Y. Ins. Co.*, 7 Gray, 61; *Carter v. Humbolt Ins. Co.*, 12 Ia., 287; *Stout v. City Ins. Co.*, 12 Ia., 371; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind., 443; *Ripley v. Aetna Ins. Co.*, 29 Barb., 552; *Gooden v. Amoskeag Ins. Co.*, 20 N. H., 73; *Brown v. Ins. Co.*, 5 R. I., 894; S. C., 7 R. I., 301; *Ames v. N. Y. Ins. Co.*, 14 N. Y., 258; *Ketchum v. Prot. Ins. Co.*, 1 Allen N. B., 186-187; *Lampkin v. Western Ass. Co.*, Up. Can., 13 Q. B., 287, 361; *Provincial Ins. Co. v. Aetna Ins. Co.*, 16 Up. Can., Q. B., 145; *Gray v. Hartford Ins. Co.*, 1 Blatchf., 280.

But it is claimed that, by a statute of Missouri, the limitation contained in the contract was so enlarged as to admit of a second suit at any time within one year after the discontinuance of the first.

The status and rights of the parties with reference to this question, are purely matters of contract, and to be determined solely by the provisions of the contract. The parties have made their own standard of limitations and rights. If they are not bound by the general limitations of the statute, for the same reason they are not bound by the savings of that statute. There is no escape from this conclusion, except by holding the condition to be null and void.

Wilson v. Aetna Ins. Co., 27 Vt., 99; *Brown v. Ins. Co.*, 7 R. I., 301.

But, assuming the statute to be applicable to this class of cases, the plaintiff is not barred by it unless he suffered a nonsuit in the first action.

It is submitted: 1, that the plaintiff is not within the equities and meaning of the statute, for these were intended to cover only cases of accidental miscarriage; nor, 2, is he within the letter of the statute, for in no proper sense can he be said to have suffered a nonsuit.

Steph. Pl., 109; 3 Chit. Pr., 784-810; 1 Bouv. Law Dic., 679, secs. 35, 36, 37, 38.

Mr. Justice Field delivered the opinion of the court:

This is an action upon a policy of insurance in the sum of \$5,000, issued by the defendant, a Corporation created under the laws of Con-

necticut, to the plaintiff, upon a brick building belonging to him, situated in Kansas City, in the State of Missouri. The policy bears date on the first of June, 1861, and runs for one year. The building was destroyed by fire in March, 1862, and in June following, the plaintiff brought an action for the loss sustained, in the Kansas City Court of Common Pleas, in the County of Jackson, in that State. To this action the defendant appeared and answered to the merits, and the cause continued in that court until June, 1864, when it was dismissed by the plaintiff. Within one year after this dismissal, the present action was commenced in the Court of Common Pleas, in the County of St. Louis, from which it was transferred to the Circuit Court of the United States.

The policy contains the condition that no action against the Company for the recovery of any claim upon the policy shall be sustained, unless commenced within twelve months after the loss shall have occurred; and, that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced.

To the present action the defendant pleaded this condition. The plaintiff replied the commencement of the first action in the Kansas City Court of Common Pleas within the year stipulated in the condition, and the commencement of the present action within one year after the dismissal of that action.

To the replication, the defendant demurred.

The Statute of Limitations of Missouri, after prescribing various periods of limitation for different actions, provides that if in any action commenced within the period mentioned, the plaintiff shall "suffer a nonsuit," he may commence a new citation within one year afterwards.

By the demurrer to the replication two questions are presented for our determination: First, whether the condition against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss is valid; and second, whether, if valid, the condition was complied with in the present case under the Statute of Limitations of Missouri.

The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the Statute of Limitations. This notion arises from a misconception of the nature and objects of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage prompt-

itude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims. It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the losses should be speedily adjusted and paid. The conditions in policies requiring notice of losses to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible.

A stipulation in a policy to refer all disputes to arbitration stands upon a different footing. That is held invalid, because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy. That is a very different matter from prescribing a period within which such resort shall be had. The condition in the policy in this case does not interfere with the authority of the courts; it simply exacts promptitude on the part of the assured in the prosecution of his legal remedies, in case a loss is sustained respecting which a controversy arises between the parties.

The Statute of Missouri, which allows a party who "suffers a nonsuit" in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defects in the proofs, or in the parties or pleadings, and like particulars. In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and as a consequence, from its exceptions also.

The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless such action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract.

The questions presented in this case, though new to this court, are not new to the country. The validity of the limitation stipulated in conditions similar to the one in the case at bar, has been elaborately considered in the highest courts of several of the States,¹ and has been

1.—*Peoria Ins. Co. v. Whitehill*, 25 Ill., 466; *Williams v. Mutual Ins. Co.*, 20 Vt., 222; *Wilson v. Aetna*

sustained in all of them, except in the Supreme Court of Indiana, *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind., 448, which followed an adverse decision of *Mr. Justice McLean*, in the Circuit Court for the district of that State. *French v. Lafayette Ins. Co.*, 5 McLean, 461. Its validity has also been sustained by *Mr. Justice Nelson*, in the Circuit Court for the District of Connecticut. *Cray v. Hartford Ins. Co.*, 1 Blatchf., 280.

We have no doubt of its validity. The commencement, therefore, of the present action within the period designated, was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period.

Judgment affirmed.

Cited—18 Wall., 70; 21 Wall., 269; 3 McCrary, 545; 72 N. Y., 504; 14 Am. Rep., 371 (35 Tex., 249); 18 Am. Rep., 388 (21 Minn., 88); 34 Am. Rep., 553 (78 N. Y., 468).

ANN PAYNE, *Comp. and Appt.*,

ZADOC HOOK, WILLIAM CARRINGTON,
ET AL.

(See S. C., 7 Wall., 425-483.)

Jurisdiction over administrator by circuit court—equity jurisdiction of Federal Courts not limited by state laws—test of equity jurisdiction—chancery jurisdiction over executors and administrators—bill by one distributee—parties—when bill is not multifarious.

Circuit Court of the United States for Missouri, has jurisdiction of a bill against an administrator and his sureties, on his official bond, to obtain a distributive share of the estate.

The equity jurisdiction conferred on the Federal Courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different States of the Union.

The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction.

A Court of Chancery has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.

It is no objection to such a bill that there are other distributees besides the complainant.

The sureties of the administrator are proper parties to such suit.

Such bill is not multifarious, although it seeks to open the settlement with the Probate Court as fraudulent, and to cancel the receipt from the complainant to the administrator.

[No. 118.]

Argued Mar. 18, 1869. Decided Apr. 12, 1869.

APPEAL from the Circuit Court of the United States for the District of Missouri.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. Glover and Shepley, for appellant:

NOTE.—*Multifariousness.* See note to *Gaines v. Chew*, 48 U. S. (2 How.), 619.

Ins. Co., 27 Vt., 99; *N. W. Ins. Co. v. Phoenix Oil Co.*, 31 Pa., 449; *Brown v. Savannah Ins. Co.*, 24 Ga., 101; *Portage Ins. Co. v. West*, 6 Ohio St., 602; *Amebury v. Bowditch Ins. Co.*, 6 Gray, 608; *Fullam v. N. Y. Ins. Co.*, 7 Gray, 61; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287; *Stout v. City Ins. Co.*, 12 Iowa, 371; *Ripley v. Aetna Ins. Co.*, 29 Barb., 552; *Gooden v. Amoskeag Co.*, 20 N. H., 73; *Brown v. Roger Williams Co.*, 5 R. I., 304; *S. C.*, 7 R. I., 301; *Amees v. N. Y. Ins. Co.*, 14 N. Y., 268.

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In the argument of the demurrer, it was insisted that the Circuit Court of the United States had no jurisdiction of the cause; that the principal, Zadoc Hook, could not be jointly sued with his securities; and that the bill was multifarious.

1. The circuit court had jurisdiction of the case made by the bill. The complainant was a citizen of Virginia, and all the defendants were citizens of Missouri. The bill showed a matter of legal controversy. These facts were sufficient to maintain the jurisdiction of the Federal Court. "The judicial power of the United States shall extend * * * * * to controversies between citizens of different States." Art. III., Const., sec. 2.

There is no exception here whatever. And there is no reason why a distributee or legatee should not demand his rights against an administrator or executor in the Federal Court.

8 Story, Const., 562, secs. 1684, 1685; *Bray v. Bell*, 1 Pet., 670; *Childress v. Emory*, 8 Wheat., 642; *Boyce v. Grundy*, 9 Pet., 275; *Edmonds v. Orenshaw*, 14 Pet., 166; *Suydam v. Broadnax*, 14 Pet., 74; *Page v. Patton*, 5 Pet., 304; *Union Bk. v. Jolly*, 18 How., 508 (59 U. S., XV., 472); *Bacon v. Robertson*, 18 How., 480 (59 U. S., XV., 499); *Michoud v. Girod*, 4 How., 540; *Aspen v. Nixon*, 4 How., 467; *Hill v. Tucker*, 18 How., 458; *Fruce v. N. O.*, 18 How., 471 (59 U. S., XV., 400); *Hagan v. Walker*, 14 How., 29.

It is not pretended that any legal right of the administrator could not be insisted on in the Federal Court, or that that court would not be bound to administer the law of Missouri in his behalf. 4 How., 478.

In *Hyde v. Stone*, 20 How., 170 (61 U. S., XV., 874), it was held that "the jurisdiction of the courts of the United States, over controversies between citizens of different States, cannot be impaired by the laws of the States which prescribe the modes of redress in these courts, or which regulate the distribution of their judicial power."

The doctrine in *Fenwick v. Sears*, 1 Cranch, 259; *Dixon v. Ramsay*, 8 Cranch, 819; *Story, Conf.*, sec. 513; *Vaughan v. Northup*, 15 Pet. (1), has no application here. The complainant sues the administrator in the State where his letters were granted, and calls on him to account, after payment of all debts, according to his local laws and in a court of concurrent jurisdiction with the state courts.

2. The sureties were proper parties.

Bush v. Hampton, 4 Dana, 85; *Blackberry v. Holton*, 5 Dana, 521; *Carrol v. Connet*, 2 J. J. Marsh., 198; *Alexander v. Mercer*, 7 Ga., 549; *Clark v. Shelton*, 16 Ark., 474; *Brooks v. Gibbons*, 4 Paige, 374; *Spottswood v. Dandridge*, 4 Munf., 296; *Moore v. Waller*, 1 A. K. Marsh., 488.

3. The bill is not multifarious. It demands relief only on one ground of action, and all the defendants are jointly interested in it. That cause of action is complainant's right to a share in the estate of Fielding Curtis. The charging part of the bill suggests a defense that may be set up, and proceeds to show why it is no defense; but this is only in aid of the single cause of action the bill contains. This is a very common form of bill. The fraudulent receipt and

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transfer asked to be canceled, constitute no new cause of action.

See, *Michoud v. Girod*, 4 How., 564; where "fraudulent acquittances" were set aside; *Story*, Eq. Pl., § 800, sec. 281, 303, sec. 287; *Gaines v. Chew*, 2 How., 629.

Messrs. Wm. B. Napton, and J. T. Gnat, for appellées:

1. The Circuit Court of Calloway County, having the state chancery jurisdiction, now invoked in the Federal Court, because of the non-residence of the complainant in Missouri, had no power under the laws of Missouri, and the adjudications expounding those laws, to grant the relief asked. The power of our chancery courts begins after a final settlement.

Miller v. Woodward, 8 Mo., 169; *Clark v. Henry*, 9 Mo., 340; *Overton v. McFarland*, 15 Mo., 312; *Picot v. Biddle*, 35 Mo., 29.

2. Will the Federal Court, sitting in Missouri, when called upon to interpret state laws in a case where the jurisdiction is given solely because of the non-citizenship of one of the parties, give a relief which the state courts could not?

This case ceases to be one of equitable cognizance, just as well in the Federal Courts as in the state courts, because of the peculiar construction of our probate system in Missouri, and because the nature and character of this system will be viewed in this court precisely as it is viewed in the courts of the State. The state laws creating that system, and the adjudged construction of those laws, will be enforced in this tribunal, just as they would be in a state tribunal, and not overturned or disregarded.

If this was not so, we should have the anomaly of a citizen of Virginia or New York having rights in Missouri, under Missouri laws, which the citizens of Missouri has not; thus not merely putting the former on an equality with the latter, but actually conferring advantages on the New York or Virginia citizen.

The following authorities show, not only that state laws are enforced by the Federal Courts, but that construction given by the state courts to them is also followed, even in cases where the state courts are thought to have given a construction to them not warranted by the Acts:

McKeen v. Delancy, 5 Cranch, 22; *Polk v. Wendal*, 9 Cranch, 87; *Elmendorf v. Taylor*, 10 Wheat., 153; *McNiel v. Holbrook*, 12 Pet., 84; *McCluny v. Silliman*, 3 Pet., 270; *Sims v. Hundley*, 6 How., 1; *Hinds v. Vattier*, 5 Pet., 398; *Ross v. Duval*, 13 Pet., 45; *McElmoyle v. Cohen*, 13 Pet., 312; *McDowell v. Peyton*, 10 Wheat., 454; *Thatcher v. Powell*, 6 Wheat., 119; *Harpending v. Dutch Church*, 16 Pet., 455; *Green v. Neal*, 6 Pet., 291; *U. S. v. Morrison*, 4 Pet., 124; *NeSmith v. Sheldon*, 7 How., 812; *Henderson v. Griffin*, 5 Pet., 151; *Campbell v. Claudius*, 1 Pet. (C. C.), 484; *Ewing v. St. Louis*, 5 Wall., 413 (72 U. S., XVIII., 657).

In *Ewing v. St. Louis*, the point in this case is expressly adjudicated: "A non-resident complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the later courts equity would afford no relief, neither will it in the former."

Mr. Justice Davis delivered the opinion of the court:

Ann Payne, a citizen of Virginia, exhibited
See 7 WALL.

her bill in the Circuit Court for Missouri against Zadoc Hook, public administrator of Calloway County, in that State, and his sureties on his official bond, all citizens of Missouri, to obtain her distributive share in the estate of her brother, Fielding Curtis, who died intestate in 1861, and whose estate was committed to the charge of the public administrator by order of the County Court of Calloway County. It appears that Curtis never married, and that his nearest of kin are entitled to distribution of his estate. This bill charged gross misconduct on the part of the administrator; that he has made false settlements with the Court of Probate; withheld a true inventory of the property in his hands; used the money of the estate for his private gain; and obtained from the claimant by fraudulent representation, a receipt in full for her share of the estate, on the payment of a less sum than she was entitled to receive. The object of the bill is to obtain relief against the fraudulent proceedings, and to compel a true account of administration in order that the real condition of the estate can be ascertained, and the complainant paid what justly belongs to her.

The court below sustained a demurrer to the bill, and the complainant electing to abide by her pleading, the bill was dismissed, and the case was brought here by appeal.

The jurisdiction of the Circuit Court for Missouri to hear this cause is denied, because, in that State, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators, until final settlement is given to the local county court, which is the Court of Probate; and as the administration complained of is still in progress in the County Court of Calloway County, resort must be had to that court to correct the errors and frauds in the accounts of the administrator.

The theory of the position is this: that a Federal Court of Chancery, sitting in Missouri, will not enforce demands against an administrator or executor, if the court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local Court of Probate, she has no better or different rights, because she happens to be a citizen of Virginia.

If this position could be maintained, an important part of the jurisdiction conferred on the Federal Courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this court, and overruled.

We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in

their courts, or which regulate the distribution of their judicial power." *Hyde v. Stone*, 20 How., 175 [61 U. S., XV., 875]; *Suydam v. Broadnax*, 14 Pet., 67; *Union Bank v. Jolly's Administratrix*, 18 How., 503 [59 U. S., XV., 472]. If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union. *Green's Adm'r v. Creighton*, 23 How. 90 [64 U. S., XVI., 419]; *Robinson v. Campbell*, 3 Wheat., 212; *U. S. v. Howland*, 4 Wheat., 108; *Pratt v. Northam*, 5 Mas. C. C., 95.

The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. *Watson v. Sutherland*, 5 Wall., 78 [72 U. S., XVIII., 582].

"It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." *Boyce's Est. v. Grundy*, 8 Pet., 2.

It is very evident than an action at common law, on the bond of the administrator, would not give to the complainant a practical and efficient remedy for the wrongs which, she says, she has suffered. A proceeding at law is not flexible enough to reach the fraudulent conduct of the administrator, which is the groundwork of this bill, nor to furnish proper relief against it. It is, however, well settled that a Court of Chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her right share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond.

But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. *Cooper, Eq. Pl., 86.*

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The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. *West v. Randall*, 2 Mas., 181; *Story, Eq. Pl., sec. 89, et seq.*

The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names the other distributees, who have the same common interest, without stating of what particular State they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants, when the controversy is not with them, but with the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation. *West v. Randall, supra; Wood v. Dummer*, 8 Mas., 317; *Story, Eq. Pl., supra.*

The next objection which we have to consider is, that the sureties of the administrator are not proper parties to this suit. Their liability on the bond in an action at law is not denied, but it is insisted they cannot be sued in equity. If this doctrine were to prevail, a Court of Chancery, in the exercise of its power to compel an administrator to account for the property of his intestate, would be unable to do complete justice, for if, on settlement of the accounts, a balance should be found due the estate, the parties in interest, in case the administrator should fail to pay, would be turned over to a court of law, to renew the litigation with his sureties. A court of equity does not act in this way. It disposes of a case so as to end litigation, not to foster it; to diminish suits, not to multiply them. Having power to determine the liability of the administrator for his misconduct, it necessarily has an equal power, in order to meet the possible exigency of the administrator's inability to satisfy the decree, to settle the amount which the sureties on the bond, in that event, would have to pay.

Besides, it is for the interest of the sureties that they should be joined in the suit with their principal, as it enables them to see that the accounts are correctly settled, and the administrator's liability fixed on a proper basis. If they were not made parties, considering the nature and extent of their obligation, they would have just cause of complaint.

It is said the bill is multifarious, but we cannot see any ground for such an objection. A bill cannot be said to be multifarious unless it embraces distinct matters, which do not affect all the defendants alike. This case involves but a single matter, and that is the true condition of the estate of Fielding Curtis, which, when ascertained,

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will determine the rights of the next of kin. In this investigation all the defendants are jointly interested. It is true the bill seeks to open the settlement with the Probate Court as fraudulent, and to cancel the receipt and transfer from the complainant to the administrator, because obtained by false representations; but the determination of these questions is necessary to arrive at the proper value of the estate, and in their determination the sureties are concerned, for the very object of the bond which they gave was to protect the estate against frauds, which the administrator might commit to its prejudice.

The decree of the Circuit Court for the District of Missouri is reversed, and this cause is remanded to that court, with instructions to proceed in conformity with this opinion.

Cited—13 Wall., 287; 20 Wall., 453; 21 Wall., 283; 94 U. S., 738, 749, 752; 97 U. S., 21; 109 U. S., 486; 1 McCrary, 38, 51; 4 Hughes, 299; 6 Bank. Reg., 385; 8 Blatchf., 128; 12 Blatchf., 243; 19 Blatchf., 111; 1 Dill., 17; 2 Dill., 519; 5 Dill., 417; 1 Wood, 269, 270, 547; 3 Wood, 547, 781; 6 Bles., 431; 5 Sawy., 589, 594; 23 Kan., 708.

UNITED STATES, *Pff.*,

v.

BENJAMIN B. ROSENBERG.

(See S. C., 7 Wall., 580-583).

Division of opinion in criminal cases.

This court cannot acquire jurisdiction upon a certificate of division of opinion on the question as to whether a motion to quash an indictment ought to be granted.

[No. 383.]

Argued Mar. 3, 1869. Decided Apr. 12, 1869.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

This case arose upon certain indictments found against the defendant in the court below for forgery, etc., of evidence of citizenship. A motion was made to quash the indictments. Upon hearing the motion, the court was equally divided, and certified the question to this court.

Messrs. Wm. M. Evarts, Atty. Gen., and J. Hubley Ashton, Asst. Atty. Gen., for plaintiff.

Messrs. A. R. Lawrence, Jr., and E. W. Stoughton, for defendant.

(The argument being to the merits, is not here given.)

Mr. Chief Justice Chase delivered the opinion of the court:

This case comes here upon a certificate of division of opinion between the judges of the Circuit Court for the Southern District of New York, upon a motion to quash an indictment; and the first question is, whether the court can take cognizance of such a certificate under the Judiciary Act of 1802. 2 Stat. at L., 156.

The general rule undoubtedly is, that this court cannot, upon a certificate of division of opinion, acquire jurisdiction of questions relating to matters of pure discretion in the cir-

cuit court. Thus it has been held that this court will not determine, upon a certificate of division of opinion, whether or not a new trial shall be granted (*U. S. v. Daniel*, 6 Wheat., 543), or whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise (*Smith v. Vaughn*, 10 Pet., 366), or any question in any equity cause relating to the practice in the circuit court, and depending on the exercise of sound discretion in the application of the rules which regulate the course of equity to the circumstances of the particular cause. *Packer v. Nison*, 10 Pet., 410.

The principles by which the limit of jurisdiction, upon certificates of division, is determined, were quite fully considered in the case of *Davis v. Braden*, 10 Pet., 288, and the conclusion of the court was, that a division on a motion, to be granted or refused at the discretion of the court, does not present a point which can be certified under the Act of Congress. Upon this principle, the court in that case refused to take cognizance, upon certificates, of the question, whether an action of detinue, founded upon tort, when abated by the death of the defendant, can be revived against his personal representatives.

In the opinion then delivered, the court took notice of the case of *U. S. v. Wilson*, 7 Pet., 150, supposed to be an authority for taking cognizance of the question made by the motion to revive. In that case the question certified was, whether a prisoner, convicted of a capital crime, could have any advantage from a pardon without bringing it judicially before the court; and it arose upon a motion of the district attorney for sentence. The court regarded this as a question going to the merits, and not determinable in the exercise of mere discretion; and, therefore, held this case not to be an authority for another, in which the merits were not involved in the question certified.

There are other cases in which the court has taken cognizance of questions directly affecting the merits of the cause, even though arising, in form, upon motions determinable at discretion. The case of *U. S. v. Chicago*, 7 How., 190, where the question certified arose on a motion to continue a temporary injunction, granted by the district judge, until final hearing on the merits, must be regarded as one of this character. The continuance of the injunction was clearly matter of discretion with the court; but the question certified involved the right of the United States in the land which was the subject of the suit, and was one proper for consideration upon the motion for continuance. The court held, though not unanimously, that the case was exceptional in its character, and that cognizance of the question certified might be properly taken. It may be doubted whether, in this instance, the exception made to the general rule was quite warranted by the principle established in prior decisions.

In the later case of *U. S. v. Reid*, 13 How., 361, the point of jurisdiction upon certificate was not noticed. One of the questions certified seems, however, to have been clearly cognizable here. The defendants had been separately tried, and one of them, when upon trial, had proposed to call the other as witness, and the court had rejected the testimony. The question certified was, whether this ruling was cor-

NOTE.—Cases certified on division of circuit court; jurisdiction of U. S. Supreme Court in; on what division should be. See note to *Webster v. Cooper*, 51 U. S. (10 How.), 51.

See 7 WALL.

rect. It arose upon motion for new trial, but it was plainly a point which must be determined, as of right, before sentence could be pronounced; and the certificate, therefore, was within the principle of *U. S. v. Wilson* [supra].

The motion to quash, upon which the question now before us arose, was clearly determinable as a matter of discretion. It was preliminary in its character, and the denial of the motion could not finally decide any right of the defendant. The rule laid down by the elementary writers is, that "a motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception."

When made in behalf of defendants, it is usually refused, unless in the clearest cases, and the grounds of it are left to be availed of, if available, upon demurrer or motion in arrest of judgment.

It is quite clear, therefore, that we cannot take cognizance of the questions certified to us in the present condition of the case. They may hereafter arise upon demurrer, or on motion in arrest, and if the opposition of opinion shall still exist, can be again presented for consideration here.

At present the case must be dismissed for want of jurisdiction.

Cited—11 Wall., 91; 13 Wall., 253; 100 U. S., 63.

Ex parte WILLIAM H. MCCARDLE.

(See S. C., 7 Wall., 508-515.)

Jurisdiction in cases of habeas corpus—repeal of Act—effect of.

The Act of March, 1868, takes away the jurisdiction defined by the Act of February, 1867, of this court, in cases of *habeas corpus*.

No judgment can be rendered in a suit, after the repeal of the Act under which it was brought and prosecuted.

This court in such case has no longer jurisdiction of the appeal.

[No. 223.]

Argued Mar. 19, 1869. Decided Apr. 12, 1869.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

This case arose upon a petition for the writ of *habeas corpus*, filed in the court below by the appellant, alleging unlawful restraint by military force. The writ was issued and return was made, denying that the restraint was unlawful. The court below, upon the hearing, having remanded the petitioner to military custody, he took an appeal to this court. A motion to dismiss this appeal for want of jurisdiction was denied at the last term.

For a full statement of the case, see the opinion of the court, and the report of the decision denying said motion to dismiss.

6 Wall., 818 (73 U. S., XVIII., 816).

Messrs. Lyman Trumbull, Matt. H. Carpenter, James Hughes, D. G. Swain, and Enoch Totten, for respondents:

It is clear that this court had no jurisdiction of this proceeding and appeal from the circuit court, except under the Act of Feb. 5, 1867; and so this court held on the motion to dismiss made by us.

Ex parte McCordle, 6 Wall., 818 (73 U. S., XVIII., 816.)

When the jurisdiction of a court to determine a case or a class of cases depends upon a statute, and the statute is repealed, the jurisdiction ceases absolutely. If any cause be pending at the time of such repeal it falls.

Rez v. The Justices of London, 3 Burr., 1456; *Norris v. Crocker*, 13 How., 429; *Ins. Co. v. Ritchie*, 5 Wall., 541 (73 U. S., XVIII., 540); *Gale v. Wells*, 7 How. Pr., 191; *Hollingsworth v. Va.*, 3 Dall., 378; *Surtees v. Ellison*, 9 B. & C., 750; *Butler v. Palmer*, 1 Hill, 824.

2. The Act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. It can make no difference at what period in the progress of the cause the jurisdiction ceases. After it has ceased, no judicial act formed.

Ins. Co. v. Ritchie, 5 Wall., 541 (73 U. S., XVIII., 540); *Hollingsworth v. Va.*, 3 Dall., 378.

In *Norris v. Crocker*, 13 How., 429, this court affirmed and acted upon the same principle; and the exhaustive argument of the present *Chief Justice*, then at the bar, reported in that case, and the numerous authorities there cited, render any further argument or citation of cases unnecessary.

Rez v. Justices of London, 3 Burr., 1456; *Yeaton v. U. S.*, 5 Cranch, 281; *The Rachel v. U. S.*, 6 Cranch, 829; *U. S. v. Preston*, 3 Pet., 57; *Com. v. Marshall*, 11 Pick., 350.

Messrs. J. S. Black, W. L. Sharkey, C. T. Botts, and David Dudley Field, for appellant.

(This case was very elaborately argued on the merits, early in March, 1868, prior to the passage of the Act taking from this court jurisdiction of appeals in such cases.)

But as the court does not go into the merits, no abstract of the argument is deemed necessary.)

Mr. Chief Justice Chase delivered the opinion of the court:

This cause came here by appeal from the Circuit Court for the Southern District of Mississippi.

A petition for the writ of *habeas corpus* was preferred in that court by the appellant, alleging unlawful restraint by military force.

The writ was issued and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority, for trial before a Military Commission, upon charges founded upon the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor.

Upon the hearing, the petitioner was remanded to military custody; but upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal bond for costs, he was admitted to bail upon recognizance with sureties conditioned for his future appearance in the circuit court, to abide by and perform the final judgment of this court.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied. A full statement of the case may be found in

the report of this decision and it is unnecessary to repeat it here.

Ex parte McCordle, 6 Wall., 318 [73 U. S., XVIII., 816].

Subsequently the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an Act was passed by Congress (Act March 27, 1868, 15 Stat. at L., 44), returned, with objections by the President, and repassed by the constitutional majority, which, it is insisted, takes from this court jurisdiction of the appeal.

The 2d section of this Act was as follows:

"And be it further enacted, that so much of the Act approved February 5, 1867, entitled 'An Act to Amend an Act to Establish the Judicial Courts of the United States,' approved September 24, 1789, as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States, for the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby repealed."

The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the *Chief Justice* being detained from his place here by his duties in the Court of Impeachment, the cause was continued under advisement.

At this term we have heard arguments upon the effect of the repealing Act, and will now dispose of the case.

The first question necessarily is that of jurisdiction; for, if the Act of March, 1868, takes away the jurisdiction defined by the Act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from Acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest Acts of the first Congress, at its first session, was the Act of September 24th, 1789, to establish the judicial courts of the United States. That Act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. U. S.*, 6 Cranch, 812; *Wiscart v. Dauchy*, 8 Dall., 321, particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the Judicial Act, but are given by the Constitution;" they are, nevertheless, "limited and regulated by that Act, and by such other Acts as have been passed on the subject." The court said, further, that the Judicial Act was an exercise of the power given by the Constitution.

stitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that Acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as Acts granting jurisdiction, and not as Acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the Act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus*, is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the Legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing Act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing Act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the Legislature, or of legislative interference with courts in the exercising of continuing jurisdiction. *De Chastellux v. Fairchild*, 15 Pa., 18; *State v. Fleming*, 7 Humph., 152; *Lewis v. Webb*, 3 Me., 326. *Lanier v. Gallatas*, 18 La. Ann., 175.

On the other hand, the general rule, supported by the best elementary writers (Dwarris, Stat., 538), is, that "when an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing Acts upon suits under Acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker*, 13 How., 429, and more recently in *Ins. Co. v. Ritchie*, 5 Wall., 541 [73 U. S., XVIII., 540]. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the Act under which it was brought and prosecuted.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be

given to the repealing Act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this as in error. The Act of 1868 does not except from that jurisdiction any cases but appeals from circuit courts under the Act of 1867. It does not affect the jurisdiction which was previously exercised. *Ex parte McCordle*, 6 Wall., 824 [78 U. S., XVII., 817].

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.

See—S. C., 6 Wall., 318.
Cited—8 Wall., 103; 18 Wall., 166; 20 Wall., 620; 98 U. S., 401; 107 U. S., 242; 4 Sawy., 256; 12 Am. Rep., 226 (25 Mich., 108); 31 Wis., 263.

THE STEAMBOAT BELFAST, B. C. NELSON and A. F. HARTEL, Claimants, *Pff. in Err.*,
v.

BOON & CO., J. H. & S. B. STEERS AND JOHN WATSON & CO.

(See S. C., "*The Belfast*," 7 Wall., 624-646.)

Admiralty jurisdiction between ports of same state—of district courts, exclusive—over maritime torts—state Legislatures cannot create a maritime lien enforceable by admiralty suit—concurrent common law action—lien for materials in home port, enforceable by state laws—contracts for ship-building, not maritime contracts.

Redress can be obtained in the admiralty for the breach of a contract of affreightment, in a case where the port of shipment and the port of destination are in the same State.

The entire admiralty power of the Constitution is lodged in the Federal Courts by the 9th section of the Judiciary Act and the District Courts have "exclusive original cognizance," exclusive of the State Courts as well as the other Federal Courts.

Admiralty has jurisdiction over marine torts, though the voyage is between ports and places in the same State.

State Legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State Court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the Admiralty Courts.

There is no form of action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy.

A maritime lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States to create liens not amounting to a regulation of commerce.

Contracts for ship building are held not to be maritime contracts.

[No. 121.]

Argued March 23, 1869. Decided Apr. 12, 1869.

IN ERROR to the Supreme Court of the State of Alabama.

This case arose upon three libels in admiralty, filed in the City Court of Mobile, by the defendants in error, under a Statute of Alabama, to recover damages for breaches of certain contracts of affreightment.

The three causes were subsequently consolidated and heard together.

The said court rendered a decree in favor of the libelants. The Supreme Court of Alabama

NOTE.—Lien for freight, who has, and how waived. See note to *Raymond v. Tyson*, 58 U. S. (XV.), 47.

To what places the jurisdiction of admiralty is confined. See note to *Allen v. Newberry*, 68 U. S. (XVI.), 110.

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having affirmed this decree, on appeal, the claimants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. P. Phillips, for plaintiffs in error:

All three of the cases are founded upon contracts of affreightment made with the steamer engaged in navigating the river between Mobile in Alabama, and Columbus, in the State of Mississippi. The case of Boon & Co. only differs from the others in this: that their cotton was put on board on the downward voyage from Columbus, at a point within the State of Alabama.

It is unnecessary to go through the decisions on the subject of admiralty jurisdiction. Whether they be reconcilable or not, it is sufficient for the purpose of the case to ascertain the judgment of the court in its most recent decisions, determining the character and limit of that jurisdiction.

In the case of *The Moses Taylor*, 4 Wall., 424 (71 U. S., XVIII., 400), the action was on a contract for personal transportation. The court held that this was a maritime contract; that it was not distinguishable from a contract for the transportation of freight, and that the breach of either is the appropriate subject of admiralty jurisdiction.

And further, that the clause of said section, which saves to suitors a common law remedy, does not save the proceeding *in rem*, as used in Admiralty Courts, such a proceeding not being a remedy afforded by the common law.

The court, in defining the nature of the statute in the cause before it, says: "The action provided is in the nature of admiralty proceedings, and the distinguished characteristic of which is, that the thing proceeding against itself is seized and impleaded as the defendant, and is sentenced accordingly; that it is this dominion over the thing that gives to the title made under its degree validity against the world; while by the common law process, property is reached only through a personal defendant, and then only to the extent of his title." In this case, it is true, the contract related to a service to be performed on the high seas, to wit: from New York to San Francisco.

In *The Hine v. Trevor*, reported in same volume, 4 Wall., 556 (71 U. S., XVIII., 451), the action was for a collision occurring on the Mississippi, near the City of St. Louis. "This record (says the court) raises distinctly the question how far the jurisdiction in admiralty is exclusive, and to what extent the State Courts can exercise a concurrent jurisdiction." Owing to the importance of the principles involved, the case was held under advisement for some time, in order that every consideration which could influence the result might be deliberately weighed.

The court affirms the judgment given in the case of "*The Moses Taylor*" and re-asserts the doctrine declared in the case of "*The Genesee Chief*," and the principles of admiralty jurisdiction, as conferred on the Federal Courts by the Constitution, extend wherever ships float, and navigation successfully aids commerce, whether internal or external.

It further declares that the grant of this power under the Act of 1789 is exclusive, not

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only of all other Federal Courts, but of all other State Courts and, therefore, state statutes which confer upon State Courts a remedy for marine torts and marine contracts, by proceedings strictly *in rem*, are void.

The statute of Iowa, then before the court, was subjected to the same criticism as was applied in the California case, and for like reasons held void.

The provisions of the Alabama Code are precisely those of the Acts quoted in the above cases, and subject to the same condemnation.

Since the decision of the Supreme Court of Alabama in this case, that court has itself decided in the case of *The Mist v. Martin*, that contracts of affreightment between the Port of Mobile and a port in another State cannot be enforced in a State Court. This covers two of the cases presented in this record.

Under the two recent decisions of this court, already cited, it is submitted that the judgment must be reversed.

Mr. J. M. Carlisle, for defendants in error:

Is the ordinary contract of a common carrier, made between parties who are citizens of the same State, for the transportation of goods from one town to another, both being in that same State, without such goods, *in transitu*, being carried into or through any other State of foreign dominion, a contract which can only be enforced by a proceeding in admiralty in the Federal Courts.

The case arose in, and concerned alone, the internal commerce of the State of Alabama and, therefore, it was one with which the laws of that State only could deal. It lay wholly beyond the region of Federal powers. And it is quite unimportant in what form or by what system of pleading and evidence, the State might provide a remedy in such a case. The mere form cannot affect the substance. If the power exercised be one belonging to the State, and not to the Federal Government, it does not concern the Federal Government whether it be exercised in one form or another, nor whether the proceeding be called a libel in admiralty, a bill in equity, or an action at common law; whether given by modern statute, or found in the Year Books. *Gibbons v. Ogden*, 9 Wheat., 204.

But suppose this be not so. It is then submitted, that all three of the original actions, if they might have been instituted in the District Court of the United States in admiralty, might also be brought in a State Court, the jurisdiction being concurrent; and that the particular remedy given by the Alabama statute, and adopted in these cases, is whether the true intent and meaning of the saving in the 9th section of the Judiciary Act. 1 Stat., 77.

What is meant as well in the Act of 1789 as in the Constitution itself, by the "common law," has been authoritatively settled by this court in repeated adjudications.

Parsons v. Bedford, 3 Pet., 446; *U. S. v. The Vengeance*, 3 Dall., 297; *Webster v. Reid*, 11 How., 487.

Common law remedies are not merely "Suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized, and

equitable remedies were administered, or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit." If the subject-matter be the adjudication of purely legal rights, without any admixture of equitable rights, and without involving any usurpation of jurisdiction over matters depending upon the public law of nations, or the peculiar maritime law, the proceeding, whatever its form, is the common law remedy, provided only that it afford to the parties the opportunity of ascertaining their rights by a trial having the substantial and essential elements of a trial at common law.

A trial at common law is a trial *per pais*.

It is not necessary that in every case trial by a jury should, in fact, be had, but that the right to it be conceded to both parties. It is not necessary that the trial be begun by the service of process or by actually bringing into court, in any other way, the party whose rights are to be affected by the proceeding. Attachment suits and suits for partition are examples. A defendant may be brought into court as well by seizing his property and bringing it into court, under circumstances giving him plain and reasonable notice of the cause of its seizure, as by the service of process on his person. If the statute makes provision for his personal appearance, and a day is given to him in court, with the right of trial by jury, then it is as much a common law case as if it had been begun by *capias ad respondendum*, instead of a seizure of his property. And, on the other hand, though the suit be begun by a *capias* and proceeded in throughout according to the most exact forms of a common law suit, in all things but one, to wit: the trial by jury, if that be denied, it is no true case at common law. It is this distinctive quality alone which the Constitution guaranties and preserves from all innovation; and there is no instance in this court in which, where the subject-matter was the adjudication of purely legal rights, and the right of trial by jury has been preserved, in which the case has been treated as other than a common law case, whether a concurrent remedy existed either in admiralty or in equity, or not, and whatever may have been the mere form of the proceedings.

It has been supposed that that the case of *The A. D. Hine*, 4 Wall., 556 (71 U. S., XVIII., 451), is an exception to this rule. But an examination of that case, and of the statute on which the remedy was founded, will show that this is a mistake. It is true that the learned justice, in delivering the opinion of the court, *arguendo*, relies upon the form of the proceeding, it being *in rem*, without naming any defendant, as proving that it was not a common law remedy. But the case was one in which there was and could be no jury trial. The statute (Iowa Revision of 1860, p. 656) which authorized the proceeding in that case, although it saved to the plaintiff all his common law rights (in imitation of the Act of 1789), made no provision to protect the owner of the vessel, and afforded him no opportunity, by his personal appearance, of converting the proceeding into a common law trial by jury. It was begun, continued and ended, and could only be so, as a civil law proceeding *in rem*. The judgment of the court in that case in no degree

depends upon the *dictum* (if, indeed, such was the idea in the mind of the learned justice at the time) that the test of a common law remedy is, that there must be a named defendant, against whose person process is prayed. With unfeigned deference and very great respect, it is submitted that such a test is not warranted by the authorities and cannot be reconciled with the doctrines of this court hereinbefore quoted and referred to. And in the case of *Webster v. Reid*, 11 How., 459, 460, it is plainly implied that the naming of the defendant is not necessary, and that the attachment of the property is the beginning of a suit against the owner. The court says: "No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice nor an attachment nor other proceeding against the land, until after the judgments."

Surely it was not intended to say in the case of *The Hine*, that the State of Iowa or any other State of the Union could not, at its discretion, provide for its citizens, as to contracts arising between themselves, in their domestic commerce, a common law remedy against the property of unknown defendants, who therefore could not possibly be named.

Mr. Justice Clifford delivered the opinion of the court:

Persons furnishing materials or supplies for ships or vessels, within the State of Alabama, have a lien by the law of that State on the same for all debts contracted by the master, owner or consignee thereof for the work done, and for the materials and supplies furnished, in preference to other debts due and owing from the owners of such ships or vessels. By the Code of that State it is also provided, under the title, "proceedings in admiralty," that whenever any steamboat or other water-craft shall receive on board, as a common carrier, any goods or merchandise as freight, to be delivered at any special place, and shall fail to deliver the same as directed in the bill of lading, or other contract of shipment, the owner or consignee of such goods or merchandise shall have a lien on such boat or other water-craft for his loss or damage, to be enforced in the same manner and subject to the rules and regulations prescribed in relation to similar liens for labor, materials and supplies furnished to such steamboats or other water-craft, as described in the antecedent provision. Rev. Code, secs. 8127, 8142.

Pursuant to those statutory rules and regulations of the State, the libel in this case was filed in the City Court of Mobile, and the libelants alleged that they, on the 23d of January, 1866, shipped on board the steamboat, *Belfast*, then lying at Vienna in that State, one hundred bales of cotton, to be transported to Mobile, in the same State, and there to be delivered to certain consignees, they paying freight therefor at the rate of \$5 per bale, the dangers of the river excepted; that on the way down the river, below Vienna, twenty-nine bales of the cotton were lost, not by the dangers of the river, and were never delivered to the consignees, whereby the libelants suffered loss to the amount of \$5,900. Introductory allegations of

the libel, also, are the same as in a libel *in rem* in the District Courts of the United States; and in conclusion, the "libelants pray process in admiralty" against the steamer, "her tackle, apparel and furniture," and that the same may be condemned to satisfy their damages and costs. Process was accordingly issued, commanding the sheriff to seize and take the steamer, etc., into his possession, and to hold the same until released by due course of law. Respondents appeared as claimants, and alleged that they were the owners of the steamer, and they admitted that the cotton was shipped on board at the time and place, and on the terms and for the purpose alleged in the libel; but they excepted to the jurisdiction of the court, and alleged that the steamer, at the time the cotton was shipped, was duly enrolled and licensed under the laws of the United States; that she was then and there regularly engaged in commerce and navigation between the City of Columbus, in the State of Mississippi, and the City of Mobile, in the State of Alabama, and that the cotton described in the libel was lost in her trip down the river from the former city to her port of destination. Defense of the respondents upon the merits was, that the steamer and cargo were captured by a band of robbers in the trip down the river, within the ebb and flow of the tide, and within the admiralty and maritime jurisdiction of the United States, and without any negligence or fault on the part of the officers and crew of the steamer. They also set up the defense, that it was agreed between the master and the shippers that the vessel should not be liable for the loss of the cotton, if it was captured by armed men during the voyage, without any negligence or fault on the part of the carrier. Libelants excepted to that part of the answer denying the jurisdiction of the court, as insufficient and invalid; and they also excepted to the defense, as pleaded, that the steamer was robbed of the cotton, as no bar to a recovery in the case, and the court sustained the views of the libelants in both particulars, and the respondents excepted to the respective rulings of the court.

Two other consignments of cotton were also on board the steamer at the time the alleged robbery occurred. Ninety bales were shipped by J. H. Steers & Company, at Columbus; and one hundred bales were shipped by John Watson & Company at the same place. Both shipments were to be transported to the Port of Mobile, and there to be delivered to certain consignees under a similar contract of freightment as that alleged in the first case, except as to the price to be paid for the transportation. Steers & Company lost thirty-four bales of their shipment, and Watson & Company lost thirty bales, as alleged by the respective parties. Libels in the same form were also filed by those parties about the same time, in the same court, and the owners of the steamer appeared in each case as claimants, and pleaded the same defenses in the three cases.

Evidence was introduced by the respective libelants, proving that the entire cotton lost, and not delivered, was of the value of \$4,000. They also introduced the several bills of lading, and the respondents admitted the shipments as alleged in the respective libels. On the other hand, the libelants admitted that the

steamer was robbed, as alleged in the answer, and without any neglect or fault of the owners of the steamer, or those in charge of her navigation.

Agreement of the parties, as stated in the bill of exceptions, was that the three cases should be tried together, and they were all submitted at the same time and upon the same issues. Finding of the court was that the whole loss in the three cases was \$4,000, and of that sum the decree of the court allow \$1,000 to the libelants in the first case, \$1,400 to the libelants in the second case, and \$1,600 to the libelants in the third case, with costs to the prevailing party.

Exceptions were seasonably tendered by the respondents to the rulings and decision of the court, and the exceptions were duly allowed by the court. Appeals were then taken by the respondents to the Supreme Court of the State, where the objections to the jurisdiction of the court were renewed in the formal assignment of errors. The parties were heard, but the court overruled the objections to the jurisdiction of the court, and affirmed the respective decrees rendered in the subordinate court. Writs of error were then sued out under the 25th section of the Judiciary Act, and the respective causes were removed into this court.

Jurisdiction of this court to re-examine the questions presented in the pleadings may be assumed as existing without discussion, as it is conceded that the questions are the same as were raised and decided in the State Courts, and it is not controverted that the questions are such as may be re-examined here under the 25th section of the Judiciary Act.

Theory of the respondents is, that the respective libels were libels *in rem* to enforce a maritime lien in favor of the shippers of the cotton, under contracts of affreightment for the transportation of goods and merchandise from one port to another upon navigable waters, and that the State Courts have no jurisdiction to employ such a process to enforce such a lien in any case; that the jurisdiction to enforce a maritime lien by a proceeding *in rem* is exclusively vested in the Federal Courts by the Constitution of the United States and the laws of Congress. But the libelants controvert that proposition, and insist that the State Courts have concurrent jurisdiction in these cases under that clause in the 9th section of the Judiciary Act which saves "to suitors in all cases the right of a common law remedy where the common law is competent to give it." 1 Stat. at L., 78.

2. They also contend, if their first proposition is not sustained, that inasmuch as the three cases were heard together, under an agreement that they should be tried upon the same issues, and that the libel filed by W. C. Boon & Company, as stated in the bill of exceptions, was selected as the case to be tried in the court where the suits were commenced, the rights of the parties in the other two cases must abide the decision of this court in that case.

Assuming that to be so, then they contend that the State Court had jurisdiction in the first case, because the contract of affreightment was for the transportation of goods and merchandise between ports and places in the same State. Impliedly, the argument admits that the rule is otherwise where the contract is for the trans-

portation of goods and merchandise between ports and places in different States; but the proposition is, that where the contract is between citizens of the same State, for the transportation of goods and merchandise from one port to another in the same State, the case is not one within the jurisdiction of the Admiralty Courts of the United States, unless it becomes necessary, in the course of the voyage, to carry the goods or merchandise into or through some other State or foreign dominion.

Obviously the questions presented are questions of very great importance, as affecting the construction of the Federal Constitution, and the rights and remedies of the citizens engaged in an important and lucrative branch of commerce and navigation.

Judicial power to hear and determine controversies in admiralty, like other judicial power, was conferred upon the Government of the United States by the Federal Constitution, and by the express terms of the instrument, it extends to all cases of admiralty and maritime jurisdiction; which, doubtless, must be held to mean all such cases of a maritime character as were cognizable in the Admiralty Courts of the States at the time the Constitution was adopted. *Waring v. Clarke*, 5 How., 454.

Admiralty jurisdiction, as exercised in the Federal Courts, is not restricted to the subjects cognizable in the English Courts of Admiralty at the date of the Revolution, nor is it as extensive as that exercised by the continental courts, organized under, and governed by, the principles of the civil law. *Bags of Linseed*, 1 Black, 108 [66 U. S., XVII., 85].

Best guides as to the extent of the admiralty jurisdiction of the Federal Courts, are the Constitution of the United States, the laws of Congress, and the decisions of this court.

Two of the contracts of affreightment in these cases, were for the transportation of cotton between ports and places in different States; but as the contract alleged in the libel filed in the first case, was for the transportation of cotton from one port to another, in the same State, it becomes necessary to determine, irrespective of the questions presented in the other cases, whether such a contract is cognizable in the Admiralty Courts of the United States, because, if not, the libelants, in any view of the case must prevail, as there would be in that state of the case, no jurisdiction in this court to re-examine the decision of the State Court in that case.

Much controversy has existed as to the true extent of the admiralty and maritime jurisdiction of the Federal Courts, but great aid will be derived in the solution of this question by an examination of the decisions of this court at different periods since the judicial system of the United States was organized.

Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jurs belli*, and seizures on water for municipal and revenue forfeitures.

(1) Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. 1 Conkl. Adm., 19.

(2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts.

Jurisdiction in the former case depends upon

the nature of the contract, but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable, are not maritime any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction, as defined by law. *The Commerce*, 1 Black, 579 [66 U. S., XVII., 109]; 2 Story, Const. (3d ed.), secs. 1666, 1669.

Such jurisdiction, whether of torts or of contracts, was, and still is, restricted in the parent country to tide-waters, as they have no large fresh water lakes or fresh water rivers which are navigable. Waters where the tide did not ebb and flow, were regarded in that country as not within the admiralty and maritime jurisdiction; and such was the decision of this court in the case of *The Jefferson*, 10 Wheat., 428, and the rule established in that case was followed for more than a quarter of a century.

Attempt was subsequently made to restrict the jurisdiction of the Admiralty Courts in torts to cases arising on the high seas, but this court held that it extended to all waters within the ebb and flow of the tide, though *infra corpus comitatus*, and as far up the rivers emptying into the seas or bays and arms of the sea, as the tide ebbed and flowed. And that rule, ever after it was promulgated, prevailed, and was universally applied by district courts in cases of collision. *Waring v. Clarke*, 5 How., 449.

Application of that rule was made by the Federal Courts in collision cases arising upon the Hudson, the Penobscot, the Kennebec, the Merrimac, the Alabama and many other rivers navigable only between ports and places in one State.

Exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, was conferred upon the District Courts by the 9th section of the Judiciary Act, including all seizures under the laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas.

Remedies for marine torts, it is conceded, may be sought in the Admiralty Courts under that provision, although committed within the body of a county, but is denied that redress can be obtained in the admiralty for the breach of contract of affreightment in a case where the port of shipment and the port of destination are in the same State.

Repeated attempts were made at an early day to induce the court to hold that seizures on water were not cases of admiralty cognizance, and that contracts of affreightment were exclusively cognizable in the courts of common law; but this court refused to adopt either proposition, and held that the entire admiralty power of the Constitution was lodged in the Federal Courts, and that Congress intended by the 9th section of the Judiciary Act to invest the District Courts with that power as courts of original jurisdiction; that the phrase "exclusive original cognizance," was used for that purpose, and was intended to be exclusive of the State Courts as well as the other Federal Courts. *The Lexington*, 6 How., 390; *The Vengeance*, 3 Dall.,

297; *The Betsey*, 4 Cranch, 448; *The Samuel*, 1 Wheat., 9; *The Octavia*, 1 Wheat., 20.

When the case of *The Lexington* was decided, it was still supposed that the admiralty jurisdiction was limited to the waters affected by the ebb and flow of the tide, but the case is a decisive authority to show that the jurisdiction of the admiralty, in matters of contract, was understood to be coextensive with the jurisdiction in cases of marine torts.

Subject-matter of the suit in the case of *Waring v. Clarke*, was that of a collision, and the subject-matter in the case of *The Lexington* was a loss of specie *in transitu*, under a contract of affreightment. Viewed in any light, those two cases settle the question that where the voyage and transportation are over tide-waters, the jurisdiction of the admiralty is the same in matters in maritime contracts as in marine torts.

Such was the state of the law upon the subject, as decided by this court, when the case of *The Genesee Chief*, 12 How., 457, was brought here for re-examination; and in that case this court held that the jurisdiction in admiralty depended, not upon the ebb and flow of the tide, but upon the navigable character of the water; that if the water was navigable, it was deemed to be public, and if public, that it was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

Prior to that decision, the Western lakes and navigable rivers of the United States, above tide-waters, were not supposed to be waters within the admiralty and maritime jurisdiction of the Federal Courts. Strange as that proposition may now appear to one familiar with the provision contained in the 9th section of the Judiciary Act, it is, nevertheless, true that the rule restricting admiralty jurisdiction to tide waters had prevailed from the organization of the judicial system to that date, but the effect of that decision was to dispel that error and place the admiralty jurisdiction upon its true constitutional and legal basis, as defined in the Constitution of the United States and the laws of Congress.

Subsequent decision of this court, in the case of *The Magnolia*, was, that the admiralty jurisdiction of the Federal Courts extends to cases of collision upon navigable waters, although the place of the collision may be within the body of a county and above the ebb and flow of the tide; and this court also held in that case that the district courts exercise jurisdiction over fresh water rivers, "navigable from the sea," by virtue of the 9th section of the Judiciary Act, and not as conferred by the Act of the 26th of February, 1845, which is applicable only to the "lakes, and navigable waters connecting said lakes." *The Magnolia*, 20 How., 296 [61 U. S., XV., 909]; 5 Stat. at L., 516.

Direct proposition of the respondents in the case of *The Commerce*, 1 Black, 578 [66 U. S., XVII., 109], was, that the case before the court, which was a collision on the Hudson River, was not a case cognizable in the admiralty, because it did not appear that either of the vessels was engaged in foreign commerce, or in commerce among the several States; but the court held that judicial power in all cases of admiralty and maritime jurisdiction was conferred by the Constitution, and that in cases of tort

the question of jurisdiction was wholly unaffected by the considerations suggested in that proposition; and we re-affirm the rule there laid down, that locality is the true test of admiralty cognizance in all cases of marine torts; that if it appears, as in cases of collision, depredations upon property, illegal dispossession of ships, or seizures for the violation of the revenue laws, that the wrongful act was committed on navigable waters, within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty. 2 Story, Const., sec. 1669.

Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself.

Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants. *The Genesee Chief*, 13 How., 452.

Congress may regulate commerce with foreign nations and among the several States, but the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal Government by the Constitution, and Congress cannot enlarge it, not even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations. *The St. Lawrence*, 1 Black, 526 [66 U. S., XVII., 182].

Remarks, it is conceded, are found in the opinion of the court in the case of *Allen v. Newberry*, 21 How., 245 [62 U. S., XVI., 111], inconsistent with these views; but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the Western lakes, where the jurisdiction in admiralty is restricted, by an Act of Congress, to steamboats and other vessels * * * employed in the business of commerce and navigation, between ports and places in different States and Territories. *The Hine v. Trevor*, 4 Wall., 555 [71 U. S., XVIII., 451].

No such restrictions are contained in the 9th section of the Judiciary Act and, consequently, those remarks, as applied to a case falling within that provision, must be regarded as incorrect.

Such a rule, if applied to the commerce and navigation of the Atlantic coast, would produce incalculable mischief, as the vessels in many cases, even in voyages from one port in a State to another port in the same State, are obliged, in the course of the voyage, to go outside of any particular State, and it would not be difficult to give examples where more than half the voyage is necessarily upon the high seas. Unless the admiralty has jurisdiction, in such a case, to enforce the maritime lien, in case of a collision or jettison, it is difficult to see to what forum the injured party can resort for redress. Piracy, it is said, is justiciable everywhere, but it cannot be admitted that maritime torts are justiciable nowhere.

Unable to deny that the admiralty has jurisdiction over marine torts, though the voyage is between ports and places in the same State, the
See 7 WALL.

advocates of the more restricted jurisdiction over maritime contracts set up a distinction, and contend that the admiralty jurisdiction over such contracts is limited by the power granted to Congress to regulate commerce. Reference may be made to the case of *Maguire v. Card*, 21 How., 249 [62 U. S., XVI., 118], as one where that distinction was adopted; but the decisive answer to that case, and the one preceding it in the same volume, will be found in the later cases already referred to, and in the case of *The Mary Washington*, 5 Am. L. Reg. (N. S.), 692, where the opinion was given by the present *Chief Justice*. All three of the cases, therefore, as well the case of *W. C. Boon & Company* as the other two, are cases within the admiralty and maritime jurisdiction of the Federal Courts.

II. Suppose that to be so, then it is contended by the libelants, in the second place, that all three of the original actions were well brought in the State Court as a court of concurrent jurisdiction with the District Courts of the United States in admiralty, and that the particular remedy, given by the statute of the State, and adopted in these cases, is within the true intent and meaning of the saving clause in the 9th section of the Judiciary Act.

Wherever a maritime lien arises, the injured party may pursue his remedy, whether for a breach of a maritime contract or for a marine tort, by a suit *in rem*, or by a suit *in personam*, at his election. Attention will be called to three classes of cases only as examples to illustrate that proposition; but many more might be given to the same effect.

Shippers have a lien, by the maritime law, upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfillment of the contract of the carrier, that he will safely keep, duly transport and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment. *The Bird of Paradise*, 5 Wall., 545 [72 U. S., XVII., 662]; *The Eddy*, 5 Wall., 481 [73 U. S., XVIII., 486]; *Bags of Linseed*, 1 Black, 112 [66 U. S., XVII., 37]; *Maude & P., Ship*, 254.

Owners of vessels damaged by collision, occasioned without fault on their part, and wholly through the fault of those in charge of the colliding vessel, also have a maritime lien on the vessel in fault as a security for such damages as may be awarded to them in the admiralty for the injury thereby caused to their vessel, and they may proceed *in rem* to enforce their claims for the damages, or they may waive the lien and bring their suit *in personam* against the master or owners of the vessel. *Sturgis v. Boyer*, 24 How., 117 [65 U. S., XVI., 593]; *Chamberlain v. Ward*, 21 How., 553 [62 U. S., XVI., 218].

Material-men, also, who furnish materials or supplies for a vessel in a foreign port, or in a port other than a port of the State where the vessel belongs, have a maritime lien on the vessel as a security for the payment of the price of all such materials and supplies. They have such a lien because, upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel and, consequently, they are entitled to proceed *in rem* in the Admiralty Court to en-

force the lien, but they are not compelled to do so, as they may waive the lien and bring their suit *in personam* against their master or owners, as they are also liable as well as the vessel. *The St. Lawrence*, 1 Black, 529 [66 U. S., XVII., 183]; *Manro v. Almeida*, 10 Wheat., 473; *The Reindeer*, 2 Wall., 884 [69 U. S., XVII., 911]; *The General Smith*, 4 Wheat., 488.

None of these principles are controverted, but the libelants contend that the State Courts have concurrent jurisdiction to afford the parties the same remedies in all such cases. No warrant for that proposition, however, is found in the 9th section of the Judiciary Act, nor in any other part of that fundamental regulation of our judicial system. On the contrary, the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is, by the very terms of that section, conferred upon the District Courts of the United States, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." Nothing is said about a concurrent jurisdiction in a State Court or in any other court, and it is quite clear that in all cases where the parties are citizens of different States, the injured party may pursue the common law remedy here described and saved, in the Circuit Court of the district as well as in the State Courts.

Original cognizance is exclusive, in the District Courts, except that the suitor may, if he sees fit, elect to pursue a common law remedy in the State Courts, or in the Circuit Court, as before explained, in all cases where such a remedy is applicable. Common law remedies are not applicable to enforce a maritime lien by a proceeding *in rem* and, consequently, the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts. *The Moses Taylor*, 4 Wall., 411 [71 U. S., XVIII., 397].

State Legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a State Court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the Admiralty Courts. Observe the language of the saving clause under consideration. It is to suitors, and not to State Courts, nor to the Circuit Courts of the United States. Examined carefully it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty; or he may bring a suit *in personam* in the same jurisdiction; or he may elect not to go into admiralty at all, and may resort to his common law remedy in the State Courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case.

Undoubtedly most common law remedies in cases of contract and tort, as given in common law courts, and suits *in personam*, in the admiralty courts, bear a strong resemblance to each other, and it is not, perhaps, inaccurate to regard the two jurisdictions in that behalf as concurrent, but there is no form of action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy.

Consignees or shippers may proceed in the admiralty *in rem* against the vessel to enforce their maritime lien, or they may waive that lien and still proceed in the admiralty *in personam* against the owners of the vessel to recover damages for the nonfulfillment of the contract, or they may elect to bring a common action against the owners to recover damages, as in other cases for the breach of a contract to be executed on land.

Proceedings in a suit at common law on a contract of affreightment are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. When properly brought, the suit is against the owners of the vessel, and in States where there are attachment laws the plaintiff may attach any property not exempted from execution, belonging to the defendants.

Liability of the owners of the vessel under the contract being the foundation of the suit, nothing can finally be held under the attachment except the interest of the owners in the vessel, because the vessel is held under the attachment as the property of the defendants, and not as the offending thing, as in the case of a proceeding *in rem* to enforce a maritime lien. Attachment in such suits may be of the property of non-residents or of defendants absent from the State, as in suits on contracts not maritime; and the same rules apply in respect to the service of process and notice to the defendants.

Applying these rules to the cases before the court, it is obvious that the jurisdiction exercised by the State Court was of the precise character which is exclusive in the District Courts of the United States sitting in admiralty. Authority does not exist in the State Courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien.

Such a lien does not arise from a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the States, under the decisions of this court, to create such liens as their Legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement. *The General Smith*, 4 Wheat., 488; *The St. Lawrence*, 1 Black, 529 [66 U. S., XVII., 183].

Contracts for ship building are held not to be maritime contracts and, of course, they fall within the same category; but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District Courts of the United States as provided in the 9th section of the Judiciary Act. *Ferry Co. v. Beers*, 20 How., 402 [61 U. S., XV., 964].

Respective decrees reversed, and the several causes remanded, with instructions to dismiss the respective libels.

Rev'g—41 Ala., 50.

Cited—8 Wall., 25; 10 Wall., 210, 217; 11 Wall., 29, 188, 191, 192; 13 Wall., 242; 15 Wall., 354; 16 Wall., 531, 533; 20 Wall., 218, 219; 21 Wall., 556; 23 U. S., 316, 366; 25 U. S., 517; 29 U. S., 42; 102 U. S., 119; 104 U. S., 516; 109 U. S., 632; 8 Ben., 155; 3 Ben., 395, 421, 475; 5 Ben., 64, 71, 436, 437; 11 Blatchf., 343; 11 Blatchf., 455, 464-496; 3 Bank. Rex., 182; 6 Bank. Reg., 454; 2 Abb. U. S., 76, 77; 1 Bro., 180, 223, 341; 2 Biss., 206; 3

Biss., 249; 7 Biss., 240; 1 Low., 377; 1 Sawy., 137, 356, 360, 369; 3 Hughes, 431; 5 Hughes, 376; 2 Filpp., 43, 143; 2 Low., 95, 176; 3 Cliff., 453; 4 Dill., 448; 45 Ind., 479; 57 N. Y., 247; 70 Pa. St., 252; 92 Pa. St., 46; 2 Am. Rep., 646, 647, 648, 649 (42 Miss., 715); 3 Am. Rep., 734, 735 (43 N. Y., 554); 7 Am. Rep., 180 (33 Iowa, 223); 7 Am. Rep., 231 (34 Ind., 451); 8 Am. Rep., 587 (23 La., 39); 13 Am. Rep., 372 (23 O. St., 557); 14 Am. Rep., 39 (23 Ill., 223); 22 Am. Rep., 401 (28 O. St., 612); 34 N. J. L., 99; 103 Mass., 330; 35 Wis., 107; 45 Mo., 69; 18 O. St., 327, 332.

JAS. W. FINLEY, *Appt.*,

v.

THOMAS M. ISETT, WILLIAM C. BREWSTER AND SAGE O. BUTLER.

Insufficient evidence to establish a trust.

What evidence insufficient to establish a trust for the benefit of a third person in mortgage and notes executed to a banking firm and payable to it.

[No. 150.]

Submitted Apr. 7, 1869. Decided Apr. 15, 1869.

A PPEAL from the Circuit Court of the United States for the District of Iowa.

The bill in this case was filed in the court below by the appellant, praying the court to declare a certain trust and decree the assignment to him of certain notes and a mortgage made to secure the same. The court entered a decree ordering that the defendants assign, without recourse, to the said complainant, a part of said notes, and as to the remaining equities prayed for in said bill, dismissed the same. Whereupon the plaintiff took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Arthur W. Windett and Geo. C. Bates, for appellant.

Messrs. Wm. F. Brannan and Richman & Carskaddon, for defendants, Isett & Brewster:

It may be admitted that Brewster, in general terms, said to other parties that this was a trust matter; and it does not affect Isett & Brewster's rights to the securities, nor would it be inconsistent with their answers or their testimonies. The rule of law upon this point is very clear.

"In order to fasten a trust upon property of any description by means of parol declarations, the expressions used must amount to a clear and explicit declaration of trust. They must also point out with certainty the subject-matter of the trust, and the person who is to take the beneficial interest in it; loose and indefinite expressions are insufficient for this purpose."

Harrison v. McMennomy, 2 Edw. Ch., 51; *Stocum v. Marshall*, 2 Wash. (C. C.), 898; *Mercer v. Stark*, 1 Sm. & M. Ch., 479; *Dorsey v. Clarke*, 4 H. & J., 551; *Chiles v. Woodson*, 3 Bibb., 71; *Noel v. Noel*, 1 Ia., 423; *Corbit v. Smith*, 7 Ia., 60.

None of these alleged admissions, as actually testified to, support the averments of the bill respecting them, or come within the requirements of the rule for establishing a trust by parol declarations. They do not point out with any certainty the subject-matter of the trust, and are altogether silent as to the person to be benefited by it. They, therefore, really amount to nothing in themselves; and are not inconsistent, either with the rights that Isett & Brewster claim, nor with their answer.

See 7 WALL.

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If parol testimony can be introduced to contradict the written instruments, and give to them language they were not intended to use, such testimony must be very clear and convincing, or the bill will be dismissed.

Addington v. Cann, 3 Atk., 141; *Paine v. Hall*, 18 Ves., 475. And if the testimony be inconsistent and conflicting, the court will refuse the relief prayed. *Grey v. Grey*, 2 Sm., 597.

But we do not think that the testimony which sought to contradict the written instruments, is competent or ought to be admitted. *Woolam v. Hearn*, 7 Ves., 311.

Mr. Justice Miller delivered the opinion of the court:

In the spring of the year 1865, Sage O. Butler made and delivered to Isett & Brewster, a banking firm of Muscatine, Iowa, his five several promissory notes for \$2,000 each, payable to their order in one, two, three, four and five years from date; and at the same time made and delivered to them a mortgage on certain real estate, to secure the payment of the notes.

The plaintiff, Finley, on the 23d January, 1866, filed this bill in chancery, alleging that the notes and mortgage were deposited with Isett & Brewster, in trust for his benefit, for the purpose of securing Butler's indebtedness to him, and praying the court to declare the trust and decree Isett & Brewster to assign to him the notes and mortgage, or for such other relief as might be appropriate. Butler is also made defendant, and all three of them required to answer specific interrogatories, under oath, touching the alleged trust.

Isett & Brewster file separate answers, and say that the notes were delivered to them as security for advances made by them to Butler, to enable him to carry on the business of packing pork during the previous winter, and with an understanding that, when their debt was paid, they would transfer the notes and mortgage to whomsoever Butler might direct. They allege that Butler is still indebted to them in the sum of \$6,000, and say they are willing to transfer the securities to plaintiff on payment of that sum and interest.

There seems to be no doubt about Butler's indebtedness to Isett & Brewster, and to complainant.

The issue, therefore, is a very simple question of fact, namely: Whether Isett & Brewster received the notes and mortgage from Butler as a security primarily for their own debt, and then subject to his order; or as a mere trust for plaintiff, without any beneficial interest in themselves.

The main reliance of plaintiff to establish the trust, is on a letter written by Butler to him, at or about the time he delivered the securities to Isett & Brewster.

In this letter Butler says: "For the purpose of protecting you to some extent against worthless securities, I executed my notes, on the 11th March, at one, two, three, four and five years, with interest at 6 per cent., to order of Messrs. Isett & Brewster, and secured the same by mortgage on my pork house, and the mortgage was recorded, and Messrs. Isett & Brewster hold these notes in trust and will, at proper time, transfer them, with mortgage (without recourse), to parties I may designate.

When I know my exact situation, I hope to do more, but in the meantime please keep the above confidential."

Butler, whose deposition is in the record, swears that he read this letter to Brewster, at the time he delivered to him the notes and mortgage, and told him that he intended them for the benefit of plaintiff, and that Brewster assented to the arrangement and agreed to assign them, without recourse, when requested.

In addition to this positive testimony of Butler, there is some evidence of statements not very clear or satisfactory, made by Brewster, when speaking of these securities afterwards.

The statement of Holden is, that when he asked Brewster about these notes and mortgage, he said "It was a trust matter." As this was true, whether the trust was to secure Finley first, or only for his use, after Isett & Brewster were paid, it does not prove anything in the present issue.

Higgins, another witness, says that, when he asked Brewster why he had taken the mortgage, he said he did not take it on his own account, but in trust for another. This conversation was April 18th, six days before the date of the letter from Butler to plaintiff, and is to be taken for what it is worth.

To this testimony on the part of the complainant, is opposed:

1. The fact that the notes and mortgage are payable to the order of Isett & Brewster, and are in their possession; which raises the legal presumption that they were their own property.

2. The separate answers of Isett & Brewster to plaintiff's bill and interrogatories, in which they both deny the exclusive trust for plaintiff, and assert their interest to the extent of their debt.

3. Brewster denies, in his deposition, that the letter of Butler to Finley was ever read to him or by him, or that he ever gave assent to the claim of Finley.

4. Certain letters from Finley, the plaintiff, to Brewster and Butler, written in October, 1865, in regard to the matters now in controversy, in none of which does he claim that these notes are for his benefit, until after Isett & Brewster are first paid, and in one of them, dated October 2d, to Butler, he says: "As I understand you and Mr. Brewster, the mortgage was given with the intention of protecting my interests as well as Mr. B.; when Mr. B.'s claim was satisfied, the transfer of the property to be made to me. This is the way I understand my position now."

5. The statement of Butler in his deposition, that at the interview between himself and Finley and Brewster, in October, Mr. Brewster spoke of his prior claim on the notes and mortgage and that, while Finley did not in words admit it, he made no denial of it.

We are of opinion that the weight of the evidence is clearly in favor of the statement of the defendants, that they were to be first paid out of the notes, before they were to transfer them.

The decree of the Circuit Court, giving the two notes last due to plaintiff, is, therefore, as favorable to him as the facts justify, and must be affirmed.

THE WASHINGTON, GEORGETOWN AND ALEXANDRIA RAILROAD COMPANY ET AL. *Appts.*,

v.

THE MAYOR, BOARD OF ALDERMEN AND BOARD OF COMMON COUNCIL OF THE CITY OF WASHINGTON, JOSEPH H. BRADLEY ET AL.

(See S. C., "*R. R. Co. v. Bradleys*," 7 Wall., 575-578.)

Final decree, what is—allowance of appeal—decree, when final—supersedes.

A decree directing a sale of trust property, and that the proceeds be brought into court, is a final decree.

Where an appeal was prayed and the appeal bond was filed and approved, it may be properly inferred that an appeal was allowed.

During the term, a decree is subject to be rescinded or modified upon motion, and cannot, therefore, be regarded as final until the end of the term.

It becomes final, when a motion to rescind has been heard and denied.

Bond of appeal approved and filed within ten days after such denial, is sufficient to justify a *supersedeas*.

[No. 446.]

Argued Apr. 9, 1869. Decided Apr. 15, 1869.

APPPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below by the appellants, for an injunction against the sale of certain property, and for the cancellation of a certain deed of trust. A decree having been entered in that court, vacating a temporary injunction and directing a sale of said property by trustees, the complainants took an appeal to this court.

The case is fully stated by the court.

On motion to dismiss by the appellees, and on motion for *supersedeas* by the appellants.

Messrs. R. J. and J. L. Brent and A. G. Riddle, for appellants.

Messrs. Jos. H. Bradley, Barctley and Stanton, for appellees.

Mr. Chief Justice Chase delivered the opinion of the court:

Two motions have been submitted to our consideration in this case; one, in behalf of the appellees, to dismiss the cause for want of jurisdiction; the other, in behalf of the appellants, for *supersedeas*. In support of the motion to dismiss, it was urged, first, that the decree appealed from was not final; and second, that there was no allowance of appeal.

It appears that the original decree of the Supreme Court of the District was entered on the 6th of February, 1869. It ordered that the injunction formerly granted be dissolved, and directed a sale by the trustees of the property in controversy, according to their deed of trust, and the bringing of the proceeds into court to abide further order.

We think that this was a final decree within the principles of the case of *Dean v. Nelson* [*infra*, 94], decided at this term, though it might have been otherwise had the decree been limited to the dissolution of the injunction, thereby merely permitting the trustees to sell under their trust.

The first ground of the motion to dismiss, therefore, cannot be sustained.

Nor is the second ground more tenable. It is true that it does not appear upon the record directly that there was an allowance of the appeal; but an appeal was prayed, and subsequently the appeal bond was filed in the court, and approved by one of the judges; and, we think, it may be properly inferred, from these facts, that an appeal was actually allowed. The motion to dismiss, therefore, must be denied.

In support of the motion for *supersedeas*, it was argued that the appeal bond was approved, and filed within ten days after the decree.

The decree was entered on the 6th of February, 1869. A petition for the suspension of the order of dissolution was filed, by the secretary of the complainants, on the same day. A motion to the same effect was made in behalf of the Department of War, on the 15th of February; and a petition to open the decree was filed on the 18th of February, by one of the stockholders of the company.

We do not think it necessary to consider the effect of either of these proceedings; for, on the 6th of March and, as we understand, during the term at which the decree was rendered, a motion to rescind was made in behalf of the complainants, and was heard and decided.

There is no doubt that, during the term, the decree was, at all times, subject to be rescinded or modified, upon motion, and could not, therefore, be regarded as absolutely final, until the end of the term. It became final, in this case, when the motion to rescind had been heard and denied. This took place on the 18th of March, and, on the 20th, the appeal was prayed in open court, and on the 23d the bond of appeal was approved and filed.

We think this was in time, and the motion for supersedeas must, therefore, be allowed.
(See *Brockett v. Brockett*, 2 How., 240.)

Cited—10 Wall., 293; 94 U. S., 21.

ANDREW B. JAMES, *Plff. in Err.*,

v.

THE PRESIDENT AND DIRECTORS OF
THE BANK OF MOBILE.

(See S. C., 7 Wall., 692, 693.)

Where no exceptions, judgment affirmed—order.

Where the appeal is regularly taken but there is no bill of exceptions nor anything upon which error can be assigned, it cannot be dismissed, and the judgment should be affirmed.

An order entered through inadvertence, cannot be drawn into a precedent.

[No. 303.]

Argued Apr. 9, 1869. Decided Apr. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court. On motion to dismiss.

Mr. P. Phillips, for defendants in error.

Messrs. J. M. Carlisle and P. H. Morgan, for plaintiff in error.

Mr. Chief Justice Chase delivered the opinion of the court:

See 7 WALL.

The record in this case contains nothing but the declaration; the plea of the general issue; the proof of protest of the bill of exchange indorsed by the defendant, and notice to him of non-payment and judgment of the court, in favor of the plaintiff. There is no bill of exceptions, and nothing upon which error can be assigned.

But the regular course, in cases of this description, is to affirm the judgments. The appeal is regularly here, and cannot be dismissed for want of jurisdiction. *The motion, therefore, must be denied.*

Counsel for appellee has referred us to an order dismissing a writ of error at the last term, under circumstances like those of the case before us. This order must have been entered through inadvertence, and cannot be drawn into a precedent.

JOHN C. COCKS, *Appt.*,

v.

CHARLES IZARD.

(See S. C., 7 Wall., 559-563.)

Tenant, held trustee for his landlord, of lands bought at judicial sale.

A tenant who bought his landlord's property at a judicial sale, in the absence of the landlord, for a sum of money hardly equal to its yearly rental value, by unfair practices, which prevented other persons from bidding, may be compelled, in equity, to account and reconvey to his landlord.

[No. 142.]

Argued Apr. 7, 1869. Decided Apr. 15, 1869.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The bill in this case was filed in the court below by the appellant, praying an accounting and a reconveyance of certain lots, purchased by the defendant at a judicial sale, and formerly owned by the complainant. The court below sustained a demurrer and dismissed the bill; whereupon the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Conway Robinson, for appellant:

1. The provisional court mentioned in the bill was not a court competent to exercise judicial power, consistently with the Constitution of the United States (art. III., secs. 1, 2; *Martin v. Hunter*, 1 Wheat., 328); but was a mere agent of military power, to assist it in preserving order, and to protect the inhabitants in their persons and property. *Jecker v. Montgomery*, 18 How., 515; *Cross v. Harrison*, 16 How., 190; *Leitensdorfer v. Webb*, 20 How., 177 (61 U. S., XV., 891); *Halleck*, Int. Law, ch. 32, secs. 5, 6, p. 781.

2. The sale is void, not only because it was made without a legal execution, but also because it was made without those steps which in Louisiana are necessary to be taken to render a sale under execution valid.

1 Henn. Dig. of La. Rep., 650, and cases there cited; *Collier v. Stanbrough*, 6 How., 21.

3. Whether the Marshal's conduct was proper or not, the fraud of the purchaser is shown

(Civ. Code of La., arts. 1841, 1842; *Badon v. Badon*, 6 La., 257; *Brownson v. Fenwick*, 19 La., 435); or a trust. He became not the absolute owner of the land, but a trustee for the appellant.

Jones v. Hubbard, 6 Munf., 261; 6 Cal., 211; *Keith v. Purvis*, 4 Desaus., 114; *Trice v. Pratt*, 1 Dev. & B. Eq., 626; *Combs v. Little*, 3 Green, Ch., 310.

4. In every aspect it was proper to resort to a Court of Chancery.

Bodley v. Taylor, 5 Cranch, 221; *Robinson v. Campbell*, 3 Wheat., 222; *U. S. v. Howland*, 4 Wheat., 115; 1 Story, Eq., sec. 57; *Shelton v. Tiffin*, 6 How., 185; *Trice v. Pratt*, 1 Dev. & B. Eq., 626; *Combs v. Little*, 3 Green, Ch., 310; 1 Story, Eq., sec. 68; 4 Wheat., 110; 1 Story, Eq., sec. 76; *Duncan v. McCalmont*, 3 Beav., 417.

Mr. P. Phillips, for appellee:

By Act of 28th July, 1866, 14 Stat., 344, it is declared that all suits, prosecutions and proceedings of the provisional court are to be transferred into the Circuit Court of the United States, and be proceeded with in said court as if originally commenced therein. The judgment in this case having by the Act been transferred into the circuit court, to be treated there as a judgment of its own, if the defendant had been guilty of fraud at the sale, in deterring bidders by false representations, an application on that ground could have been made to the court to set aside the sale and order a resale, or an action may have been instituted to recover damages for loss arising from this misconduct.

Winn v. Elsee, 6 Rob. La., 100; *Liles v. Rhodes*, 7 La., 91; *Stoute v. Voorhies*, 4 La., 396.

The bill, therefore, can only be maintained in equity, on the ground that the declarations made at the sale created a trust in favor of the complainant.

This is evidently the view of the pleader who seeks the conveyance of the title from the defendant. In doing this, he should have made those persons parties to whom Izard conveyed the property. That there were such parties is shown by the prayer that he should convey "a valid title, unincumbered by any incumbrance, resulting from any of the defendants's acts."

The mere declaration of a vendor that he intends to buy for another without evidence of any previous agreement to do so or of any advance of money for that purpose, raises no trust which can be supported in equity.

Lloyd v. Lynch, 28 Pa., 423; *Pattison v. Horn*, 1 Grant, 308.

Mr. Justice Davis delivered the opinion of the court:

It was decided by this court, in *Slater v. Maxwell*, 6 Wall., 276 [78 U. S., XVIII., 799], that where a judicial sale is impeached for fraud, or unfair practices, of officer or purchaser, to the prejudice of the owner, a Court of Chancery is the proper tribunal to afford relief, and this decision only re-affirmed a well established doctrine of equity jurisprudence. The present case is within this rule, and the court below manifestly erred in sustaining a demurrer to the bill.

The complainant puts his case for relief on two principal grounds. The necessities of this case do not require us to examine and decide the first point thus raised by him; for the sec-

ond, if the averments of the bill are true, affords ample ground to give the complainant the desired relief.

The bill charges that Cocks, a citizen of the State of Mississippi, was the owner of a valuable dwelling-house and lots in the City of New Orleans, occupied by Izard, as his tenant, which were seized on judicial process, and ordered to be sold. It does not appear in what way the court acquired jurisdiction of the case, but, it is fair to presume, it was through a proceeding by attachment, as the complainant avers he was without the State, and did not know of either the judgment, execution, levy or sale.

In this condition of things, the sale took place, and Izard bought the property for a sum of money hardly equal to its yearly rental value. This he was enabled to accomplish by unfair practices, which operated to prevent persons, who were in attendance at the sale and desirous of purchasing, from bidding.

These practices were of a character well calculated to deceive, for it is easy to see that fair minded men knowing the owner of the property to be absent, would be inclined to put faith in the declarations of his tenant, that if he purchased, it was on account of his landlord, whose interests he wished to protect, and would be disinclined to interfere with the arrangement.

Can it, then, be doubted, if these things are true, that the conduct of the defendant deprived the complainant of the advantage which he would have received from a fair sale of his property, at which there would have been competition among persons both able and willing to buy?

The law will not tolerate any influences likely to prevent competition at a judicial sale, and it accords to every debtor the chance for a fair sale and full price; and if he fails to get these, in consequence of the wrongful interference of another party, who has purchased his property, at a price greatly disproportioned to its value, equity will step in and afford redress, either by setting aside the proceedings under the sale, or by holding the purchaser to account.

The defendant in this case has behaved badly, and cannot be allowed to enjoy the fruits of his unfair dealing. The complainant had a right to expect, after reposing enough confidence in him to rent him a dwelling-house, that he would not, in his absence, turn against him, and use this very relation to his prejudice. It may be that, at the time of his purchase, the defendant intended to carry out his promises, for, after the sale, he admitted his obligation to do so, but his cupidity, in the end, got the better of him, as he now asserts an adverse title in himself.

It is insisted that the complainant should have availed himself of the summary mode, by petition or motion to the court, to have had the sale set aside, and resale ordered; but this objection cannot prevail. It is needless to inquire whether he could have obtained his object in this way, as by not pursuing it, he did not forfeit his right to sue in equity; and the defendant has surely no right to complain, for he has now ample opportunity to make defense and vindicate his integrity.

The decree of the Circuit Court of the United States for the District of Louisiana is reversed, and the cause is remanded to that court, with directions to proceed in conformity with this opinion.

CORNELIUS K. GARRISON, *Appt.*,

v.

THE UNITED STATES.

(See S. C., 7 Wall., 688-692.)

Doubtful expressions in contract—how construed—order to General Butler.

Doubtful expressions in a contract should be construed most strongly against the party who uses the language.

The order of Sept. 1, 1861, to General Butler, to raise, arm and equip six thousand men, only required him to bring the costs of recruiting, arming and equipment, in the aggregate, within that of like troops raised for the service.

[No. 143.]

*Argued Apr. 7, 1869. Decided Apr. 15, 1869.***A**PPEAL from the Court of Claims.

This case arose upon a petition filed in the court below, by the appellant, to recover a balance of \$23,400, alleged to be due him on a certain contract for guns furnished to the United States. The court below having entered a decree dismissing the petition, the petitioner took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. T. J. D. Fuller, for appellant:

In reference to the alteration of the contract, the court finds the facts to be, that the alteration was made before the time had elapsed for the delivery of the guns and it was made at the suggestion of Major Strong, Chief of Ordnance of the New England Department. The substituted gun and bayonet were seasonably delivered and inspected, and the regular vouchers were thereupon delivered to the claimant. The court below, we say, erred in its construction of the amendment, in this: that in changing the arms, it changed the rate of compensation or the mode of ascertaining it.

The United States had agreed to accept from the contractor the long Enfield rifles, with bayonets of the triangular pattern, in place of the saber bayonet, "upon the value conditions as are herein specified." In other words, upon the same value conditions. The plain, natural meaning of the language of the alteration in the contract is, "I will accept Enfield rifles with triangular bayonets, instead of Liege rifles with saber bayonets, at the same price—the one for the other."

The question of the relative value of the two arms or the relative expense of the two arms was not considered by the court; nor does the case disclose any evidence on that subject.

Of the execution of the contract upon the part of the claimant, no question is made by the defendant.

The dispute arises about the amount of the consideration to be paid.

Was there a sale of arms for the price stipulated or agreed to be paid, or was it a sale without any price named?

The authorities say when the price is agreed upon, there can arise no question; and if no price be named the law implies a promise to pay what the thing is reasonably worth.

But the price of goods sold may be determined by other means. It may be fixed by valuers, by the terms of the contract, to be appointed by the parties; and when fixed by the

valuers, it is equivalent to an agreement by the parties.

The court below arrived at the conclusion that here was no fixed or agreed price.

Then, instead of adopting the rule of law, that the government should pay what the arms were reasonably worth at the time of their delivery and acceptance, it adopted the rule or measure of value that the government should pay what the Ordnance Department was paying about the time of delivery. This is a different measure from what the law prescribes.

Messrs. E. R. Hoar, Atty. Gen., and T. H. Talbot, for appellee:

The court below applied the contract, construing it as an agreement to pay—(1) \$27, or (2) "Such less sum as the Ordnance Department may have paid for guns like in quality and description," to any person; or, (3) such less sum as the department had contracted to pay for like arms to said Garrison.

Finding no contract to pay Garrison for Enfield rifles, it adopted the price which the department had paid at about the date of this contract to other persons, for guns like those which Garrison furnished, namely, \$33 apiece. Under this construction the court found full payment of the contract price had been made.

This construction was correct.

Whatever authority General Butler had, to purchase arms, was circumscribed by the limitation in the order of the Secretary of War, that the cost "should not exceed in the aggregate that of like troops now or hereafter raised for the service of the United States."

The word "hereafter" must be held to refer to the time to elapse between the date of the order and the actual raising of the troops. No other future time would afford any proper standard of comparison of prices.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the Court of Claims.

The Secretary of War, by an order approved by the President, of the date of September 1, 1861, authorized General Butler to raise, organize, arm, uniform and equip in the New England States, a force not exceeding six regiments, and his requisitions on the quartermaster's, ordnance and other staff departments of the army were to be paid, provided "The cost of such recruitment, armament and equipment did not exceed in the aggregate that of like troops, now and hereafter raised for the service of the United States."

Under this order the plaintiff, on a written contract with General Butler, furnished the government six thousand Enfield rifles for his troops. The rifles were accepted and approved, and payment made at the rate of \$27 per gun for 2,800, and \$20 per gun for 3,200.

The plaintiff claims that under the contract he is entitled to \$27 per gun for the last, and brings this suit for the balance due at that price.

The matter in issue is to be determined by a sound construction of the written contract.

The original contract was for six thousand "Minie rifles of Liege pattern, with saber bayonets and all appendages complete," for which the United States contracts, "and agrees to pay for each of said rifles as shall pass inspection,

the sum of \$27, or such less sum as the Ordnance Department may have paid for guns, like in quality or description, or contracted to pay for, to said Garrison."

From the finding of the court it appears that at the suggestion of Major Strong, Chief of Ordnance of the New England Department, the Enfield rifle was substituted for the Liege pattern, when the following memorandum was indorsed on the original contract:

"It is agreed by the United States to accept from C. K. Garrison, the contractor, the long Enfield rifles, with bayonets of the triangular pattern, in place of the saber bayonets, upon the value conditions as are herein specified. B. F. Butler, *Maj. Gen. Comd'g.*"

The claimant insists that the only effect of this supplementary indorsement of General Butler was, to substitute the Enfield for the Liege gun, at the same price that was agreed to be paid for the latter.

The counsel for the government maintain that its effect is to accept the Enfield gun at any sum less than \$27 for which the United States had purchased Enfield rifles prior to the date of the contract from any other person.

As the court does not find that the Liege gun had been purchased for less than \$27, the plaintiff would be entitled, under his construction, to that sum.

It must be confessed that the language of the memorandum is not happy. To accept the Enfield rifle, in place of the saber bayonet, "upon the value conditions as are herein specified," is not very clear, and at best but amounts to a reference to the original agreement for the price of the substituted gun.

We are inclined to the view of the contract claimed by plaintiff, for the following reasons:

1. The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expressions should, therefore, according to a well known rule, be construed most strongly against the party who uses the language.

2. The change in the contract was made at the request of the ordnance officer of the government. It was, therefore, for the accommodation of defendant.

3. This construction was acted upon at the time by Major Strong, the officer at whose suggestion it was made, and who certified the account, and paid at that price for the first 2,800 guns, and would have paid the same price for the others, but was forbidden by the Secretary of War.

4. According to our construction of the original agreement, the alternative price, less than \$27, was the price of Liege guns, for which the government might have paid, or contracted to pay Garrison before the present contract. This view is confirmed by the fact, found by the court, that Garrison had a contract with the Ordnance Department, of July 1, 1861, for ten thousand Liege guns, at \$27 per gun, which had not then been performed. It seems reasonable that it was in reference to this contract with Garrison, already made by the department, the price of which was probably unknown to General Butler, that the provision was inserted by which he secured himself against paying more than the government had already paid for similar guns to the same party, and as

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Garrison knew what the price in that contract was, he had no objection to the provision.

If this view of the alternative clause of the original agreement be correct, then it could have no application to the substituted Enfield rifle, because Garrison had never received any pay, or contracted to receive pay, for such guns, with the Ordnance Department. The effect of this was to leave the reference of the subsequent indorsement to the original contract for the price, as limited to the \$27.

As we have already said that we believe this to have been the real intention of the parties, it should be carried into effect by the Court of Claims.

It is objected to this view that General Butler's authority, from the Secretary of War, to contract, was limited to the prices paid by the government for arms similar to those purchased by him, and that this court finds that Enfield rifles were then being purchased at from \$20 to \$23 per gun.

We do not so understand the order to General Butler. His order was to raise, arm and equip six thousand men, "provided the cost of such recruitment, armament, and equipment, does not exceed in the aggregate that of like troops now or hereafter raised for the service of the United States."

Our first observation is, that this must evidently have been merely directory to General Butler; for it could not have been supposed that he could contract with any person for arms, clothing, etc., at prices to be determined by what the government could buy them for afterwards.

2. General Butler was only required to bring the costs of recruiting, arming and equipment, in the aggregate, within that of like troops raised for the service. This, of course, left him a discretion in contracting for each article he needed, provided the amount of all his contracts did not exceed the expense laid down by the rule.

The judgment of the Court of Claims is reversed, with instructions to the court below to enter a judgment for the plaintiff for the difference between \$20 and \$27 each for the 3,200 guns described in the second voucher.

THE UNITED STATES, *Pff.*,

v.

JOHN W. KIRBY, A. G. HUGHES, RICHARD MORROW, DAVID KEMPLER AND DEWITT C. KEMPLER.

(See S. C., 7 Wall., 482-487.)

Arrest of mail carrier for murder, is not obstructing mail.

The arrest of a mail-carrier upon bench-warrants from the Circuit Court of Kentucky upon an indictment for murder was not an obstruction of the mail within the meaning of the Act of Congress. Such arrest was not obstructing or retarding the passage of a carrier of the mail within the meaning of that Act.

NOTE.—Obstructing the mail; what constitutes the offense.

A warrant in a civil suit against a mail carrier is no justification for the arrest of such carrier, though the officer may have acted in ignorance of the Act of Congress (4 S. at L. 104), and though the carrier was not detained longer than was necessary for the

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[No. 187.]

Argued Apr. 5, 1863. Decided Apr. 15, 1863.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Kentucky.

The case is fully stated by the court.

Messrs. E. R. Hoar, Atty. Gen., and J. Hubley Ashton, Asst. Atty. Gen., for the United States:

1. The weight of authority upon the questions here involved is decidedly in favor of the position of the government, that the arrest of the carrier of the mail under the warrant was an obstruction of the mail and of the carrier thereof, within the intent and meaning of the Act of Congress. *U. S. v. Barney*, 3 Am. Law Jour., 128.

This case was decided by Judge Winchester, in Maryland District, in 1810. The indictment was under Act of March 3, 1799 (1 Stat., 738), which is in the same words as the Act of 1825, sec. 9. The detention there was by an inn-keeper under a lien for the keep of the horses employed in carrying the mail; and the court held that the defendant was not justified. Judge Winchester said:

"The statute is a general prohibitory Act."

It has introduced no exceptions. The law does not allow any justification of a willful and voluntary act of obstruction to the passage of the mail," etc.

3 Hall, Law Jour., 181; *U. S. v. Harvey*, 8 Law Rep., 77.

The indictment in this case was under the Act of 1825, and was against a constable for arresting the mail-carrier under a warrant in an action of trespass. Chief Justice Taney held that the mere serving of the warrant would not render the party liable; yet, "If by serving the warrant he detained the carrier, he would then be liable."

The late Chief Justice further said: "We do not construe the term 'willfully' in the same sense as the traverser's counsel. If the traverser by serving the warrant detain the carrier, then he willfully detained him in the sense that word is used in the Act of Congress."

To the contrary of these decisions, perhaps, is the opinion of Mr. Justice Washington, in *U. S. v. Hart*, 1 Pet. (U. C.), 890.

In that case it was held that the Act of Congress was not to be construed so as to prevent

the arrest of the driver of a carriage in which the mail is carried, when he is driving through a crowded city at an improper rate.

2. The word "willfully" in the Act of 1825, means no more than intentionally or designedly.

1 Bish. Cr. L., 422; 2 Russ. Cr., 594; *Commonwealth v. Bradford*, 9 Met., 270.

3. The writ of no state court can properly run into the sphere of the exclusive dominion of the Government of the United States, and persons engaged in carrying the mail are within the sphere of that dominion, while in actual custody of the mail and actually employed in the carriage of it. *Ableman v. Booth*, 21 How., 516 (62 U. S., XVI., 178).

If, as this court has decided, no state court can by its process take a thing, in the lawful custody of an executive officer of the United States, out of the possession of that officer, it would seem that no state process can lawfully take an officer of the United States away from a thing, such as the mail of which he is in the lawful custody and possession, for the purpose of exercising one of the governmental functions of the United States.

To obstruct such an officer under such circumstances, is to obstruct the Government of the United States; and this cannot lawfully be done by any State.

Slocum v. Mayberry, 2 Wheat., 9; *Harris v. Dennis*, 8 Pet., 804; *Taylor v. Carryl*, 20 How., 596 (61 U. S., XV., 1032); *Freeman v. Howe*, 24 How., 458 (65 U. S., XVI., 751).

(No counsel appeared in this court for defense.)

Mr. Justice Field delivered the opinion of the court:

The indictment in this case is founded upon the 9th section of the Act of Congress of March 3, 1825, "To Reduce into One, the Several Acts Establishing and Regulating the Post-office Department," which provides that, "If any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same, he shall, upon conviction for every such offense, pay a fine not exceeding \$100; and if any ferryman shall, by willful negligence or refusal to transport the mail across the ferry, delay the same, he shall forfeit and pay for every ten minutes that the same shall be so delayed, a sum not exceeding \$10." 4 Stat. at L., 104.

execution of the warrant. *U. S. v. Harvey*, 8 Law Rep., 77.

The law does not allow any justification of a willful and voluntary act of obstruction to the passage of the mail, such as the seizure, by its lawful owner, of a stolen horse found in a mail stage, or the arrest of its driver for debt. *U. S. v. Barney*, 3 Am. L. J., 128.

The Act of Congress prohibiting the stoppage of the mail, is not to be so construed as to prevent the arrest of the driver of a carriage transporting the mail when he is driving through a crowded city at such a rate as to endanger the lives of the inhabitants. *U. S. v. Hart*, Pet. C. C., 890; S. C., 3 Wheel-er's Crim. Cas., 304.

Restricting speed of trains to six miles an hour by city ordinances does not conflict with Act relative to willful obstruction of mail carriers. 5 Op. Atty-Gen., 554.

Mere service of process on carrier without detention is not obstruction of mail. *U. S. v. Harvey*, 8 Law Rep., 77.

The present statute is as follows: Any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver,

or carrier carrying the same, shall, for every such offense, be punishable by a fine not more than one hundred dollars. U. S. R. S., sec. 3995.

Preventing a horse being supplied to carry mail, as by detaining him under a lien for his keep, is not punishable under above section; the law contemplates retarding the passage of the mail, and applies only when it is in actual transit. *U. S. v. McCracken*, 3 Hugh, 344.

A lien for keep of horses is no defense for stopping or detaining horses actually carrying or drawing the mail, in transit. *U. S. v. Barney*, 8 Hugh, 545; S. C., 3 Hall's L. J., 128.

The above section applies where mail is carried by mail car in a passenger train which is unlawfully stopped by persons who are willing to permit the passage of the mail car detached from the passenger cars of the train. *U. S. v. Clark*, 23 Int. Rev. Rec., 306.

A mail carrier, although he may not, while in discharge of his duty, be detained upon any civil suit, is legally liable to arrest on a charge of any criminal offense, as a violation of the law against the sale of liquor. *Penny v. Walker*, 64 Me., 480; S. C., 18 Am. Rep., 290.

See 7 WALL.

The indictment contains four counts, and charges the defendants with knowingly and willfully obstructing the passage of the mail of the United States, in the District of Kentucky, on the 1st of February, 1867, contrary to the Act of Congress, and with knowingly and willfully obstructing and retarding at the same time, in that District, the passage of one C. W. Farris, a carrier of the mail, while engaged in the performance of his duty, and with knowingly and willfully retarding, at the same time, in that District, the passage of the steamboat, General Buell, which was then carrying the mail of the United States from the City of Louisville, Kentucky, to the City of Cincinnati, Ohio.

To this indictment, the defendants, among other things, pleaded specially to the effect that, at the September Term, 1866, or the Circuit Court of Gallatin County, in the State of Kentucky, which was a court of competent jurisdiction, two indictments were found by the grand jury of the county against the said C. W. Farris, for murder; that by order of the court, bench-warrants were issued upon these indictments, and placed in the hands of J. W. Kirby, one of the defendants, who was then sheriff of the county, commanding him to arrest the said Farris and bring him before the court to answer the indictments; that in obedience to these warrants, he arrested Farris, and was accompanied by the other defendants as a posse, who were lawfully summoned to assist him in effecting re-arrest; that they entered the steamboat, Buell, to make the arrest, and only used such force as was necessary to accomplish this end; and that they acted without any intent or purpose to obstruct or retard the mail or the passage of the steamer. To this plea the District Attorney of the United States demurred, and upon the argument of the demurrer, two questions arose:

First. Whether the arrest of the mail-carrier upon the bench-warrants from the Circuit Court of Kentucky, was, under the circumstances, an obstruction of the mail, within the meaning of the Act of Congress.

Second. Whether the arrest was obstructing or retarding the passage of a carrier of the mail, within the meaning of that Act.

Upon these questions the judges were opposed in opinion, and the questions are sent to this court upon a certificate of division.

There can be but one answer, in our judgment, to the questions certified to us. The Statute of Congress by its terms applies only to persons who "knowingly and wilfully" obstruct or retard the passage of the mail, or of its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. All persons in the public service are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. Process of that kind can, therefore, furnish no justifica-

tion for the arrest of a carrier of the mail. This is all that is decided by the case of the *U. S. v. Harvey*, 8 Law Rep., 77, to which we are referred by the counsel of the government. The rule is different when the process is issued upon a charge of felony. No officer or *employé* of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt the *employés* of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.

The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "That whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1 Edward II., which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the Act of Congress which punishes the obstruction or retarding of the passage of the mail, or its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.

The questions certified to us must be answered in the negative; and it is so ordered.

Cited—16 Wall., 163; 100 U. S., 244; 7 Sawy., 546, 558; 18 Am. Rep., 272 (4 Me., 430).

FREDERICK S. BLITZ, *Piff. in Err.*,
v.

WILLIAM A. BROWN ET AL.

(See S. C., 7 Wall., 698, 694.)

Insufficient authentication of transcript—new writ of error.

Where there was only a blank form of a certifi-
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cate of authentication to the transcript filed, without the seal of the court below or the signature of its clerk, this court has no jurisdiction of the case, and it must be dismissed.

The plaintiff may have leave to withdraw the record, but the case can be brought here only by a new writ of error.

[No. 218.]

Argued Apr. 9, 1869. Decided Apr. 15, 1869.

IN ERROR to the Supreme Court of the District of Columbia.

This action was brought by the defendants in error in the Supreme Court of the District of Columbia, to recover money for goods, etc., and on accounts stated. Judgment having been obtained against him in that court, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

On motion to dismiss.

Messrs. J. M. Carlisle and J. D. McPherson, for defendants in error.

Mr. J. H. Bradley, for plaintiff in error.

Mr. Chief Justice Chase delivered the opinion of the court:

In this case no authenticated transcript of the record has been filed. That which purports to be a transcript contains only a blank form of a certificate of authentication, without the seal of the court below or the signature of its clerk. The filing of such a paper is not the filing of the transcript at the next term after the issuing the writ of error, without which we can have no jurisdiction of the case. The motion to dismiss must be allowed.

A motion has also been made in behalf of the plaintiff in error, for leave to withdraw the paper from the files, in order that the blank certificate may be duly signed and sealed, and then when thus perfected, the record may be returned and have its place on the docket, as if regularly filed according to law and the practice of the court.

Leave to withdraw the record is granted, but the residue of the motion must be denied.

The case can be brought here only by a new writ of error.

JOSIAH MORRIS and JOHN F. JOHNSON, Claimants of 120 BALES OF COTTON,
Appts.,

v.

THE UNITED STATES.

(See S. C., 7 Wall., 578-580.)

Information—admiralty proceedings.

In a case of only the unlawful conversion of property, a proceeding by information cannot be sustained.

Neither the Act of 1861 nor the Act of 1862 contemplated any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.

[No. 163.]

Submitted Apr. 9, 1869. Decided Apr. 15, 1869.

APPEAL from the District Court of the United States for the Middle District of Alabama.

This case arose upon an information exhibited in the District Court of the United States for the Middle District of Alabama, against one hundred and twenty bales of cotton on land, marked T. H. Watts and Josiah Morris and See 7 WALL.

John F. Johnson, praying for the forfeiture of said cotton and for judgment against said Morris and Johnson for the value thereof in money.

The court below found as matters of fact:

That prior to December 1, 1862, said cotton was the property of said Thos. H. Watts, who about that time sold the same to the Confederate States, so called, for the purpose of aiding the rebellion; that said cotton remained the property of the so called Confederate States at the time of the surrender of General Richard Taylor, and was included in the terms of such surrender, and yielded up to the United States as subject of war; that, prior to said surrender, said Johnson had stored said cotton to the use of said so called Confederate States for about three years, and then sold the same to said Morris, who in turn sold the same to other parties; that said sales were both made with full knowledge by defendants of the ownership of said cotton by the so called Confederate States, and without any authority from or knowledge of said States or their agents.

Whereupon the said court found as matters of law:

That the said cotton was lawful subject of prize and capture and condemnation; and that the United States is entitled to recover against the defendants the full value thereof.

Judgment of condemnation having been decreed against said cotton, and judgment for the value thereof against said Johnson and Morris, an appeal was taken by them to this court.

Mr. W. P. Chilton, for appellants.

1. A libel for forfeiture under the Act of August 6, 1861, or July 18, 1862, must aver that the thing sought to be condemned has been seized, and that seizure still subsists.

The Washington, 4 Blatchf. C. C., 101, 17; *Law Rep.*, 477; *Taylor v. Carryl*, 20 How., 583 (61 U. S., XV., 1028); *The Silver Spring*, 1 Spr., 551; 4 Cranch, 2; 2 Ware, Adm., 362.

The seizure is a jurisdictional fact. See same authorities.

2. Denial of right, to jury, was erroneous under *Union Ins. Co. v. U. S.*, 6 Wall., 769 (73 U. S., XVIII., 879); *Armstrong's Foundry*, 6 Wall., 766 (73 U. S., XVIII., 882); *The Sarah*, 8 Wheat., 391; *U. S. v. The Vengeance*, 3 Dall., 297.

3. Only in cases of prizes and captures during the rebellion, is condemnation in admiralty authorized by the statute. 12 Stat. at L., 319.

Messrs. Wm. M. Everts, Atty-Gen., and J. Hubley Ashton, Asst. Atty-Gen., for appellees.

Mr. Chief Justice Chase delivered the opinion of the court:

In this case an information was exhibited in the District Court of the United States, alleging in substance that certain bales of cotton had become the property of the United States through the surrender of the Confederate General, Taylor, on the 6th of May, 1865, or otherwise had become liable to seizure and condemnation under the Acts of Congress of August 6, 1861, and July 17, 1862; that this cotton was stored until some day in April, not specified, in the warehouse of the defendant, Johnson, and on some days not specified, in the year 1865, was removed by him and the defendant, Morris, from the warehouse and sold; and that the defend-

ants had appropriated the proceeds to their own use. The information did not allege that the cotton was at the time, or had ever been, in any place where it could be seized, or that any proceeds of the sale existed in any such form as to be capable of seizure.

The defendants answered, setting up various matters of defense, and filed with their answer several exceptions to the information, of which two only required notice.

The first was, that the information does not show any valid and subsisting seizure at the time of filing the information.

The second was, that the information did not allege any seizure under the Act of Congress.

These exceptions were overruled by the district court, which proceeded to render a personal judgment against the defendants for the value of the cotton, as found by the court.

In this the district court erred.

Without adverting to the principles settled in the cases of *Union Ins. Co. v. U. S.*, 6 Wall., 768 [73 U. S., XVIII., 881]; and *Armstrong's Foundry, &c.*, 769 [882], we are clearly of opinion—first, that the information, at most, presents only a case of the unlawful conversion of property to the use of the appellants, and that for redress of such an injury this proceeding by information cannot be sustained; and second, that neither the Act of 1861 nor the Act of 1862 contemplated any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.

The decrees of the District Court must, therefore, be reversed, and the cause remanded, with directions to the District Court to cause restitution to be made to the appellants, of whatever sum of money they have been compelled to pay under that decree.

Cited—9 Wall., 606.

THE UNITED STATES, *Ptf. in Err.*, v.

ADDISON R. GILMORE, ENOS LOWE
AND GILBERT C. MORRELL, Impleaded
with JESSE WILLIAMS and FRANCIS R.
WEST.

(See S. C., 7 Wall., 491-495.)

In action on bond of receiver, what credits not allowed—error in their admission.

In an action on a bond of a receiver of public moneys, it is error to admit evidence of claims for credits which have not been presented to the accounting officers of the Treasury, for their examination, and by them disallowed in whole or in part.

To allow them to remain in the case was an error, and any instruction given afterwards, short of their withdrawal, was unavailing to cure it.

[No. 151.]

Submitted Apr. 8, 1869. Decided Apr. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

This action was brought in the court below by the plaintiffs in error, upon the bond of Gilmore, one of the defendants in error, as receiver and as depository of public moneys, to recover the sum of \$9,210.40 with interest, alleged to be due from said Gilmore. The trial resulted in a verdict and judgment for the

plaintiffs for \$17.42; whereupon the plaintiffs took an appeal to this court.

A further statement of the case appears in the opinion.

Messrs. E. R. Hoar, Atty. Gen., and J. Hubley Ashton, Asst. Atty. Gen., for plaintiff in error:

Two points are relied upon for a reversal of this judgment.

1. The court below erred in admitting the testimony of the defendant, Gilmore, to establish a claim for a credit against the United States for office rent; such claim not appearing to have been presented to the accounting officers of the Treasury for their examination, and by them disallowed.

9 Cranch, 236; 6 Wheat., 148; 10 Pet., 138; 2 Paine (C. C.), 69.

2. The court below erred in admitting the testimony of the same defendant, to prove a similar claim against the United States for clerk hire; such claim not appearing to have been presented to the accounting officers of the Treasury for their examination, and by them disallowed. *Vide* same authorities.

The defendant stated in his testimony, that he "presented these claims to the accounting officers and they were disallowed." But this does not meet the requirements of the law. See 4th sec. Act March 3, 1797, 1 Stat., 512. The fact of such presentation and disallowance must appear by a transcript from the books and proceedings of the Treasury, and cannot be established by parol.

(No counsel appeared for the defendants in error.)

Mr. Justice Swayne delivered the opinion of the court:

This is an action of debt upon the bond of Gilmore, one of the defendants in error, as receiver of public moneys "for the district of lands subject to sale in the Territory of Nebraska," and also as a depository of public moneys.

Upon the trial the defendants claimed a credit for the hire of certain clerks employed by Gilmore as such depository, and offered proof in support of the demand. The attorney of the United States objected to the admission of the evidence upon several grounds. One of them was, that it must first be shown that the claim had been exhibited to the proper accounting officer of the Treasury and disallowed, and that the exhibition and disallowance could be proved only by the certificate of such officer. "Whereupon the court stated it would permit the evidence, and control the matter by instructions to the jury. Objections overruled, the ruling excepted to by plaintiffs."

The same things occurred with reference to a claim for office rent, set up by Gilmore as such depository.

Gilmore subsequently testified as follows:

"I presented these claims to the accounting officer, and they were disallowed."

To what officer they were not presented is not disclosed. This is all the testimony the bill of exceptions contains upon the subject.

The statutory provisions prescribing what shall be done by the debtor in such cases are found in the 4th section of the Act of March 3d, 1797, 1 Stat. at L., 515. That section, so

far as it is material to be considered in the case before us, is as follows:

"In suits between the United States and individuals, no claim for a credit shall be admitted upon the trial but such as shall appear to have been presented to the accounting officers of the Treasury for their examination, and by them disallowed in whole or in part."

Those officers were then the auditor and comptroller. There was but one of each at that time. Act Sept. 2, 1789, 2 Stat., 66. It was made the duty of the auditor "to receive all public accounts, and after examination to transmit the accounts, with the vouchers and certificate, to the comptroller for his decision thereon."

The Act of the 25th of April, 1812, 2 Stat. at L., 716, created the General Land Office, and transferred to the commissioner the duties of auditor in respect to all accounts relating to the public lands. The Act of March 8d, 1817, 3 Stat., 367, created four additional auditors and one additional comptroller. It gave the charge of all accounts accruing in the Treasury Department to the first auditor, and made it his duty to report them to the first comptroller. The language employed is the same as that used in the Act of 1797. This did not affect the duties of the Commissioner of the General Land Office as to all accounts relating to public lands, which the Act of 1812 had devolved upon him.

Receivers and depositaries are required to keep accounts of their contingent expenses. Those accounts are separate and distinct from those of their receipts and disbursements of the public moneys. Where the offices of receiver and depositary are united in the same person, the expense accounts of the two offices are, nevertheless, required to be kept separate from each other.

The claims in question in the case before us grew out of that branch of Gilmore's duties which related to his office of depositary, and had no connection with his office of receiver. They should, therefore, have been presented to the first auditor for examination, and afterwards to the first comptroller for his final decision. If disallowed, the disallowances would have appeared in the "statement of the differences of account" transmitted by the auditor to the comptroller with the accounts, vouchers and certificate, as required by the statute. If the comptroller had confirmed the decision of the auditor, a transcript of the proceedings of those officers would have been the proper evidence for the defendants to produce.

If the claims were not presented until after the account was closed upon the books of the Treasury, still it was necessary to submit them for examination to both those officers. The action of both was necessary. A transcript showing that action would have been sufficient. Parol evidence in such cases is wholly inadmissible. Evidence from the books of the Treasury in some form is indispensable.

These remarks have no application to those provisions of the section under consideration which have not been referred to.

The court should not have permitted any proof of the claims to be given until the proper foundation for it had been laid. When the defendants failed to produce the evidence neces-

See 7 WALL.

sary to warrant the introduction of such testimony, all which had been given should have been excluded, and the claims withdrawn from the consideration of the jury. To allow them to remain in the case was an error, and any instruction given afterwards, short of their withdrawal, was unavailing to cure it. The course proposed to be pursued when the objection by the district attorney was taken, could hardly fail, under any circumstances, to mislead and confuse, and to prevent the proper trial of the cause. The object of pleading is to concentrate the controversy upon the questions of fact and of law, which should control the result. The value of the system in the administration of justice can hardly be too highly estimated. The exclusion from the testimony of everything irrelevant and incompetent is not less important.

Was the error committed by the admission of the testimony objected to subsequently remedied?

Nothing further upon the subject appears in the record but the following passages at the close of the bill of exceptions:

"The plaintiff requested the court to charge the jury as follows:

"1st. That in this action no claim for credit can be admitted as a defense, unless it is first shown to the jury that such claim was presented to the proper officer of the government for examination, and by such officer disallowed in whole or in part; or that the defendant, Gilmore, first shows that he was prevented from exhibiting such claim or account of expenses at the Treasury by absence from the United States, or some unavoidable accident."

Another instruction, not material to be stated, was also asked. The bill then proceeds:

"Which said two points were not given by the court in the form requested, but were substantially given in the oral charge of the court to the jury. The first point and the second were given with a modification, to which the plaintiffs then and there excepted."

What the modification of the first instruction was, to which this exception relates, is not shown. We cannot, therefore, consider it.

Whether the testimony in support of the claim was properly in the case was a question for the court, and not for the jury. Yet it was left to the latter for them to determine. It is clear that the incompetent testimony which had been admitted was not withdrawn from their consideration.

The judgment is, therefore, reversed, and the cause will be remanded to the Circuit Court, with instructions to issue a venire de novo.

Cited—9 Wall., 765.

ELLEN KELLY, Appt.,

v.

ELLEN OWEN, MARGARET KAHOE AND
PHILLIP KELLY.

(See S. C., 7 Wall., 496-499.)

Citizenship of women—under Act of Congress.

The Act of Congress of Feb. 10, 1855, confers the privileges of citizenship upon women married to citizens of the United States.

Under this Act, the citizenship of the husband,

whenever it exists, confers citizenship upon the wife.

The terms, "who might lawfully be naturalized under the existing laws," only limit the application of the law to free white women.

[No. 161.]

Submitted Apr. 8, 1869. Decided Apr. 15, 1869.

APPPEAL from the Supreme Court of the District of Columbia.

This appeal grows out of a bill filed by the appellees in the Supreme Court of the District of Columbia, holding a court of equity for the partition or sale of the real estate of the late Miles Kelly, the complainants being the brother and sisters or the deceased and their husbands, and the defendant his widow. Miles Kelly died, a naturalized citizen, and had acquired real estate in the District of Columbia, both before and after his naturalization.

The contest in this case arises solely over property acquired after naturalization, and which cannot pass to his alien representatives.

All the parties were aliens by birth. Ellen Kelly, the widow, was less than eighteen years of age when she came to this country. She married the decedent, Jan. 2, 1853, who was naturalized May 8, 1855, and who died without issue Mar. 2, 1862, intestate. Decedent's sisters were more than eighteen years old when they came to this country. Ellen Owen married a foreigner already naturalized. Margaret Kahoe married a foreigner, who subsequently became naturalized. The question arises on these facts: which, if any, of these three ladies were citizens of the United States by virtue of their marriage?

The court decreed that the property be sold and the proceeds of sale be paid to the appellant. The appellees excepted to the decree, and prayed an appeal to the General Term of the Supreme Court of said District, which appeal was duly heard and the decree of the *Chancellor* reversed, and a decree passed ordering the proceeds of sale to be paid to the appellant and appellees, as the widow and sisters of said Kelly, deceased. The appellant took an appeal to this court.

Messrs. R. J. Brent and S. L. Phillips, for appellant:

A woman "who might lawfully be naturalized under existing laws," means one who has fulfilled the conditions of the Act of 1862, viz.: 1. Has declared on oath or affirmation intention of becoming a citizen. 2. Has, at time of making application, taken oath of allegiance. 3. Has resided five years, etc.

Marriage does not obviate the necessity of fulfilling these conditions, but only the necessity of applying to the court for the decree and of taking the oath of allegiance.

Mr. Wm. Jno. Miller, for appellees:

The words "who might lawfully be naturalized under existing laws," requires no more than that the alien woman claiming its benefits be a "free white woman, a resident of the United States, and not an alien enemy."

Act, Apr. 14, 1862, 2 Stat. at L., 153, sec. 1, *Id.*, sec. 4, Condition; *Burton v. Burton*, 1 Keyes, 859.

Mr. Justice Field delivered the opinion of the court:

This is a suit in equity, for the sale or partition of certain real estate, situated within the District of Columbia, of which Miles Kelly was

seized at the time of his death, in March, 1862. The deceased died intestate, and without issue, leaving surviving him, in the United States, a widow, Ellen, and two sisters, Ellen Owen and Margaret Kahoe. The widow claimed the entire estate, after the payment of the debts of the deceased, to the exclusion of the sisters, who claimed that they were entitled, as his heirs at law, to a share of the same. The court rendered a decree in favor of the widow, and the sisters appealed to the Supreme Court of the District, where the decree was reversed, the latter court holding that the sisters were entitled to a share of the estate.

The case turns upon the construction given to the 2d section of the Act of Congress of February 10th, 1855, which declares "that any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." 10 Stat. at L., 604.

As we construe this Act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous Acts of Congress provides. The terms "married," or "who shall be married," do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that, whenever a woman, who under previous Acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the Act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers, under the Act, citizenship upon her. The construction which would restrict the Act to women whose husbands, at the time of marriage, are citizens, would exclude far the greater number, for whose benefit, as we think, the Act was intended. Its object, in our opinion, was to allow her citizenship to follow that of her husband, without the necessity of any application for naturalization on her part; and, if this was the object, there is no reason for the restriction suggested.

The terms, "who might lawfully be naturalized under the existing laws," only limit the application of the law to free white women. The previous Naturalization Act, existing at the time, only required that the person applying for its benefits should be "a free white person," and not an alien enemy. Act of April 14th, 1862, 2 Stat. at L., 153.

A similar construction was given to the Act by the Court of Appeals of New York, in *Burton v. Burton*, 40 N. Y., 373; and is the one which gives the widest extension to its provisions.

It follows, from these views, that the widow and the two sisters were citizens of the United States upon the decease of the intestate husband. The widow and Margaret Kahoe became such on the naturalization of their respective husbands, and Ellen Owen became such on her marriage. The sisters are, therefore, entitled to share with the widow in the estate of the deceased, and the decree of the Supreme Court of the District must be affirmed.

Ordered accordingly.

Cited—6 Sawy., 606; 80 N. Y., 177.

SAMUEL H. RANDALL, *Plff. in Err.*,

LINCOLN F. BRIGHAM.

(See S. C., 7 Wall., 522-541.)

Judges not liable to suit for judicial act—nor for removal of an attorney—practice on such removal—notice to the attorney—state construction of State Constitution conclusive on this court.

Judges of limited and inferior authority are not liable to a civil action for any judicial act within their jurisdiction.

Judges of superior or general authority, are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, when done maliciously or corruptly.

An action cannot be maintained by an attorney against a judge, for a wrongful removal of him from the bar.

It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them.

All that is requisite to their validity is that, when not taken for matters occurring in open court, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense.

The manner in which the proceedings shall be conducted, is a matter of judicial regulation.

Construction of a State Constitution by the highest court of the State, not called in question by any conflicting decision of that court, is conclusive upon this court.

[No. 141.]

Argued Apr. 6, 1869. Decided Apr. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This action was brought in the court below by the plaintiff in error, to recover damages resulting from an alleged wrongful removal of him from the bar by the defendant, one of the Judges of the Superior Court of Massachusetts. The trial having resulted in a verdict and judgment in favor of the defendant, the plaintiff sued out this writ of error.

A very full statement of the facts of the case appears in the opinion of the court.

Mr. Samuel H. Randall, in person:

1. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."

Art. 10, Declaration of Rights; Const. of Mass., adopted A. D. 1780.

The terms "life, liberty and property" comprehend every right known to the law. Property includes those estates which one may acquire in professions, which are often the source of the highest emoluments and honor.

Cummings v. Missouri, 4 Wall., 277 (71 U. S., XVIII., 356); *Per Field, J.*; *Gorham v. Luckett*, 6 B. Mon., 146; *Allen v. McKeen*, 1 Sumn., 277; *Sevier v. Justices of Wash. Co.*, Peck, Tenn., 334; *Avery v. Tyngbam*, 3 Mass., 160; *Hardin Co. v. Hardin*, Peck (Tenn.), 291; *Wammack v. Holloway*, 2 Ala., 81; *Brewer v. Davis*, 9 Humph., 208; *Miller v. Taylor*, 4 Burr., 2345; *Shaw's case*, 12 Mod., 118; *Bentley's case*, 1 Str., 557; *Gaskin's case*, 8 T. R., 209; *Queen v. Gov. of Dartington School*, 6 A. & E. (N. S.), 700; *Capel v. Child*, 2 Crompt. & J., 558; *Queen v. Smith*, 5 Q. B., 621; *Queen v. Saddler's Co.*, 10 H. of L. cases, 404; *McMahon v. Lennard*, 6 H. of L. cases, 970; *Willis v. Gipps*, 5 Moo. (P. C.), 379; *Rogers v. Dutt*, 18 Moo. (P. C.), 209; *Bonaker v. Beans*, 16 Q. B., 162; *Ex parte Ramahay*, 18 See 7 WALL.

Q. B., 187; *Wilde v. Russell*, 12 Jur. (N. S.), 645; *People v. Burbank*, 12 Cal., 378; *Culder v. Bull*, 8 Dall., 386; *Fletcher v. Peck*, 6 Cranch, 135; *James Prescott's trial* before Senate of Mass., 122; 2 Bl. Com., secs. 36, 37.

The Statute of Massachusetts which provides for and authorizes the admission of applicants when found to be duly qualified by the Supreme Judicial or Superior Court, to the office of attorney at law, with the right and privilege to practice when admitted by either court, in all the courts of the State, makes no limitation of the time for which the office shall be held and enjoyed; but provides that "An attorney may be removed by the Supreme Judicial or Superior Court for any deceit, malpractice or other gross misconduct. Gen. Stat., ch. 121, secs. 28-34.

The grant of the "office of attorney" at common law, is the grant of an office for the life or during the good behavior of the grantee; and it has been variously declared by the courts to be a "license," "a privilege," "a franchise," "a freehold," "a right to practice law in courts," and "a profession which is the high road to wealth and distinction."

7 Bouv. Bac. Abr., "Office," 808; *Ex parte Hennen*, 13 Pet., 259; *Ex parte Garland*, 4 Wall., 383 (71 U. S., XVIII., 386); *Ex parte Austin*, 5 Rawle, 194; *Ex parte Sweet*, 20 Pick., 1; *Ex parte Gephard*, 1 Johns. Cas., 184; *Ex parte Secombe*, 19 How., 9 (60 U. S., XV., 565); *Ex parte Burr*, 9 Wheat., 529; *Ex parte Sayre*, 7 Cow., 368; *Ex parte Leigh*, 1 Munf., 481; *Ex parte Fisher*, 6 Leigh, 619; *Iowa v. Stark*, 7 Ia., 499; *Anonymous*, 4 Johns., 191; *In re Cooper*, 22 N. Y., 81; *In re Dorsey*, 7 Port., 381; "Judges' Opinions," 20 Johns., 472; *Bruce v. Fox*, 1 Dana, 450; *Fletcher v. Dingersfield*, 20 Cal., 430; *People v. Turner*, 1 Cal., 151; *Bradley's case*, 7 Wall., 364 (*infra*, 214); 13 Mass. Law Rep., 480; *Viss v. Hamilton Co.*, 19 Ill., 78; *Commons v. Judges of Cumberland Co.*, 1 Serg. & R., 187; *Ex parte Heyfron*, 7 How. (Miss.), 187; *People v. Lamborn*, 1 Scam., 123; *Mills' case*, 1 Mich., 193; *Chapman's case*, 11 Ohio, 489; *In re King*, 8 Q. B., 129; *Hurst's case*, 1 Lev., 75; *Gillman v. Wright*, 1 Sid., 410; *White's case*, 6 Mod., 18; *Hastings' case*, 1 Sid., 410; *King v. Sheriff of York*, 2 Show., 154; *Barber's case* in English courts; *In re The Justices of Antigua*, 1 Knapp (P. C.), 267; *In re Monckton*, 1 Moo. (P. C.), 55; *Smith v. Justices of Serra Leone*, 8 Moo. (P. C.), 331; *In re Downis and Arrindell*, 8 Moo. (P. C.), 414; *Morgan v. Leach*, 8 Moo. (P. C.), 368; *Miller v. Hope*, 2 Shaw, App. Cas., 125; Stat. 4 Hen. IV., ch. 18; Stat. 3 James I., ch. 7; Stat. 2 George II., ch. 28; Stat. 6 George II., ch. 27; Stat. 6 and 7 Vict., ch. 78, sec. 27; *Withers v. State*, 36 Ala., 253; Act Sept. 24, 1789, sec. 85; 1 Stat. at L., 92.

"The position in England is, that unless the statute which creates the office limits its tenure at the time of the creation, it is an office for life as at the common law." *Ex parte Hennen*, 13 Pet., 259.

In *Hurst's case*, 1 Lev., 75, a *mandamus* was granted to restore him to his office, because it was said: "He is an officer concerning the public justice, and is compellable to be an attorney for any man, and has a freehold in his place."

Lord Hope, *Ch. J.*, re-affirmed this doctrine in *White's case*, 6 Mod., 18.

"An attorney and counselor being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency."

Ex parte Garland, 4 Wall., 338 (71 U. S., XVIII., 386).

"The office of an attorney is not put above the judiciary, and is entitled only to an equal share of independence."

"An attorney at law is an officer of the court, and his office is an office for life. The grant of an office without express limitation at common law being taken most strongly against the grantor, endures for the life of the grantee; and though the principle has not been applied to offices within the grant of the Executive, it must necessarily be applied to the office of attorney. For to subject the members of the profession to removal at the pleasure of the court, would leave them too small a share of the independence necessary to the duties they are called upon to perform to their clients and to the public. As a class, they are supposed to be, and in fact always have been, the vindicators of individual rights and fearless assertors of the principles of civil liberty; existing where alone they can exist in a government, not of parties or men, but of laws."

2. "No subject shall be held to answer for any crimes or offenses until the same is fully and plainly, substantially and formally described to him; nor be compelled to accuse or furnish evidence against himself, and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face; and to be fully heard in his defense by himself or his counsel, at his election; and no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land."

Art. 12, Declaration of Rights, Const. of Mass., 1780.

And the same provisions are substantially in all the American Constitutions.

See *Green v. Briggs*, 1 Curt. (C. C.), 325; *Wynhamer v. People*, 13 N. Y., 392; *Magna Charta*, ch. 29; art. 5, Amended U. S. Const.

At the common law, the words "crime and offense" are used as substantially synonymous and universal terms; and as comprehending every act for which a forfeiture of any legal right might be worked or penalty imposed or punishment inflicted in any form of judicial proceeding.

Tomlin, Law Dic., 664, tit. "Crime;" Bouv. Law Dic., 1868 ed., and cases cited; 2 Swift, Abr., 284; 4 Bl. Com., 5, 6, and n. 8, Wend. ed.; *Kentucky v. Dennison*, 24 How., 99 (65 U. S., XVI., 726); 1 Chit. Pr., 14; *King v. Shaw*, 12 Mod., 118; 1 Bish. Cr. L., sec. 48; 2 Burr. Law Dic., 766; *Bonaker v. Evans*, 16 Q. B., 171; *James Prescott's Trial*, 124.

The words the "law of the land," as they

stand in *Magna Charta* and the Amer. Const., mean "due process of law." And "due process of law" implies that in every judicial proceeding there shall be some form of legal process; sufficient allegations or charge; due notice to the party proceeded against; the opportunity to answer to and contest the charge or allegations, and to be heard or tried in a legal and regular course of judicial proceedings, by an impartial judge and judgment of the law only upon the matter charged, if duly established or proved against the party, of which a legal record shall be preserved as a memorial of the cause. And these rights exist in all cases, civil or criminal, whether by the exercise of the court's ordinary jurisdiction with trial by jury, or by the exercise of the discretionary or summary jurisdiction of a court, without the right to trial by jury.

Steamboat Co. v. Foster, 5 Ga., 194; *Greene v. Briggs*, 1 Curt., 325; *Bk. of Col. v. Okely*, 4 Wheat., 224; *Same v. Ross*, 4 Harr. & McH., 456; *McGinnis v. State*, 9 Humph., 48; *Murry v. Askew*, 6 J. J. Marsh., 27; *Wells v. Caldwell*, 1 A. K. Marsh., 441; *Lewis v. Garrett*, 5 How. (Miss.), 434; *Hoke v. Henderson*, 4 Dev., 15; *Ervine's App.*, 16 Pa., 263; *Norman v. Heist*, 5 Watts & S., 171; *Wynhamer v. People*, 13 N. Y., 392; *Com. v. Davis*, 11 Pick., 434; *Com. v. Dean*, 21 Pick., 334; *Com. v. Philips*, 16 Pick., 218; *Com. v. Blood*, 4 Gray, 32; *Capet v. Child*, 2 Crompt. & J., 558; *Dimes v. Grand Junc. Canal*, 8 H. of L., 759; *Ex parte Ramshay*, 18 Q. B., 187; 2 Co. Inst., 50; *Murray v. Hoboken Land Co.*, 18 How., 280 (59 U. S., XV., 376); *Taylor v. Porter*, 4 Hill, 146; *Fisher v. McGirr*, 1 Gray, 37; *In re Dorsey*, 7 Port., 405; *In re Pitman*, 1 Curt., 186; *Reg. v. Baines*, 2 Ld. Raym., 1265; 2 Kent, Com., 18, n.; 8 Story, Com. Const., 661; *Bagg's case*, 11 Coke, 97; *Rez v. Robe*, 2 Str., 999; *Rez v. Mayor of Liverpool*, 2 Burr., 731; *Rez v. Univ. of Cambridge*, 1 Str., 564; *Bonaker v. Evans*, 16 Q. B., 162; 3 Bl. Com., secs. 273-296; 4 Bl. Com., ch. 20; *Sayles v. Briggs*, 4 Met., 423; *James Prescott's Trial*, 122.

8. The summary jurisdiction of a court, therefore, does not mean that a judge can lawfully exercise an arbitrary power, will or discretion, without any process of law at all; but it is the exercise of a discretionary power vested, by the law, in the court, to proceed by summary process, for the purpose of a more expeditious and effectual dispensation of justice in those cases wherein the law has deemed the exercise of such power to be necessary by the court, without the intervention of a jury.

1 Bl. Com., book 4, ch. 20; Sullivan, Lect., sec. 39, p. 356; *People v. Turner*, 1 Cal., 151; *People v. Smith*, 3 Cal., 221; *Chapman's case*, 11 Ohio, 430; *In re Pitman*, 1 Curt., 186; *Darby's case*, 3 Wheel. (C. Cas.), 5; *Bradley's case*, 19 Bos. Law Rep., 430; *Gorham v. Luckett*, 6 B. Mon., 146; *Vaneandt v. Waddel*, 2 Yerg., 260; Stat. 12th George I., ch. 29.

The discretionary power of a court is one thing; the discretion of a judge while in the exercise of that power, another.

The discretion of the court is the exercise of its incidental powers, or of its judgment on any occasion that calls for it after jurisdiction has vested in the court, whether in an ordinary or in a summary or discretionary proceeding.

The discretion of a judge is the exercise of an arrogated or usurped power, before any, or where no sufficient jurisdiction as a court has vested in him at all. In the one case, the discretion is legal and judicial; in the other, illegal and arbitrary. In the former, a judge is in the regular exercise of the functions of a court as the agent and representative of the law; in the latter, he is a tyrant and a law unto himself.

Piper v. Pearson, 2 Gray, 120; *Heard v. Pierce*, 8 Cush., 888; *Com. v. Barry*, Hardin, 248; *Harvis v. Cammack*, 6 Dana, 248; *Rez v. Wilkes*, 4 Burr, 2539; *Rez v. Young*, 1 Burr, 563; *Wilmon v. Ely*, 4 Serg. & R., 265; *Bouv. Dic.*, Discretion, and cases cited; L. Code, art. 3522, No. 13; 2 *Bouv. Bac. Abr.*, p. 630, and cases cited; *Steamboat Co. v. Foster*, 5 Ga., 204; 3 *Bl. Com.*, ch. 22, sec. 327.

4. Any proceeding which comprehends within itself what is technically called a charge, and which involves a determination of the guilt or innocence of a party, may be justly regarded as a criminal proceeding.

A proceeding is clearly criminal in its nature, which occasions any deprivation of a party's rights for official misconduct or other legal offense. And it is no less criminal or penal in its nature, because the same party may be further liable for the same act which works the forfeiture of the particular right or office to other punishment provided by the laws of the land, or may have already been convicted and punished therefor.

In re Pitman, 1 Curt., 189; *Ex parte Brown*, 1 How. (Miss.), 308; *State v. Holding*, 1 McCord, 379; *Anonymous*, 2 Halst., 162; *Const. of Mass.*, ch. 1, sec. 2, art. 8; *Const. of U. S.*, art. 1, sec. 8; *In re King*, 8 Q. B., 129; *Ex parte Brounsall*, Cow., 829; *Stephens v. Hill*, 10 M. & W., 28; *Cummings v. Missouri*, 4 Wall., 820 (71 U. S., XVIII., 362); *James Prescott's Trial*, 180; *John Vinat's Trial*, reported in app. to *Prescott's case*, 216; *King v. Southerton*, 6 East, 127; *Smith's case*, 1 Brod. & B., 522; *Smith's case*, 1 Yerg., 238.

5. But at common law, whether a proceeding be criminal, or civil, or of a mixed or dual nature, if it has the character of a judicial proceeding, some form of legal process adapted to the particular case must universally be instituted or laid as the foundation of the proceeding, notice of the same given, and the opportunity presented to the party to make his defense and to be legally and regularly tried or heard, ere any judgment, or order of forfeiture or deprivation of any freehold office or legal right can lawfully be effected or inflicted for any purpose by any tribunal whatsoever; and if in any essential particular the proceeding is irregular or defective, the conviction will not be by due process of law, and the judgment will be a nullity.

Rez v. Lodiard, Sayers, 6; *Queen v. Sadler's Co.*, 10 H. of L. Cas., 404; *Queen v. Smith*, 5 Q. B., 621; *In re Monckton*, 1 Moo. (P. C.), 455; *Bowerbank v. Bishop of Jamaica*, 2 Moo. (P. C.), 470; *Smith v. Justices of Sierra Leone*, 3 Moo. (P. C.), 861; *Gahan v. Lafitte*, 3 Moo. (P. C.), 382; *Willis v. Gipps*, 5 Moo. (P. C.), 379; *Wildes v. Russell*, 12 Jur. (N. S.), 645; *Capel v. Child*, 2 Crompt. & J., 558; *Rez v. Gaskin*, 8 T. R., 209; *Howard v. Gosset*, 10 Q. B., 381; *Bonaker v. Evans*, 16 Q. B., 162; *Ex*

parte Ramshay, 18 Q. B., 187; *Ex parte Kinning*, 4 C. B., 507; *Gorham v. Luckett*, 6 B. Mon., 146; *Murray v. Oliver*, 8 B. Mon., 1; *Greene v. Briggs*, 1 Curt., 325; *Bish. Cr. Pr.*, sec. 1001; *Broom, Max.*, 3 Lond. ed., 10; *Sevier's case*, Peck (Tenn.), 384; *Sheldon v. Newton*, 3 Ohio St., 498; *McClure v. Tenn.*, 1 Yerg., 228; *Hollingsworth v. Duane*, Wall. (C. C.), 141; *Ex parte Heyfron*, 7 How. (Miss.), 127; *Fletcher v. Daingerfield*, 20 Cal., 427; *People v. Turner*, 1 Cal., 150; *Fisher's case*, 6 Leigh, 619; *Dynes v. Hoover*, 20 How., 82 (61 U. S., XV., 844); *James Prescott's Trial*, 1821, p. 164; *Greenleaf's Trial*; *Hunt's Trial*; *Copeland's Trial*.

6. Analysis of the essential and fundamental elements or requisites of every judicial proceeding affecting any right to "life, liberty or property," at the common law, and necessary to satisfy the requirements of *Magna Charta*, or the principles of natural justice.

There must be some form of original process or original proceeding, or original order of court filed or made of record in court, as the beginning or foundation, and as the first element or premise on which to support the judgment of the law.

2 *Bl. Com.*, book 8, chaps. 18, 19; *Greene v. Briggs*, 1 Curt., 330; *Deane v. Calching*, 2 How. (Miss.), 884; *Martin v. Marshal*, Hob., 68; *Perkin v. Proctor*, 2 Wils., 886; *Peter v. Stafford*, Hob., 244; *Capel v. Child*, 2 Crompt. & J., 577; *Bonaker v. Evans*, 16 Q. B., 163; *Charlton's case*, 2 Myl. & C., 323; *Seal v. Dossee*, 9 Moo. (P. C.), 411; *Ditcher v. Denison*, 11 Moo. (P. C.), 324; *Perrot v. Hele*, 3 Wils., 58; *Middleton v. Price*, 1 Wils., 17.

There must be a sufficient charge or allegation in writing annexed to or forming a part of the original process, or embodied in and constituting the beginning or foundation of the original judicial proceeding, as in the case of petition, complaint, articles of impeachment, bills of indictment, proceedings before courts-martial, informations, libels, written motions and affidavits, or those which must be filed as a separate pleading in the case.

Greene v. Briggs, 1 Curt., 325; 1 *Bish. Cr. Pr.*, sec. 41; *Buckley v. Blackwell*, 10 Ohio, 512; *Rez v. Fuller*, 1 Ld. Raym., 509; *Rez v. Trelooney*, 1 T. R., 222; *Commonwealth v. Phillips*, 16 Pick., 212; 2 *Hawk (P. C.)*, b. 2, ch. 25, sec. 30; *Rez v. Middlehurst*, 1 Burr., 399; *King v. Williams*, 1 Leach (C. C.), 584; *Hartmann v. Com.*, 5 Pa., 60; *Com. v. O'Donnell*, 1 Allen, 594; *Rez v. Richardson*, 1 Burr., 518; *Clegg's case*, 2 Burr., 726; *Rez v. Holland*, 5 T. R., 607; *Williams v. Bish. of Salisbury*, 2 Moo. (P. C.), N. S., 876; *Queen v. Owen*, 15 Q. B., 476; *King v. Shaw*, 12 Mod., 118; *King v. Horne*, Cowp., 672; *Fisher v. McGirr*, 1 Gray, 1; *Chapman's case*, 11 Ohio, 430; 3 *Bl. Com.*, sec. 292; 4 *Bl. Com.*, sec. 287; *Reg. v. Baynes*, Salk., 680; *Ex parte Ramshay*, 18 Q. B., 187; *Bowerbank v. Bish. of Jamaica*, 2 Moo. (P. C.), 470; *Rez v. Chapman*, Sayers, 203; *Queen v. Smith*, 5 Q. B., 621; *Willis v. Gipps*, 5 Moo. (P. C.), 379; *Cloete v. Queen*, 8 Moo. (P. C.), 484.

There must be legal notice of the charge and the opportunity to make defense. *Kendall v. U. S.*, 12 Pet., 623; *Rez v. Univ. of Cambridge*, 1 Str., 557; *Reg. v. Bail. of Ipswich*, 2 Salk., 485; *Rez v. Liverpool*, 2 Burr., 734; *Rez v. Cambridge*, 2 Ld. Raym., 1348; *Ever v. Cof-*

fin, 1 Cush., 27; *Queen v. Justices of Cambridgeshire*, 7 A. & E., 489; *Brown v. Webber*, 6 Cush., 564; *Herrick v. Smith*, 1 Gray, 50; *Woodward v. Tremere*, 6 Pick., 354; *Chaffee v. Hayward*, 20 How., 208 (61 U. S., XV., 804); *Bowbank v. Bish. of Jamaica*, 2 Moo. (P. C.), 470.

7. Some form of original process adapted to the particular proceeding having been laid with the charge or allegations made, and legal notice to the party given or appearance entered, and these fundamental and essential elements of a judicial proceeding appearing *prima facie* to exist in what is denominated "a case" upon the docket, there arises what in law is called "jurisdiction," or the lawful power to hear and determine the particular subject-matter which has been referred to the judgment of the court, and to which the authority of the court is limited in pronouncing the judgment of the law; provided, always, the tribunal be one having a general jurisdiction over the subject-matter which is contained in the particular case before it.

Sheldon v. Newton, 8 Ohio St., 498; *U. S. v. Arredondo*, 6 Pet., 709; *Queen v. Bethell*, 6 Mod., 17; *Hopkins v. Com.*, 8 Met., 462; *Kendall v. U. S.*, 12 Pet., 619; *Thomas v. Hudson*, 14 M. & W., 383; *Peter v. Stafford*, Hob., 244; *U. S. v. Clark*, 1 Gall., 500; *Shriver v. Lynn*, 2 How., 59; *Mitchell v. Foster*, 4 Perry & D., 154; S. C., 12 A. & E., 472; 3 Bl. Com., sec. 25.

8. It is only after the power of a court has been started into action by some proceeding being instituted into court according to law, that waiver of rights by a party to a cause can be made; and this doctrine of waiver is limited in its application to a party's giving up some right which it is in his power to waive, and which it is legally competent for a court to accept, and not to a party's conferring on a court jurisdiction where it has not been conferred by law. And no waiver of rights in a criminal proceeding will be presumed against a party, that is not expressly shown by the record, nor is it possible for a party to waive any right in the proceeding that is void *ab initio*.

In re, Ld. Bish. of Natal, 3 Moo. (P. C., N. S.), 115; *Beaudry v. The Mayor of Montreal*, 11 Moo. (P. C.), 899; *Webster v. Commonwealth*, 5 Cush., 404; *Commonwealth v. Andrews*, 8 Mass., 132; *Steph. Pl. Herd*, 9th ed., 139; *Gililand v. Sellers*, 2 Ohio St., 223; *Com. v. Mahan*, 16 Pick., 120; *McCall v. Peachy*, 1 Call, 48; *Call v. Mitchell*, 39 Me., 465; *U. S. v. Hodge*, 6 How., 279; *Deshurst v. Coulthard*, 3 Dall., 409; *Creppey v. Durden* (Covp., 640); 1 Sm. Lead. Cas., 848, and cases cited; *Buckingham v. McLean*, 18 How., 162; *Bell v. Railroad Co.*, 4 Wall., 598 (71 U. S., XVIII., 338); *Shaw v. Spencer*, 100 Mass., 382.

9. At common law, every person who is a party to any judicial proceeding, has a right to be tried by a free, impartial and independent judge; and no man can legally be a judge in his own cause nor act in the double capacity of accuser and judge.

Day v. Savadge, Hob., 87; *Calder v. Bull*, 3 Dall., 386; *Richardson v. Welcome*, 6 Cush., 331; *Cunningham v. Bucklin*, 8 Cow., 133; *Pearce v. Atwood*, 13 Mass., 324; *Dimes v. Grand Junc. Canal Co.*, 8 H. L. Cas., 759; *Ranger v. Great Western R. Co.*, 5 H. L. Cas.,

72; *Wildes v. Russell*, 12 Jur. (N. S.), 645; 2 Hawk. (P. C.), 72, sec. 6; *Anonymous*, 1 Salk., 396; *Wright v. Crump*, 3 Ld. Raym., 766; *London v. Wood*, 12 Mod., 669; *Bonham's case*, 8 Co., 118, A.; 3 Bl. Com., sec. 383; *Raz v. Phillips*, 4 Burr., 2090, art. 19; Bill of Rights, Const. of Mass.; *Samuel Chase's Trial*, 344, 345.

10. An action on the case may be maintained at common law, for the disturbance of a party in the possession and enjoyment of an office, franchise, or other incorporeal right.

McMahon v. Lennard, 6 H. of L. Cas., 970; *Rogers v. Dutt*, 13 Moo. (P. C.), 209; *Walker v. Lamb*, Cro. Car., 258; *Ferrer v. Johnson*, Cro. Eliz., 336; *Lee v. Drake*, 2 Salk., 463; *Jones v. Pugh*, 2 Salk., 465; *Sutherland v. Murray*, cited in 1 T. R., 538; *Hastings v. Pro. Notary of Stepney Court*, 1 Sid., 410; *Crowder v. Oldfield*, 6 Mod., 19; *Strode v. Byrt*, 4 Mod., 418; *Beau v. Bloom*, 3 Wils., 456; *Carrington v. Taylor*, 11 East, 571; *Thompson v. Gibson*, 7 M. & W., 456; *Peter v. Kendall*, 6 B. & C., 703; *Townsend v. Blewett*, 5 How. (Miss.), 503; *Wammack v. Holloway*, 2 Ala., 81; *Palmer v. Fiske*, 2 Curt., 14; *People v. Turner*, 1 Cal., 190; *Bruce v. Fox*, 1 Dana, 450; *Glenn v. Hodges*, 9 Johns., 67.

"Though a case may be of first impression, if it shows a concurrence of loss and injury from the act complained of, the action will be maintainable." *Lynch v. Knight*, 9 H. of L. Cas., 577.

"If the proceedings are void against an attorney, he would have an action for damages, if interrupted or deprived of the privileges and emoluments conferred by the license. *People v. Turner*, 1 Cal., 190.

It is no objection to the maintenance of the suit, simply because it involves a determination of a party's title to his office.

Allen v. McKeen, 1 Sumn., 317; *Avery v. Tyrringham*, 3 Mass., 160; *Hearsey v. Pruyn*, 7 Johns., 179; *Arris v. Stukely*, 2 Mod., 260; *Boyer v. Dodsworth*, 6 T. R., 681; *Drew v. Fletcher*, 1 Barn. & C., 233; *Capel v. Child*, 2 Crompt. & J., 538; *Wildes v. Russell*, 12 Jur. (N. S.), 645; *Lightly v. Clouston*, 1 Taunt., 113.

11. In an action against the judge of any court, whether of record or otherwise, for an act done by him or by his command, the question in every case to be determined is: was the act done a judicial act, done within his jurisdiction? If it was not, he can claim no immunity or exemption, by virtue of his office, from liability as a trespasser: "For if he has acted without jurisdiction, he has ceased to be a judge."

Houlden v. Smith, 14 Q. B., 841; *Calder v. Halket*, 8 Moo. (P. C.), 28; *Taaffe v. Downes*, 3 Moo. (P. C.), 36; *Gahan v. Lafitte*, 3 Moo. (P. C.), 382; *Hill v. Bigge*, 8 Moo. (P. C.), 465; *Miller v. Hope*, 2 Shaw, App. Cas., H. L., 125; *Ferguson v. Kinnoull*, 9 Cl. & F., 296; *Dieas v. Brougham*, 6 Car. & P., 249; *Kinning v. Buchanan*, 8 C. B., 371; *Watson v. Bodell*, 14 M. & W., 70; *Beaurain v. Scott*, 3 Camp., 388; *Ackerley v. Parkinson*, 8 M. & S., 411; *Mitchell v. Foster*, 4 Per. & Dav., 153; *Same case*, 12 A. & E., 472; *Garnett v. Ferrand*, 9 Dowl. & Ry., 670; *Gosset v. Howard*, 10 Q. B., 411; *Van Sandau v. Turner*, 6 Q. B., 778; *Sutton v. Johnstone*, 1 T. R., 493; *Sutherland v. Murray*, cited in 1 T. R., 538; *Welch v.*

Nash, 8 East, 402; *Burdett v. Abbot*, 14 East, 1; *Mostyn v. Fabrigas*, 1 Cowp., 161; *Bushell's case*, 1 Mod., 119; *Hamond v. Howell*, 2 Mod., 119; *Müller v. Sears*, 2 W. Bl., 1141; *Smith v. Bouchier*, 2 Str., 993; *Groenvelt v. Burwell*, 1 Ld. Raym., 454; *Martin v. Marshall*, Hob., 63; *Perkin v. Proctor*, 2 Wils., 886; *Hoskins v. Matthews*, 1 Lev., 293; *Floyd v. Barker*, 12 Co. Rep., 38; *The Marshalsea case*, 10 Co. Rep., 76, chap. a; 2 Inst., 427; *Piper v. Pearson*, 2 Gray, 120; *Clark v. May*, 2 Gray, 410; *Kelly v. Bemis*, 4 Gray, 88; *Noxon v. Hill*, 2 Allen, 215; *Wise v. Withers*, 8 Cranch, 381; *Anderson v. Dunn*, 6 Wheat., 204; *Kendall v. Stokes*, 8 How., 789; *Mitchell v. Harmon*, 13 How., 144; *Dynes v. Hoover*, 20 How., 65 (61 U. S., XV., 898); *Yates v. Lansing*, 5 Johns., 282; *Bigelow v. Stearns*, 19 Johns., 89; *Cunningham v. Bucklin*, 8 Cow., 178; *Horton v. Auchmoody*, 7 Wend., 200; *Scott v. Goddards*, 7 Ohio, 2 Pt., 211; *Groene v. Mumford*, 5 R. I., 472; *Müller v. Grice*, 2 Rich., 27; *Lining v. Benham*, 2 Bay., 1; *Bevard v. Hoffman*, 18 Md., 479; *Revill v. Pettit*, 8 Met. Ky., 314; *Stat. of Marlbridge*, 52; *Henry III.*, cited in 2 C.'s Inst., 108.

Messa. Charles Allen and H. L. Dawes, for defendant in error:

1. Both the admission and removal of attorneys are judicial acts. This doctrine has been settled in this court, and is no longer open to debate.

Ex parte Secombe, 19 How., 9, (60 U. S., XV., 565); *Ex parte Garland*, 4 Wall., 378 (71 U. S., XVIII., 370); see, also, *In re Cooper*, 23 N. Y., 85.

2. By the express provision of the general Statutes of Massachusetts, ch. 121, sec. 84, as well as by the rules and practice of all common law courts, the Superior Court has jurisdiction to determine who is qualified to become or to continue one of its officers, as an attorney and counselor of the court.

3. It is a general principle, applicable to all magistrates, even to those of an inferior jurisdiction, that they are not liable to an action for any judicial act done within their jurisdiction.

In reference to inferior magistrates, it has been said that they are only protected while they act within their jurisdiction.

Pratt v. Gardner, 2 Cush., 63; *Chickering v. Robinson*, 8 Cush., 548; *Piper v. Pierson*, 2 Gray, 120; *Clark v. May*, 2 Gray, 411.

But in reference to judges of courts of general jurisdiction, the rule is not thus limited. Such judges are not liable to actions for their judicial acts, whether within or without their jurisdiction.

The extent of a judge's jurisdiction is often the very question which he is called on judicially to determine. To decide upon this question is as much a judicial decision as any other. The question may be a difficult and doubtful one; yet he is bound to decide, and to decide according to his judgment. But shall he decide in fear of peril of a lawsuit?

It is inconsistent with the nature and true theory of the judicial functions, that an action should lie against a superior judge for any judicial act, even though in excess of his jurisdiction.

The very foundation of this principle is to protect judges when they have erred. If they

have decided rightly, they need no protection; for the correctness of their decision will vindicate them. But since men's judgments are fallible, it is important and indispensable that judicial decisions shall be as independent and impartial as the lot of humanity will permit. This is the one thing in the administration of justice that we cannot possibly spare. We must have impartiality. Even an impartial judge will sometimes err. But a partial judge must often err. To secure the maximum of impartiality, a judge must be protected from personal responsibility for his errors, if he happens to make any. It would be absurd to say that he should receive the protection of the law only in those cases where no protection is required. *Taaffe v. Downes*, 8 Moo. (P. C.), 54.

This protection is for the sake of the public. It is in order to secure a calm, steady, independent, vigorous administration of justice and the laws. A judge should be enabled and ready to act with promptitude and with vigor, *pro salute reipublice*. 4 Inst., 71; 11 Coke, 98.

Accordingly, for more than five hundred years, by a uniform series of decisions, judges have been held exempt from personal responsibility for their judicial words and acts.

A. D. 1854, Book of Assizes, 27 Edw. III., pl. 18; A. D. 1431, 1 Rol. Abr., 92; 9 Henry VI., 60 B; A. D. 1561, *Gwinne v. Poole*, Lutw., 387 in argument; A. D. 1589, *Green v. Hundred of Buccle-churches*, 1 Leon., 823 in argument; A. D. 1608, *Floyd and Barker's case*, 12 Co., 23; A. D. 1616, *Bagg's case*, 11 Coke, 98 b; A. D. 1621, *Aire v. Sedgwick*, 2 Rolle, 199; A. D. 1638, *Metcalfe v. Hodgson*, Hut., 120; *Bushell's case*, 1 Mod., 119; *Hamond v. Howell*, 1 Mod., 184; S. C., 2 Mod., 218; *Groenvelt v. Burwell*, 1 Ld. Raym., 454; S. C., 1 Salk, 200; *Anon.*, 1 Salk., 201; *Mostyn v. Fabrigas*, 1 Cowp., 172 (by Mansfield); *Newcastle v. Clark*, 8 Taunt., 682; *Garnett v. Ferrand*, 6 B. & C., 611; *Müller v. Hope*, 2 Shaw's App. Cas., 125; *Kemp v. Neville*, 7 Jur. (N. S.), 913; *Scott v. Stansfield*, L. R., 8 Exch., 220; *Brodie v. Rutledge*, 2 Bay (S. C.), 69; *Phelps v. Sill*, 1 Day, 316; *Fates v. Lansing*, 5 Johns., 288; S. C., 9 Johns., 395; *Cunningham v. Bucklin*, 8 Cow., 178; *Weaver v. Devendorf*, 3 Den., 117; *Burnham v. Stevens*, 33 N. H., 247; *Kelley v. Dresser*, 11 Allen, 81.

4. The present case does not require the application of so broad a doctrine as that above contended for. Here the subject-matter and the plaintiff were both within the jurisdiction of the court. This case presents, at the most, only the question whether a superior judge can be sued for proceeding irregularly or *inverso ordine*, in a matter where he has full jurisdiction. The subject-matter was the removal of an attorney from the bar for gross misconduct. The person was an attorney of the court. These were both within the complete jurisdiction of the superior court. The only question is, whether *Mr. Justice* Brigham should have required some different form of complaint, some writing different from the charge which was contained in the letter of Leighton to Captain Green, some more formal written charge or accusation against the plaintiff.

Waiving, for the moment, the consideration of the question whether, under the rules of law, the defendant should have insisted upon some different form of complaint, it is obvious

that this question was one calling for a judicial determination by him. It was for him to decide judicially what form of proceeding would be correct; and this court is now asked to say judicially that he decided wrongly. Even if it were conceded that *Mr. Justice* Brigham's decision was wrong (which is by no means conceded), that would not advance the argument, for his decision was a judicial one, in respect to a subject-matter and a person within his jurisdiction.

This question does not depend upon reasoning alone. The case of *Ackerley v. Parkinson*, 8 M. & S., 411, is precisely in point. It was there held that no action would lie against the Vicar-General of the Bishop, for excommunicating the plaintiff, with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, and with whose goods he had intermeddled, although the citation to the plaintiff was void and had been so adjudged; because the Vicar-General had jurisdiction over the subject-matter, and there was no malice. The citation being void, the plaintiff was not legally before the court, and the proceedings were reversed on that ground. But it was held with great force of reasoning by Lord Ellenborough, and Bailey, J., that as the subject-matter was within the jurisdiction of the Vicar-General he could not be held liable in damages, because he had proceeded erroneously or *inverso ordine*. Assume, for the moment, that *Mr. Justice* Brigham was wrong in his decision, and *Ackerley v. Parkinson* is on all fours with the present case. "No authority," said Lord Ellenborough, "has been cited to show that the judge would be liable to an action where he has jurisdiction, but he has proceeded erroneously, or, as it is termed, *inverso ordine*." Bailey, J., said: "If, then, the ecclesiastical judge had jurisdiction, on what foundation does this action stand? There is no other foundation than this: that the ecclesiastical judge who had jurisdiction, has not framed his citation in the form in which it ought to be, or that he has pronounced excommunication sooner than he ought, or that he has adopted a proceeding which the course and practice of the ecclesiastical courts do not warrant. But that is nothing more than error in the exercise of the judicial functions with which he is invested.

See, also, to the same effect, *The Marshalsea*, 10 Co., 68 b; *Gwinne v. Pools*, Lutw., 587; *Lowther v. Radnor*, 8 East, 118; *Truscott v. Carpenter*, Ld. Raym., 229; *Yates v. Lansing*, 5 Johns., 289.

5. A judicial interpretation by the highest court in the State, of its own constitution not called in question by its own tribunal, and no other decision tending in any manner to shake it, is conclusive in this court.

Bank of Hamilton v. Dudley, 2 Pet., 492; *Prov. Sav. Inst. v. Commonwealth*, 6 Wall., 611 (78 U. S., XVIII., 908).

The correctness of the proceedings of *Mr. Justice* Brigham has been in all respects confirmed, after a full and exhaustive discussion by the Supreme Judicial Court of Massachusetts.

Randall, Petitioner, 11 Allen, 479.

6. Finally, if this court will inquire into the

correctness of the proceedings of *Mr. Justice* Brigham, after the decision of the Supreme Judicial Court of Massachusetts thereon, it is apparent that those proceedings were in all respects correct. The foregoing positions have not been taken through any lack of confidence in this final position. There was a written complaint made by the person who was aggrieved by the conduct of the plaintiff, addressed to his superior officer, and by that officer transmitted to the grand jury, and by the grand jury presented through the appropriate officer to the court. There was a charge in writing, which involved and included the substantial misconduct of the plaintiff. The existence of this written charge and complaint appears upon the record. No further charge or complaint was necessary. Indeed, no complaint or charge whatever in writing was necessary. This whole subject is discussed and put upon a satisfactory foundation by Bigelow, *Ch. J.*, in 11 Allen, 478-480.

The plaintiff was notified, had full opportunity to be heard, and was fully heard. The charges against him were satisfactorily established, and showed a degree of misconduct which rendered his removal from the bar an imperative duty. There is no more indulgent tribunal anywhere, to judge of the alleged misconduct of a young member of the Bar, than the Bench and Bar of Massachusetts. This defendant has but done his duty. He has acted according to his judgment; uprightly, discreetly. This cause concerns the people of Massachusetts as much as this defendant. The question involved is no less than this: whether the people of Massachusetts shall be secure in their possession and enjoyment of a learned, upright, independent and resolute judiciary.

Mr. Justice Field delivered the opinion of the court:

This action was brought by the plaintiff, who was formerly an attorney and counselor at law in Massachusetts, against the defendant, who was one of the Justices of the Superior Court of that State, for an alleged wrongful removal by him, of the plaintiff from the Bar. The declaration charges the removal to have been made without lawful authority, and wantonly, arbitrarily and oppressively. Upon the evidence produced, the court instructed the jury that the action could not be maintained, and that their verdict should be for the defendant. Such verdict was, accordingly, rendered.

The substantial facts as established by the evidence produced by the plaintiff and by the plaintiff and by the records of the state court, introduced by consent, upon which the removal was made, may be briefly stated.

In August, 1864, one Michael Leighton was arrested upon a charge of larceny, and confined in jail in Boston, to await the action of the grand jury in the Superior Court, upon his failure to give a recognizance with sureties in \$400 required for his appearance. While thus confined, he retained the plaintiff as his attorney, to whom he expressed a willingness to enlist in the Army or Navy of the United States, if the prosecution could be discontinued. The plaintiff thereupon proposed to the District Attorney to dispose of the prosecution in this

way. That officer declined to accede to the proposition at that time, but encouraged the plaintiff to expect that he would not object to such an arrangement in court, if the presiding judge approved of it, when the indictment was presented. The plaintiff and his father, without any further arrangement with the District Attorney, thereupon became sureties for Leighton, who, upon his release, proceeded to the office of the plaintiff, and there signed with his mark, he not being able to write, an agreement to enlist as a substitute, for one Brown, of Lowell, for \$400, which sum was to be retained by the plaintiff, without any subsequent claim upon him, as indemnity for his becoming surety of the recognizance, and also to pay the plaintiff \$400 for furnishing bail. Leighton subsequently enlisted in the naval service, as a substitute for Brown, who paid the plaintiff for the enlistment \$830. Of this sum the plaintiff gave Leighton, when the latter went on board the vessel to which he was assigned, the sum of \$10. Subsequently he paid \$100 to Leighton's order. The balance he retained.

Some weeks afterwards, Leighton wrote a letter to the captain of his vessel, stating that he was promised \$400 for his enlistment by his lawyer, the plaintiff; that he had only received \$10; and that, when he applied to the plaintiff for settlement, evasive answers were all he obtained. He referred in the letter to the fact that he had a wife and two children dependent upon him for support, and he appealed to the captain to see that justice was done him. This letter was shown to the plaintiff, who replied that he had paid Leighton all he had agreed to and should not pay him another cent. The wife of Leighton also applied to the plaintiff for a portion of the bounty of her husband in his hands, stating that the destitution of herself and children was such that she should be obliged to give them up to the city; to whom he replied by advising her to do so, and gave her nothing.

The captain then sent the letter to the grand jury of the county, at the time sitting upon Leighton's case. The jury, of course, could not act upon the letter, and its foreman requested the prosecuting officer to bring it before the court. This was accordingly done, the defendant being, at the time, the presiding justice. The plaintiff was thereupon sent for, and in open court, his attention was called to the letter, and he was notified that on the following Wednesday, then five days distant, his professional conduct and standing at the Bar would be considered. At the time designated he appeared and showed that since his citation he had paid to Leighton the balance of the \$400 which Leighton claimed he was entitled to receive. This right of Leighton was never admitted until after the attention of the court had been directed to the matter.

The court—being of opinion that the plaintiff took advantage of the situation of Leighton, and obtained from him an agreement which, under the circumstances, was unconscionable and extortionate and, therefore, grossly unprofessional; that he had induced Leighton to enlist by making him believe that his release from the prosecution would be accomplished by his enlistment, and that the money obtained by the enlistment subsequently paid to Leighton was

paid only in consequence of the inquiry instituted into the professional conduct of the plaintiff, he having previously denied that he was bound to pay anything—found that he had violated his oath of office as an attorney at law, and was guilty of malpractice and gross misconduct in his office and, consequently, ordered that he be removed from his office as an attorney at law within the Commonwealth of Massachusetts.

The objection taken to these proceedings is, that there was no formal complaint made against the plaintiff, with specifications, of charges, and that there was no formal citation issued to him, to appear and answer any charges. The plaintiff insists that, without such complaint and citation, the order for his removal was a mere usurpation, without authority, and void.

The Superior Court of Massachusetts is a court of general jurisdiction, and is empowered by statute to admit attorneys and counselors to practice in the courts of the State, upon evidence of their possessing good moral character, and of having devoted a prescribed number of years to the study of the law, in the office of some attorney in the State, and to remove them, "for any deceit, malpractice, or other gross misconduct."

Both the admission and the removal of attorneys are judicial acts. It has been so decided in repeated instances. It was declared in *Ex parte Secombe*, 19 How., 9 (60 U. S., XV., 565), and was affirmed in *Ex parte Garland*, 4 Wall., 378 [71 U. S., XVIII., 370].

Now, it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and be called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts.

This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement.

In England the superior judges are the delegates of the King. Through them he administers justice, and to him alone are they accountable for the performance of their trust. And it was said as long ago as 1608, as reported by Lord Coke in *Floyd and Barker's case*, 12 Coke, 25, that inasmuch as the judges of the realm have the administration of justice, under the King, to all his subjects, they ought not to be called in question for any judicial proceedings by them, except before the King himself, "for this would tend to the scandal and subversion of all justice; and those who are most sincere would not be free from continual calumniation."

In the United States, judicial power is vested exclusively in the courts. The judges administer justice therein for the people, and are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. In some States, and Massachusetts is one of them, they may be removed upon the address of both houses of the Legislature. But responsible they are not, to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.

In *Taffe v. Downes*, note, 8 Moore P. C. Rep., 41, this subject was most elaborately and learnedly considered, and all the English authorities commented upon, by the Court of Common Pleas of Ireland, in 1818. The defendant was *Chief Justice* of the King's Bench in Ireland, and had issued a warrant at chambers for the arrest of the plaintiff for a breach of the peace. The plaintiff was accordingly arrested and held to bail; and he afterwards brought an action against the *Chief Justice* for assault and false imprisonment. It was urged, in argument, that it was not lawful or defensible for a judge, without any offense committed, or charge made upon oath of crime, or suspicion of crime committed, to imprison a subject. But it was held that the action would not lie against the judge for acts judicially done by him. "Liability," said *Mr. Justice* Mayne, one of the justices of the court, "to every man's action, for every judicial act a judge is called upon to do, is the degradation of the judge, and cannot be the object of any true patriot or honest subject. It is to render the judges slaves in every court that holds plea, to every sheriff, juror, attorney and plaintiff. If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting and harassing persecution, and establish its weakness in a degrading responsibility." And the *Justices* observed that no action of the kind was ever sustained, and save one in London and one in Ireland, none was ever attempted. The one mentioned as arising in Ireland was not against any judges, but against the Governor of the country, and may perhaps be subject to other considerations. In the case in London (*Hamond v. Howell*, 1 Mod., 184; 2 Mod., 218), the action was against the recorder, who, as one of the judges of oyer

and terminer, had fined and imprisoned a petit jury for rendering a verdict against the direction of the court and the evidence. This act was declared illegal, by the Court of Common Pleas, in discussing the case on *habeas corpus*. *Bushell's case*, Vaughn, 185. Upon that decision the action was brought by one of the jurors, but the court held that the action would not lie, and were of opinion "that the bringing of the action was a greater offense than the fining of the plaintiff, and committing of him for non-payment; and that it was a bold attempt, both against the government and justice in general."

Mr. Justice Fox, in the case of *Taffe v. Downes*, conceded that the act of the *Chief Justice* was illegal, but held that he was not responsible in the action, and observed that, without the existence of the principle that a judge administering justice shall not be liable for acts judicially done, by action or prosecution, it was utterly impossible that there should be such a dispensation of justice as would have the effect of protecting the lives or property of the subject. "There is something," he said, "so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility utterly inconsistent with the constitutional independence of the judges, an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject."

The same subject was considered very elaborately in the case of *Yates v. Lansing*, 5 Johns., 282 (9 Johns., 395), in the Supreme Court and in the Court of Errors of New York. Lansing was *Chancellor* of the State, and had committed Yates, one of the officers in chancery, for malpractice and contempt. A judge of the Supreme Court discharged him, and thereupon the *Chancellor* ordered him to be recommitted. He then brought an action to recover a statute penalty for the recommitment. It was held that the action would not lie, *Mr. Chief Justice* Kent observing that the *Chancellor* may have erred in judgment in calling an act a contempt which did not amount to one, and in regarding a discharge as null when it was binding; and that the Supreme Court may have erred in the same way, but still it was but an error of judgment, for which neither the *Chancellor* nor the judges were or could be responsible in a civil action, and that such responsibility would be an anomaly in jurisprudence. "Whenever," said the learned *Chief Justice*, "we subject the established courts of the land to the degradation of private prosecution, we subvert their independence and destroy their authority. Instead of being venerable before the public, they become contemptible."

The Superior Court of Massachusetts, as we have already stated, is a court of general jurisdiction, and is clothed by statute with authority to admit and to remove attorneys at law. The order removing the plaintiff was made by the court, and not by the judge in chambers. The inquiry into his conduct was before the court, and before it he was notified to appear. His claim is that the court never acquired jurisdiction to act in his case, because there was not a formal accusation made against him, or statement of grounds of complaint, and formal citation issued to him to answer them. If

this were so, his case would not be advanced. Under the authorities cited, he could not seek redress in that event by an action against the judge of the court, there being no pretense or shadow of ground that he acted maliciously or corruptly. But the claim of the plaintiff is not correct. The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice, or of the complaint by the letter, did not touch the question of jurisdiction. The plaintiff understood from them the nature of the charge against him; and it is not pretended that the investigation which followed was not conducted with entire fairness. He was afforded ample opportunity to explain the transaction and vindicate his conduct. He introduced testimony upon the matter, and was sworn himself.

It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from his own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.

The authority of the court over its attorneys and counselors is of the highest importance. They constitute a profession essential to society. Their aid is required, not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidence which they receive and the responsibilities which they are obliged to assume, demand not only ability of a high order, but the strictest integrity. The authority which the courts hold over them, and the qualifications required for their admission, are intended to secure those qualities.

The position—that the plaintiff has been illegally deprived of rights which he held under the Constitution of Massachusetts, which declares that “no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him;” nor be “despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land” (Dec. of Rights, art. 12)—is answered by the construction which the Supreme Court of that State has given to these provisions. It has held that the proceeding taken for the removal of the plaintiff could not, in any just and proper sense, be deemed a criminal procedure, in which a party has a right to a full, formal and substantial description of the offense

charged; and that it was not essential to the validity of the order of removal that it should be founded on legal process, according to the signification of the words “*per legem terra*,” as used in Magna Charta, or in the Declaration of Rights. *Randall, Petitioner for Mandamus*, 11 Allen, 478. This construction of the highest court of the State, not called in question by any conflicting decision of that court, is conclusive upon us. *Proc. Institution v. Mass.*, 6 Wall., 680 [78 U. S., XVIII., 910].

We find no error in the ruling of the Circuit Court, and its judgment must, therefore, be affirmed. And it is so ordered.

Cited—9 Wall., 37; 12 Wall., 350; 21 Wall., 497; 95 U. S., 500; 107 U. S., 372, 308; 38 Am. Rep., 601 (28 Minn., 350); 41 Am. Rep., 249 (181 Mass., 376); 2 Hughes, 461.

ALBERT G. EWING, E. H. EWING, JOHN H. EWING AND J. T. PENDLETON,
Plffs. in Err.,

v.
M. H. HOWARD.

(See S. C., 7 Wall., 499-506.)

Decision of court below, on motion for a new trial, not reviewable—defects in declaration—effect of—amendable—promissory note bearing interest previous to its date, legal—presumption as to—burden of proof—objection cannot for the first time be raised in this court.

The ruling of the court below in granting or denying a motion for new trial, is not the proper subject of exceptions.

Defects of form in the declaration, not pointed out by demurrer, are not good cause for reversing a judgment brought here by writ of error.

Federal Courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe.

Promissory note, bearing interest anterior to its date is neither usurious nor illegal, unless the interest is reserved from a day prior to that on which the debt for which it was given arose, and it is in such a case open to explanation.

The presumption is, that the note was given upon a state of facts which authorized the taking of the instrument, and that the contract was lawful and valid.

The burden to prove the contrary, is upon the party who makes the charge.

Defendant cannot present the objection for the first time in this court, but should raise it at the trial before the jury, when the other party would have an opportunity to show that the contract was legal and valid.

[No. 186].

Submitted Apr. 5, 1869. Decided Apr. 15, 1869.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

This action was brought in the court below, by the defendant in error, on two certain promissory notes. The trial resulted in a verdict and judgment in favor of the plaintiff. The defendants moved for a new trial, and also in arrest of judgment.

These motions having been overruled by said court, the defendant thereupon sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. H. M. Watterson, and R. A. Crawford, for plaintiffs in error:

The plaintiffs in error insist that the first note is void, being an illegal contract for usury ap-

parent upon its face. It expresses that it is made for value received on the day of its date, and yet calls for interest from a period of two months and a half before that day, viz.: from the day when the ten per cent. law took effect; making the rate of interest in effect more than thirteen per cent. per annum. In the case of *Wetmore v. Brian*, 8 Head, 725, which was a case in every respect similar to the present, the Supreme Court of Tennessee says: "The argument against this construction, that the Act does not in terms affect the contract, is of but little force. This was not necessary. It is well settled that a contract may be illegal, although not in contravention of the specific provisions of the statute, if it be opposed to the general policy and intent thereof. 6 Bing. (N. C.), 174. In the case of *De Begnis v. Armistead*, 10 Bing., 110, the principle is distinctly stated and is now well established that 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because the penalty implies a prohibition, though there are no prohibitory words in the statute.' 1 Sm. Lead. Cas., 284, top.

This was but an affirmation of a leading Tennessee case of *Iser v. Brunson*, 6 Humph., which is believed to be decisive of the case presented by this record: "If a party plaintiff bring into a court, either of law or equity, an illegal contract, that it may be enforced, and this illegality is shown and set forth by himself and not disclosed by a plea or allegation from the defendant, it is the duty of either court, on ground of public policy, to repel the plaintiff and refuse its action on his behalf. Thus if, in a declaration on a security for money, *proferat* be made of the security, and upon its face it appears to have stipulated for more than legal interest, no judgment can be rendered for the plaintiff, notwithstanding the Act of 1885 only avoids the usurious excess." 6 Humph., 277.

If more were necessary to establish the point that the plaintiff in the court below obtained judgment upon a note, the illegality of which appears upon its face, it might be added that the Act of 1860, ch. 41, has been elaborately construed by the present Supreme Court of Tennessee, its constitutionality sustained, and the strict construction of it required.

Caruther v. Andrews, 2 Cold., 885.

Mr. Robert L. Caruthers, for defendant in error:

The question here is, whether this note is illegal at all. That depends upon its conformity to the provisions of the Act of 1860, making ten per cent. legal, if expressed on the face of the note. It is also required that notes should be for money loaned, or in renewal of notes for formal loans of money. It is not allowed upon notes based upon any other consideration. But this objection can only be taken by plea, and that was not done in this case.

So the only question presented for reversal by the plaintiffs in error is, whether the note of November 15, 1860, is illegal on its face; that is, does it conform to the provisions of the Conventional Interest Act of that year? If not, it is obnoxious to the objection made.

All that the statute requires to appear in the note, is the rate of interest agreed upon, if it be more than six per cent. This contract conforms to that requirement.

But it is argued that more than ten per cent. is reserved, because the money was loaned Nov. 15, 1860, to be paid on the 15th of the next April, and was to bear interest from Sep. 1, preceding, that being the day when the Act took effect. That is a question of construction. It is a well settled rule that the courts will avoid that construction of a transaction which will impose a penalty, if practicable. They will not subject a party to a contract to a penalty if, by any fair construction, it can be avoided. If this note was for money loaned on or before Sept. 1, 1860, it is legal; but if for a loan at the date of the note, it may be illegal, because it would make the interest more than ten per cent. for the money loaned, for the time it was to be retained. But if it was for a loan Sept. 1, or before that time, it would be legal. The written guaranty of O. Ewing shows that the note was for a previous loan. But, independent of that, what would be the presumption? Surely it would be that the loan was made at or before the time from which the interest was to begin to run. If so, it was legal under the statute.

If it be said, as it is, that a presumption arises that the money was loaned at the date of the note, this is rebutted by the counter presumption that the money was loaned at the time it was agreed the interest should commence running. The first would make the contract illegal, the latter legal. By the first presumption or construction the penalty of forfeiture would be inflicted by the statute; by the latter, the contract would be enforced and justice done.

But I contend that on this writ of error the court below cannot be put in the wrong by the making of an objection here that was not made there. If the defendants desired to make such a defense as that now set up, it should have been done then, and the judgment of the court taken upon it. That would have made a question for this Court of Errors to sustain or correct. It is too late to make new questions after the case gets here.

Mr. Justice Clifford delivered the opinion of the court:

The judgment in this case was for the plaintiff in the court below, and the defendants in that court sued out a writ of error and removed the cause into this court. The action was *assumpsit*, and the cause of action was the two promissory notes set forth in the bill of exceptions. Plea was the general issue, and the bill of exceptions shows that the plaintiff, to maintain the issue on his part, introduced in evidence the two promissory notes on which the suit was founded. They were introduced without objection, and the bill of exceptions states to the effect that there was no other evidence introduced by either party. Defendants moved for a new trial, and also in arrest of judgment, but the court overruled both motions, and the defendants excepted to the rulings of the court.

Settled rule of the court is, that a motion for a new trial is addressed to the discretion of the court, and that the ruling of the court in grant-

ing or denying such a motion is not the proper subject of exception.

Henderson v. Moore, 5 Cranch, 11; *Blunt v. Smith*, 7 Wheat., 248.

Motions in arrest of judgment present questions of law when they are so framed as to call in question the sufficiency of an indictment or of a declaration in a civil suit; but the transcript does not contain the motion, and the declaration appears to be in due form and sufficient to sustain the judgment.

Defects of form in the writ or declaration, not pointed out by demurrer, are not, in general, regarded in this court as good cause for reversing a judgment brought here by writ of error, as the Federal Courts possess the power to permit such imperfections to be amended in their discretion and upon such terms and conditions as the rules of the court prescribe.

1 Stat. at L., 91; *Stockton v. Bishop*, 4 How., 155; *Railroad v. Lindsey*, 4 Wall., 650 [71 U. S., XVIII., 323.]

Neither of the objections taken to the action of the circuit court and embodied in the bill of exceptions are urged in this court, and being in themselves entirely untenable, they must be considered as having been abandoned. Nothing else remains to be considered in the case except what arises from the form and tenor of the notes, which are set forth at large in the bill of exceptions, but without any comment or any objection being made to the right of the plaintiff to recover.

Examined throughout, the transcript shows no objection to the right of the plaintiff to recover on the second note in the case, and as it is not suggested by the defendants that there is any defense to that note, further comment in that behalf is unnecessary. Attention of this court is invited only to the other note, and the argument is that it is illegal and void, because it secures, by its very terms, usurious interest. Legal interest in that State is six per cent. per annum, unless otherwise agreed between the parties, but contracts between the borrower and the lender of money may be made for a higher rate not exceeding ten per cent. per annum, as in this case; provided the agreement to that effect is expressed "in the face of the contract," whether evidenced by bond, bill, note or other written instrument.

Secs. Act, ch. 41, sec. 1, p. 81.

Debts created for the loan of money under an agreement to pay ten per cent., expressed as required in the statute, may be subsequently renewed for the same rate of interest, but the provision is that if any greater amount of interest than ten per cent. per annum is paid or agreed to be paid for the use of money, "the whole amount of interest so paid or agreed to be paid shall be forfeited by the payee." Provision is also made by the 6th section of the Act, that any person or persons who shall violate the provisions of that law shall be subject to indictment, as in other cases of misdemeanor, and be punished as therein provided.

Secs. Act, p. 83, Code, 868.

Principal reason now urged for the reversal of the judgment is, that the first note described in the bill of exceptions is illegal, because the makers of the same promised to pay interest on the principal at the rate of ten per cent. per

annum, commencing the computation two months and a half before the date of the note. Date of the note is November 15, 1860, and the agreement, as expressed in the note, is to pay interest at the rate of ten per cent. per annum from and after the first day of September last until paid.

Argument for the defendants is that the contract is usurious, and that, inasmuch as the loaning of money at a greater rate of interest is prohibited by law, and the violation of the provision is declared to be a misdemeanor, the contract expressed in the note is illegal, and that the judgment should have been for the defendants.

Suppose it be admitted that the presumption is as contended by the defendant, that the note was given for the loan of money, and that the contract is illegal, still the presumption is not a conclusive one, as the note may have been given for the purchase of goods, chattels or lands, and the bargain may have been made and the property actually transferred on the exact day specified in the note, as the time from which is to be computed.

Promissory notes, if given under those circumstances, though bearing interest anterior to their date, are neither usurious nor illegal, unless the day described in the contract from which to compute the interest is anterior to the actual date of the transaction and the transfer of the subject-matter of the purchase and sale, and it is quite clear that promissory notes in such a case, as between the original parties, are open to explanation.

Where the defendant intends to make such a defense he should plead it in the court of original jurisdiction, or raise the question in some form and present it for the decision of the court. Doubtless he may raise the question by plea, by objection to the introduction of the note in evidence, or by a prayer for instruction to the jury, but he cannot remain silent in the subordinate court and then present the objection for the first time in the court of errors, when it is too late for the plaintiff to offer any explanations, or to show what was the real nature and character of the transaction.

Nothing of the kind was done or suggested in this case by the defendants, but they pleaded the general issue, giving no notice of any such defense, and the note was introduced at the trial without objection, and there is nothing in the record to show, or tending to show, that the circuit judge ever made or was requested to make any ruling upon the subject.

Parties relying upon such an objection should raise it at the trial before the jury, when the other party would have an opportunity to offer any explanations in his power to show that the contract was legal and valid.

Bills or notes promising the payment of interest from a time anterior to their date, if the bills or notes so written are to be considered as conclusive evidence that they were given for money lent on the day of their date, would properly be regarded as usurious, but it is well known that bills and notes are often given subsequent to the transaction which constitutes their consideration and for property sold, and upon other transactions, as well as for money lent. "Usury is a defense that must be strictly proved, and the court will not presume a state

of facts to sustain that defense where the instrument is consistent with correct dealing."

Marvin v. Feeter, 8 Wend., 588; *Holden v. Pollard*, 4 Pick., 178.

Universal rule is that where an instrument will bear two constructions equally consistent with its language, one of which will render it operative and the other void, the former will be preferred.

Archibald v. Thomas, 8 Cow., 290.

Theory of the defendants is that the note is usurious and illegal on its face, but the authorities are clearly the other way, that the presumption that is the note was given upon a state

of facts which authorized the taking of the instrument, and that the contract was lawful and valid.

Andrews v. Hart, 17 Wis., 307; *Leavitt v. Pell*, 27 Barb., 832; *Levy v. Hampton*, 1 McCord, 147.

Tested as matter of principle, or by the decided cases, the better opinion is that the presumption is that such a contract is valid and not usurious, and that the burden to prove the contrary is upon the party who makes the charge.

Judgment affirmed.

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IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

DECEMBER TERM, 1869.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1869.



WILLIAM B. MORRIS, *Ptff. in Err.*,

v.

SAMUEL SHRINER, ET AL.

Court will not go beyond the bill of exceptions.

When there is but a single exception in a bill of exceptions, this court will examine the case no further.

If that exception is not well taken, the judgment will be affirmed.

[No. 138.]

Argued Mar. 28, 1868. Decided Apr. 6, 1868.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. J. M. Carlisle and J. D. McPherson, for plaintiff in error.

Mr. Jackson Grimshaw, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

This is an action of ejectment. The plaintiff in error was the plaintiff in the court below. The parties waived the intervention of a jury, and submitted the cause to the court.

According to the statute regulating the practice in such cases, the finding of the court upon the facts may be either general or special, and shall have the same effect as the finding of a jury. When the finding is special, the review by this court may extend to the sufficiency of the facts found, to support the judgment. Act March 3, 1865, sec. 4, 18 Stat. at L., 501. In this case the finding was general, that the defendants were not guilty, etc., and judgment was rendered in their favor.

We must, therefore, look to the bill of exceptions as if the finding had been by a jury, the action of the court and the grounds upon which it is sought to reverse the judgment.

The bill extends over more than fifty printed pages. It contains the testimony, mostly documentary, given by both parties. We have been unable to find in it but one exception; that is, the admission of a small part of the evidence offered by the defendants. The court was very right in admitting it. The objection is insisted upon in the argument of the learned

3 WALL.

counsel for the plaintiff in error. We need not, therefore, more particularly advert to it. The bill concludes as follows:

"The court thereupon found for the defendants, and found that defendants were not guilty of unlawfully withholding from plaintiff the possession of the premises in controversy. To preserve all which matters and things of record in this cause, defendant prays the court to sign and seal this bill of exceptions on and during the progress of the trial herein, and as the several steps herein were taken, which upon and during said trial was done accordingly, and this bill of exceptions filed on and during said trial."

There being but the single exception in the bill, we can examine the case no further.

Finding that exception not well taken, we are constrained to affirm the judgment, and it is affirmed accordingly.

JOHN S. GILBERT AND ZENOR SECOR,
Appts.,

v.

THE UNITED STATES.

(See S. C., 8 Wall., 358-362.)

Act of Congress, when not a contract—when written agreement governs.

An Act of Congress authorizing a contract to be made with plaintiffs for certain government work, does not constitute an acceptance of previous proposals made by them, where a written contract was afterwards made with them on different terms.

The written agreement should govern the rights of the parties.

[No. 119.]

Argued Mar. 28, 1868. Decided Apr. 6, 1868.

APPEAL from the Court of Claims.

The petition in this case was filed by the appellants in the court below, for a sum of money alleged to be due them upon contract with the United States.

The court below having entered judgment against the plaintiffs, they took an appeal to this court.

The case is fully stated by the court.

Messrs. M. Carlisle & J. D. McPherson, J. D. Stevenson and C. Cushing, for appellants.

Mr. J. J. Weed and E. P. Norton, for appellee.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal, by plaintiff below, from a judgment of the Court of Claims.

They entered into a contract in writing on the 11th day of November, 1848, with the Secretary of the Navy, for the construction of a dry-dock, basin, and railways at Kittery, Maine. The work was done according to minute specifications, and the entire price agreed to be paid for the work by said contract, \$782,905, was duly paid on the completion of the work.

The present claim for \$72,742.83 is the difference in value between felt and tar-sheathing and copper-sheathing, the latter of which by their contract they were required to put on the dock, and did put it on.

Plaintiffs do not make any question that, by the terms of the agreement signed by them, and by the Secretary of the Navy, they were bound to copper-sheath the dock, and that this was included in the work which they agreed to do for the aggregate sum already mentioned. Nor do they contend that there was any mistake in reference to that particular, for they protested against that provision of the contract while they signed it.

But the proposition on which the present claim is based seems to be this, when fairly stated: that the Act of Congress under which the Secretary acted when he made the contract with them was, itself, an acceptance of certain proposals made by the plaintiffs; and, therefore, taken in connection with those proposals, it constituted a contract binding on the government, and that under that contract the dock was built. That those proposals were framed on the basis of allowing the sum now claimed for copper-sheathing, if copper was used.

To ascertain the correctness of this proposition we must look into the history of the transaction previous to the execution of the special contract by the Secretary of the Navy and the plaintiffs.

It appears that in the Act of March 3, 1847, making appropriations for the naval service, certain sums were set apart for floating dry-docks at Philadelphia, at Pensacola and at Kittery, which the Secretary was directed to have built.

Proposals were received for these docks from plaintiffs and others, but upon their examination, and on full consideration of the plans proposed, it was found that the appropriation was insufficient to pay for the work on the plan approved by the Secretary. Thereupon, under the advice of the Attorney-General, the Secretary declined to make any contracts.

The next session of Congress having considered the matter, passed an Act on the 3d August, 1848, in which the Secretary was directed, in the execution of the Act already mentioned, to enter into a contract with Dakin and Moody for the construction of a sectional floating dry-dock, basin, and railways at Philadelphia, and with Gilbert and Secor (plaintiffs) for the construction of a balance floating dry-dock, basin, and railways at Pensacola, and with one or the other of the parties for the construction of a floating dry-dock, basin, and railways upon either of those plans

that the Secretary might prefer, for the Navy Yard at Kittery; provided that such contracts could be made at usual prices that should not exceed by ten per cent. the prices which had been submitted by either of said parties. It was also provided that the Secretary should, in contracting with said parties, enlarge the dimensions of said works at each yard to a capacity sufficient for docking war steamers of the largest class.

Under the powers conferred by this statute, the Secretary of the Navy contracted with Dakin and Moody for the dock at Philadelphia and with the plaintiffs for the work at Pensacola. In determining which of the proposed plans (both of which, it seems, were patented) he would select for Kittery, he seems to have considered whether he could get the dock at that place copper-sheathed without any additional cost, and it is recited in the contract signed by him and by plaintiffs for the work at that place that "The Secretary of the Navy, in execution of the aforesaid law, after mature deliberation thereon, and in consideration that the said parties of the second part will copper-fasten said dock at Kittery, according to the specifications for the Pensacola dock hereto annexed, has determined to select, and does hereby select, the balance dock, basin and railways of Gilbert and Secor, parties of the second part, as best adapted for the Navy Yard at Kittery." The contract also provides for the enlargement necessary for war steamers, and for the increase of the price of the work by ten per cent.

It seems to us that this statement of the case sufficiently negatives the idea that the Act of Congress completed a contract.

When did plaintiffs become bound to build such a work as that specified in their final contract? That work was much larger than the one for which they made proposals. When did they consent to the enlargement? Their proposals of the year previous had been rejected by the Secretary. When did they renew them? The proposition which Congress authorized the Secretary to accept was ten per cent. larger than any proposal they had made. Did Congress mean to say: we accept your proposal and give you ten per cent. more than you have asked? Or did it mean to authorize the Secretary to make the best terms he could, not exceeding that limit? Clearly it must have intended the latter.

It also appears from the agreement signed and therefore accepted, by the plaintiffs, that the Secretary was induced to exercise the option which the Act gave him in regard to the two kinds of works in favor of that of plaintiffs in consideration that they would copper-fasten the dock without additional charge. Having thus induced the Secretary to decide in their favor, they are not at liberty to repudiate this part of their contract.

If these transactions are to be construed by the rules which govern agreements between private individuals, there does not appear to be any reason to infer a contract prior to the written agreement between the parties, nor any reason why that agreement should not govern the rights of the parties.

The judgment of the Court of Claims is affirmed.

Cited—8 Wall., 490.

JOSE MARIA ALVISO, Claimant, *Appt.*,

v.

THE UNITED STATES.

(See S. C., 8 WALL., 387-342.)

Mexican grant—extent of—survey—objection cannot be made for the first time here—party to appeal.

Where a Mexican grant is a grant by quantity, the claimant is entitled to the amount specified, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors.

If it is also a grant of a certain place by name and the boundaries are not given, its extent and limits must be shown by the settlement and possession of the grantee.

Where there is great doubt as to which side the weight of evidence inclines, concerning the correctness of a survey, this court will not interfere with the decision of the district court.

An objection cannot be made for the first time in this court. A claimant cannot object for the first time in this court to the position of an intervenor as a contestant.

A party who has not appealed from a decree approving a survey, cannot raise any objection to its correctness here.

[Mr. Justice SWAYNE did not sit in this cause.]

[No. 8.]

Argued Dec. 17, 1868. Decided Jan. 11, 1869.

APPPEAL from the District Court of the United States for the Northern District of California.

The petition in this case was filed by the appellant before the Board of Land Commissioners, for settling private land claims in the State of California, for the confirmation of title to a certain tract of land. A confirmation of title to said land was made by said Board, to the extent of one square league. The claimant took an appeal to the court below, which affirmed the said decree of the Board, "Provided that the said quantity of one square league, etc., be contained in the boundaries called for in said grants and the map."

Thereupon the claimant took a further appeal to this court.

The case is further stated by the court.

Mr. J. H. Bradley, for appellant.

Mr. J. A. Wills, special counsel for appellee.

Mr. Justice Field delivered the opinion of the court:

The original grant of the complainant issued in September, 1835, described the land ceded as known by the name of Milpitas, and as being one league in length from north to south, and one half a league in length from east to west, and as being in extent equal to half a square league, as shown by the accompanying map. The second grant, issued in October following, adds half a league to the original quantity on the west, so as to make the entire tract ceded a square league. Neither of these title papers gives any boundaries of the land, nor refers to any documents by which the boundaries can be ascertained, except the map mentioned. This map is a rude and imperfect sketch indicating only the general locality of the land, without fixing, with precision, its exterior limits.

The decree of the district court furnishes little assistance in the attempt to ascertain these limits. It adjudges the claim of the grantee to

be valid to the extent and quantity of one square league, provided that quantity be contained within the boundaries called for in the grant, and the maps to which they refer; and if there be less than that quantity, then the confirmation is to be restricted accordingly. As there are no boundaries called for in the grants, the reference to any such must have been inadvertently made, and the language used can only be regarded as a direction to look to the map for whatever it may be worth in determining the location of the land. The decree also declares the tract confirmed to be the land of which the possession was proved to have been long enjoyed by the claimant. The proof here mentioned only shows that the claimant had been for many years in possession of some of the land granted to him, without mentioning any boundaries of the land, or indicating that any were ever established.

In the case of *Higuera v. U. S.*, 5 Wall., 827 [72 U. S., XVIII., 469], this court speaks of concessions or grants of public lands, made by Mexican governors, as being of three kinds: 1. Grants by specific boundaries, where the donee was entitled to the entire tract; 2. Grants by quantity, as of one or more leagues of land situated in a larger tract, described by out-boundaries, where the donee was entitled only to the quantity specified; and 3. Grants of a certain place or *ranch* by some particular name, either with or without specific boundaries, where the donee was entitled to the tract, according to the boundaries, if given; and if not given, according to the limits of the tract, as shown by the proofs of settlement and possession.

The grant in the case before us partakes of the two latter classes. It is a grant by quantity, and the claimant is entitled to the amount specified, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors. It is also a grant of a certain place by name, and as the boundaries are not given, its extent and limits must be shown by the settlement and possession of the grantee.

The correctness of the ruling of the court in setting aside the first survey is not questioned; and the appellant himself united with adjoining proprietors in excepting to the second survey. The testimony taken established, with sufficient distinctness, the northern and western boundaries, as fixed by the third and approved survey. It showed that the northern boundary, between Alviso and Higuera—at one time a matter of dispute between them—was settled and fixed under the Mexican Government, and that the Penetencia Creek was the dividing line on the west, between Alviso and White, the confirmer of the grant of Rincon de los Esteros.

But as to the southern boundary—the boundary between Alviso and Berryessa—the testimony was conflicting and unsatisfactory. Indeed, it is impossible to reconcile the different statements of the witnesses as to the extent of the occupation of either party, south of Milpitas Creek. Some of them testified that the possession of Alviso extended far south of it, whilst others asserted that the creek itself was recognized, both by him and Berryessa, as the boundary between them. The contradictions are so flat that the counsel of the appellant

is forced to state that the mind is left in uncertainty whether there was any exclusive occupation of the land by either of the parties. Under these circumstances, there being great doubt as to which side the weight of evidence inclines, we should not be justified, under any rules governing our action upon such cases, in interfering with the decision of the District Court.

The counsel of the appellant objects that there is no evidence in the record that Berryessa had any grant, or if he had any, that it was ever confirmed, and insists that no weight should, therefore, be given to his possessions against the claim of the appellant. This objection cannot be made for the first time in this court. The right of Berryessa to contest the survey originally made, and the nature of his interest, were determined by the district court on his application to intervene. The Act of June 14th, 1860, provides for the return into court of surveys for examination and adjudication upon the application of parties who, in the judgment of the district court or judge, have such interest in the survey and location as to render it proper for them to intervene for its protection. It enacts that where objections are advanced by the United States, the application shall be made by the district attorney, and be "founded on sufficient affidavits," and that when the application is made by "other parties claiming to be interested in, or that their rights are affected" by the survey and location, there shall be a preliminary examination into the fact and nature of such alleged interest. "The court or judge in vacation," says the statute, "shall proceed summarily, on affidavits or otherwise, to inquire into the fact of such interest, and shall, in its discretion, determine whether the applicant has such an interest therein as, under the circumstances of the case, to make it proper that he should be heard in opposition to the survey, and shall grant or refuse the order to return the survey and location as shall be just." When the interest of the applicant is shown and the order is made, those who claim under the United States, whether by "preemption settlement or other right or title," must intervene in the name of the United States, and be represented by the district attorney and counsel employed by them acting with him. All other parties not claiming under the United States and allowed to intervene, must necessarily claim under cessions more or less perfect of the former Mexican Government. In the case at bar, when the original survey was made, Berryessa applied for and obtained an order for its return into court. In his petition he set forth that he was the owner of the *ranchito* south of the claim surveyed, under the title derived from the Mexican Government; that the creek Milpitas was the boundary between his *ranchito* and the *ranchito* confirmed, and that the survey included about fifteen or eighteen hundred acres of land belonging to him. The order of the court, made thereon, necessarily involved under the statute a determination that he possessed such interest, derived from the former government, as to render it proper that he should be heard in opposition to the survey. His right to contest the survey, founded upon the interest alleged, was then settled. The

claimant might, perhaps, have subsequently insisted that the intervenor had no such interest as to give him a right to object to the survey, and have asked on that ground for a revocation of the order. But not having taken any such course, he cannot now object to the position of the intervenor as a contestant. As contestant, the intervenor could, of course, show his own occupation of the land in dispute to meet and overthrow the pretensions of the claimant founded upon his asserted possession of the premises.

As to the eastern boundary of the approved survey, we are not entirely satisfied that it is correct. There is much force in the position that this boundary should run along the base of the hills, and not embrace any portion of their sides. But the United States, who might have interposed an objection of this character, have not appealed from the decree approving the survey in its present form. They cannot, therefore, raise any objection to its correctness now. *Forest Case*, 2 Wall., 649 [69 U. S. XVII., 739].

Upon the whole case, we are satisfied that the survey approved, is as favorable to the appellant as any which the evidence would justify. The decree sustaining that survey must, therefore, be affirmed.

Ordered accordingly.

S. C.—6 Wall., 457.

Cited—10 Wall., 232; 98 U. S., 214; 101 U. S., 807.

HORATIO SEYMOUR ET AL., Heirs of
HENRY SEYMOUR, Deceased, *Appts.*,

L. C. P. FREER, Admr., etc., of JEREMIAH
PRICE, Deceased.

(See S. C., 8 Wall., 203-220.)

Contract to purchase land and receive profits for compensation—an equity chargeable on the land—trust—follows land and proceeds—equity will enforce parties and not copartners—limitations, when applied to trusts—misjoinder, effect of.

A contract between two persons, the one to furnish money, the other to purchase lands therewith and to receive for his compensation one half of the profits on the sales of the lands, which were to be made within five years, gives the latter an equitable interest in the lands.

This equitable interest is a charge upon the property, and constitutes an equity which a court of equity will protect and enforce.

The lands having been conveyed to the one furnishing the money, he took the title in trust to sell the property, and after deducting the expenses and taxes, to pay over to the other one half of the residue.

Such trust would follow the land, except upon a bona fide sale for its fair value.

If a valid sale had been made, the trust would bind the proceeds in like manner as it bound the property.

Land which is to be converted into money is, in equity, regarded as money and treated accordingly.

The personal representative of a deceased party to such contract is the proper person to maintain a suit for his interest, and it is not necessary that his heirs at law should be parties.

The parties are not copartners in respect to the

NOTE.—*Statute of Limitations and lapses of time no bar to trusts.* See note to *Prevost v. Gratz*, 19 U. S. (6 Wheat.), 481.

lands to be bought; one is trustee, the other is *cestui que trust*.

The latter may proceed in equity to enforce the trust and lien created by the contract.

His rights continued after the expiration of the time agreed upon for the sale, unless he renounced or disclaimed his rights.

Where there is no disclaimer, the Statute of Limitations has no application to an express trust, such as exists in this case.

Where there is a misjoinder of parties in a bill, the bill as to them should be dismissed; the error would have no other effect.

The court may appoint a receiver and decree the execution of the contract by him.

[No. 88.]

Argued Feb. 10, 1869. Decided Mar. 15, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Henry Seymour died in Aug., 1837, and the defendants in the suit are the surviving executors of his will, and his heirs and devisees, except the defendant, Wetmore, who is the trustee of one of the devisees.

Jeremiah Price died intestate, in July, 1854. John High, Jr., the original plaintiff, was his administrator; but he dying pending the suit, and after filing the bill of complaint, the present plaintiff, L. C. P. Freer, was appointed administrator *de bonis non* of Jeremiah Price, and was substituted as plaintiff in the suit.

The case was heard in the circuit court in November, 1864, and was held under advisement until Oct. 18, 1865, when the first decree appealed from was made. By this decree it was adjudged that Jeremiah Price, in his lifetime and at the time of his death, was, by virtue of the agreement of 1835, "entitled, as an equal copartner in the profits, to one equal half of the profits made or to be made, from the sale of lands and real estate" mentioned in the pleadings; after deducting the advance of \$5,000, with the taxes and other charges and interest thereon; that the sales of the land already made by the heirs of Mr. Seymour, and the sales yet to be made, "are to be deemed and taken as made and to be made on joint account of the estate of the said Henry Seymour, deceased, and of the estate of the said Jeremiah Price, deceased; the heirs or personal representatives of Henry Seymour, deceased, being entitled, besides return of capital advanced as aforesaid, with taxes, charges, and interest added thereto, to one equal half part of the clear profits remaining over from proceeds of sales made and to be made; and the complainant, as administrator *de bonis non* of the said Jeremiah Price, deceased, being entitled to the other equal half of the clear profits aforesaid, as personal estate of the said Price, in course of administration," etc. The decree further provides for a reference to a master in chancery, named to take and state the accounts, with detailed directions corresponding with the principles of the decree.

The final decree was made Nov. 15, 1866.

It recites the former decree and the master's report. The latter is confirmed. "It is adjudged that the clear profits of the partnership land purchase and sale up to the present time, be equally divided between the parties in this suit; one half to the complainant, and the other half to be held by the heirs and devisees of Henry Seymour, deceased."

It adjudges that all the residue of the lands originally purchased by Price, under the agree-

See 8 WALL.

ment, which was afterwards specified particularly, be sold at a private sale under the direction of A. C. Coventry, who, by consent of parties, is appointed receiver for that purpose, on certain terms of payment and security mentioned, the receiver to bring the clear proceeds of the sales into court and pay them to the clerk, to be divided upon the principles of the decree.

The defendants appealed.

The case further appears in the opinion.

Messrs. F. Kerman, H. Denio, and Thomas Haynes, for appellants:

No interest of any third party being in question, the sole inquiry is as to the true construction and meaning of the agreement between the contracting parties. There is nothing in the policy of the law nor in adjudged cases which requires that they should be considered copartners, or to have a joint interest between themselves to any extent beyond the explicit language of their contract.

Hasard v. Hazard, 1 Story, 371.

By the terms and the true construction of the contract, the only compensation which Mr. Price was to have for his services in selecting and purchasing the land, was the profits to arise upon a sale of it within five years from the date of the contract. This is the express language of the instrument and there is not one word in it which, by any fair intendment, looks to any general interest in Price in the nature of the interest of a partner in partnership property.

The lands which Price was to select and purchase, were to be such as he should "find most advantageous to the interest of said Henry." This contradicts the theory of the complainant, that the services of Mr. Price were to be considered as a contribution towards the purchase of partnership property.

The provision, that the contracts and conveyances should be made and taken in the name of Seymour, leads to the same conclusion.

There is no ground for the suggestion that the provision for a sale in five years was merely directory and modal, and that it might be waived by Price without affecting his rights.

The complainant claims, and the decrees proceed upon the principles of the law of partnership; but the claim in that aspect is entirely unfounded.

The particular language of the instrument and the manner of vesting the title, show a clear intention that the land should belong wholly to Seymour, and that what Price was to have contingently, was simply to compensate him for his services as agent.

The point has often been decided against the complainant's position in similar cases, and the converse of that position is settled law.

Smith v. Watson, 2 Barn. & C., 401; *Reid v. Hollingshead*, 4 Barn. & C., 867; *Meyer v. Sharpe*, 5 Taunt., 74; *Stow v. Robinson*, 24 Ill., 582.

Price was, no doubt, interested in the profits to be made in the sale of this land, according to the provisions of the agreement. It was not, however, the interest which every partner to an executory contract has, in having the stipulations in his favor performed by the other party. A personal action at law against the delinquent party, or against his personal representative is

the ordinary remedy for the breach of such an agreement. *Stow v. Robinson*, 24 Ill., 582, *supra*.

It is the only one, unless special circumstances intervene to make it unavailable, when, in certain cases, a resort may be had to equity.

There was no partnership for any purpose in this case, between Seymour and Price.

Rev. Stat. Ill., 1845, sec. 1, ch. 62; 1 Cook & Co., Stat., 720; Story, Part., sec. 82; Sm. Merc. L., 47; *Hesketh v. Blanchard*, 4 East, 144; Cary, Part., 9; Bisset, Part., 18.

The foregoing references show the sense of the English courts and systematic writers on this question; and that Price, upon the facts of this case, was not a partner in any sense.

The rule has been generally, I think I may say universally, adopted in this country.

Burckle v. Eckhart, 1 Den., 387; S. C., 3 N. Y., 182; *Vandenburgh v. Hull*, 20 Wend., 70; *Fitch v. Hall*, 25 Barb., 18; *Ogden v. Astor*, 4 Sandf., 811; *Chase v. Barrett*, 4 Paige, 148. *Turner v. Bissell*, 14 Pick., 193; *Denny v. Cabot*, 6 Met., 82; *Loomis v. Marshall*, 12 Conn., 69; *Miller v. Bartlet*, 15 Serg. & R., 187; *Perrins v. Hankinson*, 6 Hals., 181; *Berthold v. Goldsmith*, 24 How., 587 (65 U. S., XVI., 762); *Stow v. Robinson*, 24 Ill., 582.

This last case is similar to the present in its principal features.

The following suggestions connected with this case are submitted:

1. It should be kept constantly in mind, that in our contract the only sale in which Price was to have any interest, was one to be made in five years; and that that period elapsed without a sale and without the fault of either party.

2. But, independent of that circumstance (which is a controlling one in every view which can be taken of this case), the case cited is decisive upon every point. It is precisely similar in principle.

3. In the case cited, Robinson was the owner of the land prior to the contract, while in our case, it was to be purchased with Seymour's money and to be conveyed to Seymour, and the stipulations concerned the land so to be purchased and conveyed. This difference is merely circumstantial, and does not affect the principle.

4. In both cases the meritorious cause of the compensation, to be made by the owner of the land to the other party, was the services of such other party respecting the land. In our case it was the selecting and purchasing it for Seymour and with his money. In the other case it was the plotting, surveying, subdividing, advertising and selling. The difference in the kind of service is of no materiality. It is merely circumstantial, not affecting the principle; the services, in both cases being collateral to the title, and contracted for as a means of carrying out the views of the owner in bringing it into market. If, in *Robinson's* case, the contract created no interest in the agent in the land, as the court decided, the contract in our case certainly created no interest in Price.

5. In both cases the party who was to make the sale had died, leaving the land unsold.

6. Under a state of facts precisely similar to in principle to that presented in this case, the Illinois court decided that the representatives of the agent had no remedy in equity. A similar decision should be made here.

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7. As to the remedy at law, our case proceeds upon an express concession that Seymour was without fault in omitting to sell within the time agreed on; while in *Robinson's* case there was a clear violation, by the owner of the land, of the stipulations of his contract in favor of the agent.

The rights of Price and his representatives were barred by the lapse of time.

The court will find in the following authorities the principles upon which courts of equity refuse to interpose when state claims are sought to be enforced:

Story, Eq. Jur., sec. 776; *Hipwell v. Knight*, 1 Younge & C., 415; *Taylor v. Longworth*, 14 Pet., 176; *Lloyd v. Collett*, 4 Bro. Ch., 471; *Harrington v. Wheeler*, 4 Ves., 686; *Brown v. Cannon*, 5 Gilm., 180; *Brashier v. Grate*, 6 Wheat., 540; *Anderson v. Frye*, 18 Ill., 95; *Bishop v. Newton*, 20 Ill., 178; *Sons v. Pratt*, 25 Ill., 95; *Kemp v. Humphreys*, 18 Ill., 577.

It is a circumstance of great weight that, during all this time, the burden upon the heirs and devisees of Mr. Seymour was increasing at a rapid rate, by the accumulation of interest and taxes and the expenses of agency. Good faith required that Mr. Price should have advised the other party that he claimed a continuing interest, if such was the fact. *Brashier v. Grate*, 6 Wheat., 540; *Rogers v. Saunders*, 16 Me., 92; *Cooper v. Brown*, 2 McLean, 495.

As the contract looked solely to a sale in five years and limited the interest of Price to the profits to be made upon such a sale, it required an express contract to continue and extend the arrangement to sales to be made afterwards.

Messrs. J. M. Howard and H. F. Mather, for appellee:

The written contract between Price and Seymour, bearing date May 9th, 1835, constituted the relation of copartnership between themselves, in the purchase and sale of the lands in controversy; and as a means of doing justice between the partners or their personal representatives, courts of equity compel sales to be made in such cases in conformity to the agreement. Whether the relation of the parties to each other, under this contract, be denominated technically a partnership or not, is, however, perfectly immaterial; inasmuch as the contract is, in any view of it, of a nature entitling either party to a decree for specific performance. The bill is equally well adapted to either view; indeed, specific performance, in all such cases, proceeds essentially on grounds of partnership, or at least on grounds analogous thereto.

Brady v. Calhoun, 1 Pa., 147; *Dudley v. Littlefield*, 21 Me., 431; *Smith v. Burnham*, 8 Sumn., 435; *Oleott v. Wing*, 4 McLean, 16; *Ward v. Thompson*, 23 How., 380 (63 U. S., XVI., 249); *Robbins v. Lanoell*, 27 Ill., 365.

It seems to be well settled that, when by agreement persons have a joint interest of the same nature in a particular adventure, they are partners *inter se*, although some may contribute money and others labor.

4 Barn. & C.; Story, Part., sec. 15; *Dobbs v. Halsey*, 16 Johns., 84.

It is not necessary, to constitute a partnership, that there should be any property constituting the capital stock which shall jointly be owned by the partners.

Champion v. Bostwick, 18 Wend., 188; *Garr v. Redman*, 6 Cal., 574; *Gray v. Palmer*, 9 Cal.,

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616; Coll., part. secs. 8, 16; *Reid v. Hollingshead*, 4 B. & C., 868; *White & T. Lead. Cas. in Eq.*, or Vol. 84, Law Lib., 555; *Fletcher v. Ashburner*, 1 Bro. Ch., 497; *Frederick v. Frederick*, 1 P. Wms., 710; *Berthold v. Goldsmith*, 24 How., 596 (65 U. S., XVI., 763).

This case was cited and relied upon by defendant's counsel to show that there was no partnership between Price and Seymour; we think it shows the contrary position, which we hold.

We say that there was a most perfect community of interest between Price and Seymour, in profits as profits. Price fulfilled all on his part; Seymour only is in default, *i. e.*, by refusing to Mr. High to sell, so as to allow communion of profits. The court says: "But he did not merely rely on the profits for his compensation, for unless half the profits exceeded \$18,000 a year, he was neither to be benefited nor injured."

Price was subjected, by express contract, to a liability to lose all he put in, in exact accordance with the established principles of the civil law; and this liability to loss, in connection with an expressly agreed participation in profits, constitutes an infallible criterion of partnership.

We hazard nothing in affirming that no reported case can be found in England or in the United States, where, upon a concurrence of those circumstances, it was decided that no partnership existed. It is also to be remembered that the opinion of *Judge Story*, as above cited from 8 Sumn., goes further, and shows that where the partnership in profits exists on speculative land purchases, in all such cases the partners have each an equitable interest in the lands, notwithstanding the legal title may be in one only of the partners.

Dobb v. Halsey, 16 Johns., 34; *Brown v. Cook*, 3 N. H., 64; head note, 3 Bosw. (N. Y.), 106.

Price was strictly a partner with Seymour in the adventure, entitled of course to maintain a bill for an account, as auxiliary thereto, as he fully performed all his parts of the contract; and, moreover, is entitled to a decree for the sale of the property that remains unsold, and out of which the profits are to come.

Stow v. Robinson, 24 Ill., 532; *Porter v. Ewing*, 24 Ill., 617.

Though the land in this case, as land, descended to the children of Seymour as heirs, yet, having been purchased solely for the purpose of sale, on speculation for the benefit of several, it had thereby impressed upon it the character of personalty, and is so held and entitled to be treated in courts of equity.

Though the death of either party to a partnership, or of both, terminates it as to further enterprise, or investments of a like nature, yet the partnership still subsists for the sole purpose of carrying out and winding up the concern.

This principle applies with peculiar force to the partnership of Price and Seymour, because the remaining unexecuted portion, that is to say, the holding of the property for sale and the sale of it at the proper time, and the division and distribution of the profits, was the whole body and substance of the partnership after the first purchase was completed, and was all incumbent on the Seymours.

The partnership property, whether real or

personal (in whomsoever the title may be vested), being held in trust for all the copartners, Seymour's heirs, as trustees in their father's place and stead, hold the property subject to the same trust, and are under the same obligations to Price or his representatives that their father, Henry Seymour, was under at the time of his death, in 1837, or would now be under, had he survived.

The time, under any Statute of Limitations, can never run against a partnership or trust, such as exists in this case, any more than against a tenant in common without ouster.

Although in most cases a claim may become stale when, after great length of time elapsed, the circumstances or condition of the property itself may be changed, as by improvements, or the property may have gone into the hands of *bona fide* purchasers or incumbrancers, or on other like principles, yet this cannot as easily occur in a case of partnership or trust, because the same principle which precludes the bar of the Statute of Limitations, applies with equal force to preclude the charge of staleness.

The following positions seem to exhaust the subject of staleness:

Parties standing as the Seymours do in this case, can never be permitted to charge staleness against the opposite parties, grounded on their own omission to do any act which they undertook or were equitably bound to do. The case from 5 Leigh (Va.), states this very pointedly.

And as to Price himself in this regard, he is to be looked to, first, as touching his acts done, actively; and secondly, as to his omission, passively. As to the first, it is clear that he performed everything, and more than the contract required, and was in no default whatever, actively; and as to the last, there was on his part nothing omitted which he was under any obligation to do; and the delay suffered passively is perfectly explained by equitable circumstances, showing it to have been a necessity arising from the very nature of the business and concurrent events not within his control.

Mr. Justice Swayne delivered the opinion of the court:

The contract which lies at the foundation of this suit, was entered into by Jeremiah Price and Henry Seymour on the 9th of May, 1835. Upon looking into it carefully, we find it contains the following provisions:

Price agreed that he would devote his time and attention, and exercise his best judgment, in purchasing lands to an amount not exceeding \$5,000, in the States of Indiana, Illinois and Ohio, and in the Territories of Michigan and Wisconsin, or in such of them as he should find most advantageous for the interest of Seymour; the contracts were to be made and the conveyances to be taken in Seymour's name; the purchases were to be made after full and careful search for the most profitable investments "in or near the sites or expected sites of towns or places of business," and in general in tracts of land of moderate extent; Seymour agreed to furnish \$5,000 wherewith to make the purchases contemplated; that the land so purchased should be sold within five years from the date of the contract; that, after charging the investment, the taxes, and 7 per cent. interest on the investment, there should be paid to Price one half of the prof-

its which should be made: it was agreed that this half of the profits should be in full for Price's services and expenses of every kind in making the explorations and searches, and in doing all such other things as should be requisite and proper in making the purchases: the purchases were to be made during the current year: nothing was to be paid by Seymour for Price's services or expenses, except from the profits as aforesaid. The premises in controversy were bought by Price, and the titles vested in Seymour, pursuant to the contract. The property consisted of 2,440¹¹/₁₀₀ acres of land in the State of Illinois, and several lots in the Village of Joliet, in that State.

It was agreed by the parties to this suit, that at the expiration of the five years within which the premises were to be sold, they were unsalable, "and that it is entirely uncertain how much they could have been sold for, or whether they would even have brought enough to pay the original investment and interest."

Before the commencement of this suit the property had become very valuable; 200 acres had been sold for \$69,200.

Seymour died in 1837, and Price in 1854. The five years within which the property was to be sold expired in 1840.

The duties and obligations with which the contract clothed Price, were those of an agent. He was to make the requisite searches and explorations in the States and Territories named, and to receive and invest the money of Seymour as he might deem best for Seymour's interest. He was to contribute his time, labor, skill and judgment, but no money except what might be expended in the service he had undertaken to perform. The titles were all to be taken in the name of the principal, who was to advance the money. These functions were performed by Price. His duties and responsibilities thereupon came to an end, and those of Seymour to him commenced. For his expenditures, whatever they might be, he was to receive no immediate or certain return. The same remark is applicable in respect to his labor and services, and the exercise of his skill and judgment. Everything to be done by the agent he was to do, without any charge to his principal.

Seymour was to receive the titles of the property purchased, as if the purchases had been made by himself at home. All the burdens incident to the acquisition of the property were to be borne by Price, with only the contingency of re-imbursement and compensation provided in the contract.

The lands were to be sold within five years. It is not stated by whom, but as the legal title was vested in Seymour, the duty of selling, by the clearest implication, devolved upon him. Price had no power to move in the matter, nor to exert any control, except the right to insist that the property should be sold by Seymour, within the time limited, and that the sales should be fairly conducted. *Mann v. Butler*, 2 Barb. Ch., 368. By an implication equally clear, Seymour was to pay all the taxes upon the property which might accrue.

It is proper here to consider the legal and equitable relations of the parties arising out of the contract.

We think Seymour took the legal title in trust for the purposes specified. A trust is where

there are rights, titles and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked. 2 Story, Eq., sec. 964; *Sturt v. Mellish*, 2 Atk., 612. Interests in real estate, purely contingent, may be made the subjects of contract and equitable cognizance, as between the proper parties. *Phyfe v. Wardell*, 5 Paige, 268; *Armour v. Alexander*, 10 Paige, 571. The object of the trust here was to sell the property within the time limited and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one half of the residue. To this extent, Seymour was a trustee, and Price the *cestui que trust*. They had a joint interest in the property. Seymour held the legal title, but the rights of Price were as valid in equity as those of Seymour were at law.

If Seymour, within the five years, had conveyed the property to one of his children, by way of advancement, or to a stranger, otherwise than upon a *bona fide* sale for its fair value, the grantee would have taken the title, subject to the trust upon which Seymour held it, and a court of equity would have followed the property and dealt with it in all respects as if the title had still remained in Seymour. If a valid sale had been made, the trust would have followed and bound the proceeds in like manner as it bound the property. *Oliver v. Platt*, 3 How., 401; *Taylor v. Plumer*, 3 Maule & S., 562; *Sweet v. Jacobs*, 6 Paige, 355; *Wylie v. Coze*, 15 How., 416.

Upon the death of Seymour, the legal estate passed to his devisees.

The principle of equitable conversion has an important bearing upon the case. Equity considers that as done which is agreed to be done. Money which, according to a will or agreement, is to be invested in land, is regarded, in equity, as real estate; and land which is to be converted into money, is regarded as money, and treated accordingly. *Anstice's Admr. v. Brown*, 6 Paige, 448. In this view of the subject, the personal representative of Price is the proper person to maintain this suit, and it is not necessary that his heirs at law should be parties.

There is another view of this subject, which we think may properly be taken. The agreement that the property should be sold, and half of the profits paid to Price, was a charge upon the property, and gave him a lien to the extent of the amount to which he should be found entitled upon the execution of the agreement, according to its terms. The principle involved in this proposition is a familiar one in equity, and constantly applied in the administration of its jurisprudence. *Pinch v. Anthony*, 8 Allen, 539; *Legard v. Hodges*, 1 Ves., Jr., 477; *Roundell v. Breary*, 2 Vern., 482; *Gardner v. Townshend*, Coop. Ch., 303; 2 Story, Eq., sec. 1, 214-217; *Denston v. Morris*, 2 Edw. Ch., 87.

It is insisted by the appellees that the contract made the parties copartners in respect to the lands to be bought. We cannot adopt that view of the subject. The adjudications which

bear upon it are conflicting and irreconcilable. The case of *Berthold v. Goldsmith*, 24 How., 536 [65 U. S., XVI., 762], is conclusive in this forum against the proposition. We deem it sufficient to refer to that authority, without reproducing the considerations which control the judgment of the court.

But the result is the same as if we held that the parties were copartners. In that event, Seymour would still have held the property as trustee for the firm, according to the rights of the respective members. *Anderson v. Lemon*, 8 N. Y., 236.

The appellants contend, that for any violation of the contract to the injury of Price, he had a remedy at law, and that neither he nor his legal representative could have any other.

An action at law, sounding in damages, may, undoubtedly, be maintained in such cases for the breach of an express agreement by the trustee, but this in no wise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent remedies. Either, which is preferred, may be selected. The remedy in equity is the better one. The right to resort to it, under the circumstances of this case, admits of no doubt, either upon principle or authority. Such, in our judgment, were the effect and consequences of the contract.

At the end of the five years, limited for its complete fulfillment, a new element, not anticipated by the parties and, hence, not provided for, intervened. The property, if then sold, would have afforded no profit. There would have been nothing to divide. It is uncertain whether it would have yielded enough to reimburse the cost and interest. According to the views we have expressed, there was a trust and lien for the benefit of Price. They could be destroyed only by something subsequently to occur. Either Price or Seymour's devisees might have insisted upon the sale of the property according to the contract. This would have extinguished the rights of both parties touching the lands, but it would have benefited neither. There would have been no profit for either party. Price would have lost his expenditures of time, money and skill. The devisees might have lost the interest upon the investment and, perhaps, a part of the principal.

The devisees might have held the property, and denied that, under the circumstances, the trust subsisted any longer. If Price acquiesced, his rights would have been at an end.

Price might, also, have expressly or tacitly abandoned his claim. This would have worked the same result. Both parties might have concluded to continue their existing relations, and to wait for a more auspicious period for the disposition of the property. Their interests were the same. What would benefit or injure one could not fail to have the same effect upon the others. If the purchases were judiciously made, the course last suggested was obviously the wisest and best for both parties. Was either of the alternatives adopted? And if so, which one?

This is the turning point of the case.

The burden of the proof as to the two former rests upon the appellants.

Upon a careful examination of the record we have failed to find the slightest proof of any disclaimer by the devisees, or of any renuncia-

tion by Price. If such evidence exists we must suppose it is contained in the correspondence between the parties. They are annexed to the bill accounts, showing the receipts and disbursements of Price down to the time of his death. The receipts, after the death of Seymour, commence on the 24th of December, 1841, and terminate on the 18th of June, 1854. All the moneys were received from Messrs. John F. and Horatio Seymour. It appears, by a stipulation in the record, that the sums with which Price debited himself had all been verified by comparing them with the original receipts in the possession of the counsel of the appellants. The Messrs. Seymour lived in the State of New York, and Price at Chicago. The moneys were all remitted by checks. It is apparent, from the face of the accounts, that the receipt of the money, in many instances, if not in all, must have been acknowledged by letter. None of these letters have been produced. Why not? The inference is a fair one, to say the least, that they contain nothing unfavorable to the claim of the appellee. This negative feature of the case is not undeserving of consideration. If Price, neither by expression or acquiescence, did anything to impair his rights, they must still subsist in full force.

We think there is proof in the record, that he and his personal representative considered the time within which the sales were to be made, prolonged until they could be made profitably, and, that in all other respects, the contract remained as if it had originally contained this modification.

We can hardly conceive how the devisees, who advanced the money to pay the taxes, and with whom Price must have corresponded, could have understood his position differently. It is admitted that from the time of the purchases down to the time of his death, Price had the care and charge of the property, and paid the taxes upon it, the devisees furnishing the money. His accounts are long, and the items numerous. There is no proof that he ever made any charge or claimed anything for his services. His accounts are silent upon the subject. How can this be accounted for, unless he expected to be compensated by his share of the profits of the lands, to be realized when the proper time for selling should arrive?

Upon his death, High, his administrator, succeeded to the agency. He was employed by the devisees, and performed the same duties as his predecessor. He negotiated the sales mentioned in the bill, and at once claimed a share of the profits for Price's estate, according to the contract. The claim was resisted by the devisees, and he thereupon instituted this suit.

The theory insisted upon by the appellees is consistent with all the evidence in the case. It is in conflict with nothing which has been developed. It is alleged, in one of the answers, that Price "never pretended to the defendants to have any interest, * * * but claimed that he ought to be allowed a reasonable compensation for his services as agent, and not under the contract." When, where, and how was the claim made? If by letter, why is not the letter produced? The fact is important, but the allegation is wholly unsupported by anything in the record.

The answers set up the bar of the Statute of

Limitations. Where there is no disclaimer the Statute has no application to an express trust, such as we have found to exist in this case.

It is said there is a misjoinder of parties in the bill with respect to the executors of Seymour. The doctrine of equitable conversion renders their presence in the case necessary, if not indispensable. If the objection were well taken, the bill as to them would be dismissed. The error would have no other effect.

It is alleged, also, that there is a defect of non-joinder as to the heirs at law of Price. The application of the same doctrine is a sufficient answer to this objection.

Conceding that the appellee is entitled to have the contract specifically executed, the appellants insist that the court below erred in decreeing that it should be done by a receiver instead of themselves. There being a trust and a lien, a court of equity had unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties. The devisees are numerous. The death of any one of them might seriously retard and embarrass the execution of a decree shaped as the appellants suggest. The appointment of the solicitor of the appellants as receiver, and the stipulation, which appears in the record, that he might sell at private sale, protects in the best manner the interests of all concerned.

The court below held that the contract made the parties to it copartners, and the decree was framed accordingly. But, as the provisions of the decree conform in all respects to our views, this theoretical error constitutes no ground of reversal. A wrong reason was given for what was properly done.

The litigation appears to have been conducted in a spirit of candor and fairness on both sides, which is eminently creditable to the parties.

We find no error in the record, and the decrees of the Circuit Court is affirmed.

Mr. Justice Field, dissenting, delivered the following opinion:

Mr. Justice Nelson, Mr. Justice Grier and myself dissent from the judgment of a majority of the court in this case.

The decrees appealed from are founded upon the theory that, by the agreement of May, 1835, Price and Seymour became copartners, and that the property purchased was copartnership property. The interlocutory decree declares that Price, by virtue of that agreement, "was entitled, as an equal copartner in the property, to one equal half of the profits made, or to be made, from the sale of the lands;" that the lands were purchased by Price as an "investment on joint account of himself and said Seymour," and that the sales made, and to be made, were "to be deemed and taken as made, and to be made, on joint account." And in the final decree the court administers the property on what it declares to be "just partnership principles." It provides for the payment out of the fund of all the costs and expenses, and that "the balance which shall remain [of the funds then on hand], being clear profits of the partnership land purchase and sale up to the present time, be equally divided." And it speaks of "closing and settling the partnership land accounts, so far as the sales and collections have progressed."

And the case was presented to this court both in the oral and printed arguments of counsel upon the question whether a copartnership was created between Price and Seymour by the agreement of 1835, or any interest vested in Price in the lands purchased.

We shall consider at some length both parts of this question, and in disposing of them, we shall dispose, in our judgment, of the entire merits of the case.

We do not consider the agreement as creating any partnership between the parties, or as vesting in Price any interest, legal or equitable, in the lands purchased. It provides simply for services to be rendered by Price for Seymour, and a contingent compensation to be made to him for such services. It stipulates on the part of Price, that he shall devote his time and best judgment to the selection and purchase of land to an amount not exceeding \$5,000, in certain designated States and Territories, or in such of them as he may find most advantageous to the interest of Seymour; that the purchases shall be made during the then existing year, and that the contracts of purchase shall be made and the conveyances taken in the name of Seymour; and on the part of Seymour, that he shall furnish the \$5,000, that the lands purchased shall be sold within five years afterwards, and that of the profits made by such purchase and sale, one half shall be paid to Price, and be in full for his services and expenses. And as if to prevent any possible misconstruction, the agreement closes with a declaration that no payment for those services or expenses shall be made except from such profits.

By the express terms of the agreement the ownership of the property was to be in Seymour; the lands were to be selected and purchased for his general interest, and the title was to be taken in his name. The special interest of Price was only in the profits as a means of compensation for his services; and the interest was not in profits which might be made at any time, upon any future sale, however remote, but upon a sale within five years. He was to receive for his compensation one half that might be realized above cost, interest and taxes, from the rise of the property within that period. If language is to be interpreted in its natural and ordinary sense, the contract means that, and means nothing more nor less. The purchases, it says, shall be made during the present year. The sale shall be made within five years from that time, and one half the profits from such purchase and sale, not from purchases or sales made at any other time, shall be paid to Price, not as profits, but as compensation for his services.

The provision for the sale in five years was not merely directory and modal, which might be waived by Price without affecting his rights. The subsequent clauses securing a compensation to him are limited to a sale within the period designated. He was to have half of the profits arising upon such sale; the moiety of the profits made upon such sale was to be in full for his compensation, and he was not to receive anything for services or expenses, except a participation in the profits made "as aforesaid."

To one who is familiar with the history of the growth of the West, there is nothing singular or even unusual in a contract of this kind. With the immense tide of immigration setting

in that direction, lands of comparatively little value one day sometimes in a few months become the sites of villages and cities, and the source of affluence to their possessors. It is not strange, therefore, that in 1835, a year somewhat noted for its speculative tendencies, a gentleman of capital should propose to one of energy and experience in such matters, that he advance the money, and the latter invest it in lands in the States and Territories of the West, "on or near the sites, or expected sites, of towns or places of business," upon a consideration that the latter should receive by way of compensation one half of the profits which might be made from the rise of the property in value within a designated period.

Nor is there anything in contracts of this character which imposes the obligations or confers the rights of copartners between the parties. There is no copartnership where the relationship between the parties is that of master and servant, or of employer and *employé*, though the compensation of the latter may be in proportion to the profits, or be paid entirely out of them. Under some circumstances parties thus receiving a portion of the profits may be held, as respects third persons, subject to the liabilities of partners; but as between themselves, and in the adjustment of their respective rights, no such relation obtains. This has been settled law for more than half a century. Thus, in *Hecketh v. Blanchard*, 4 East, 144, decided in 1803, the plaintiff had furnished goods purchased by him on credit, to one Robinson, the testator of the defendants, to take to Africa for purposes of trade, upon an agreement that if any profit should arise from the adventure, he should have one half for his trouble. The plaintiff having paid for the goods, brought an action for the amount. It was objected in defense, that as the parties were to divide the profits, if any, they must be equally liable for any loss, and that, therefore, a partnership was constituted between them. But the objection was not sustained, and Lord Ellenborough said that "*Quoad* third parties it [the agreement] was a partnership, for the plaintiff was to share half the profits; but as between themselves, it was only an agreement for so much as a compensation for the plaintiff's trouble and for lending Robinson his credit."

In *Hazard v. Hazard*, 1 Story, 371, this doctrine was applied to a case where one of two parties agreed to devote his time to the management of the concerns of factories belonging to the other party, for one fourth of the profits of the business for the first year, and one third of the profits for each year after until the expiration of the agreement, which portion of the profits was to be the sole reward for his services. It was held that there was no partnership between the parties. "A mere participation in the profits," said Mr. Justice Story, "will not render the parties partners *inter se*, whatever it may do as to third persons, unless they so intend it. If A agrees to give B one third of the profits of a particular transaction or business for his labor and services therein, that may make both liable to third persons as partners, but not as between themselves;" and he refers in support of the doctrine to the case already cited of *Hecketh v. Blanchard*.

Similar adjudications have been repeatedly

made, we believe, in the highest courts of every State in the Union. Some slight differences exist in them as to the extent in which a participation in the profits of a business, by way of compensation, will render a party liable as a partner to third persons; but there is entire concurrence in the conclusion that such participation alone does not create a partnership between the parties.

In *Denny v. Cabot*, 6 Met., 88, the question presented to the Supreme Court of Massachusetts was, whether the defendant, Cooper, was a partner with Cabot, Appleton & Co. The agreement between them was substantially this: Cabot, Appleton & Co. were to furnish Cooper stock to be manufactured into cloth at his mill on their account, and Cooper was to manufacture the cloth and deliver it to them, and was to receive from them a stipulated sum per yard, and one third part of the net profits of the business. It was held that the parties were not partners, either between themselves or as to third persons; that the agreement only provided the manner in which the compensation to Cooper for his services in manufacturing the cloth was to be ascertained, and that he had no title to any share of the cloth or any lien thereon.

In *Loomis v. Marshall*, 13 Conn., 69, a case in some respects similar to that of *Denny v. Cabot*, was before the Supreme Court of Connecticut, and the liability of a party who receives a portion of the profits of a business as compensation for his services was very elaborately and ably considered. The agreement in the case was substantially this: A was to furnish B, who occupied a factory, a supply of wool for two years, to be manufactured into cloths. B agreed to manufacture the cloths, and to devote the use of the factory to that purpose, and the net proceeds of the cloths, after deducting incidental expenses and charges of sale, were to be divided so that A should have fifty-five per cent. and B forty-five per cent. The cost of the warp used, and the expense of insurance on the wool or cloths, were to be borne by them in the same ratio, and in case of destruction of wool or cloth by fire, the amount received from the insurance was to be divided between them, according to the loss of each. It was held that the agreement did not create a partnership between the parties; that the case was properly referable to that class of cases in which one party receives a share of the profits or avails as a compensation for services rendered, labor performed, and expenses incurred in the business; and the court observed, that if it should hold that the agreement constituted a partnership, it would change the existing law as to factors, brokers, agents, ship masters and seamen, who share in the profits by way of compensation, or in lieu of wages, and introduce great perplexity in the adjustment of their legal rights and remedies.

Now, if a party does not become a partner with others in business, general or special, as is above clearly established by the authorities, from the fact that by way of compensation he participates with them in the profits of the business, it follows that he does not, by reason of such participation, acquire any interest, legal or equitable, in the property which constitutes the basis of the business. It is only

upon the theory that the services rendered by one party are to be considered as an equivalent to the capital advanced by the other, that a common interest of both in the property can be asserted. This theory, not resting upon any solid foundation, the inference deduced therefrom, of course, fails. The sharing of the profits not changing the relation of the party as agent to the one who furnishes the capital, the ownership of the property acquired by such capital is not affected. The case of *Smith v. Watson*, 2 Barn. & C., 401, is conclusive upon this point. In that case, one Sampson (whose assignees in bankruptcy were the plaintiffs) employed one Gill, a broker, to purchase whalebone and, by agreement, was to pay him one third of the profits made on the sale of it for his trouble. The defendants were bankers, with whom Sampson kept his account; and the suit was brought to recover an amount in the defendant's hands, which was the proceeds of a bill drawn by Sampson on account of a parcel of whalebone which he had sold. Gill claiming to be a partner of Sampson, by means of the agreement, indemnified the bankers and received the money. It was held that the plaintiffs, as assignees of Sampson, were entitled to recover. Bayley, J., said:

"A right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner in respect of transactions arising out of the particular adventure, in the profits of which he is to participate; but it does not give him any interest in the property itself which was the subject-matter of the adventure. Gill's right to claim property in the whalebone must arise out of the terms of the bargain with Sampson; and looking to them, it appears clearly that it was not joint property. It may be assumed that it was purchased in the name of Sampson only, for Gill was a mere agent, and was to have a proportion of the profits in lieu of brokerage. Considering the question in this view, I am clearly of opinion that Gill had no property in the whalebone, or in the proceeds of the bill." Holroyd, J., said:

"Assuming it to have been agreed between Sampson and Gill that the latter should make purchases of whalebone, and in lieu of brokerage, should have one third of the profits arising out of the sales, and that he should even bear a certain proportion of the losses, I am of opinion that although such an agreement might make Gill liable as a partner to third persons, yet that it did not vest in him any interest in the whalebone purchased with the money of Sampson. Such an agreement would not convert that which was obtained by the separate property of Sampson into the joint property of Sampson and Gill. It may be collected from the evidence, that the latter did not furnish any part of the money required to pay for the whalebone, and that the contracts for sale were not made in his name, but in that of Sampson, for Gill was to act as broker only, and to receive a share of the profits in lieu of his brokerage. The money paid for the whalebone being, therefore, Sampson's separate property, and the contracts being made in his name as the purchaser, the property in the thing purchased would vest, by virtue of the contracts, in him alone."

There is no difference in principle between this case and the one under consideration. Price was employed to purchase land, and Gill was employed to purchase whalebone. Price was to receive one half of the profits made upon a sale of the land for his services and expenses, and Gill was to receive one third of the profits on the sale of the whalebone for his trouble. Gill was held not to be a partner with Sampson, who employed him, or to have any joint interest with him in the whalebone, and upon the same principle it should be held, in our judgment, that Price was not a partner with Seymour, and did not possess any joint interest with him in the land purchased.

If the decision in the case of *Smith v. Watson* is sound law—and it has not, that we are aware of, ever been questioned, but, on the contrary, has been uniformly approved by the highest courts of England and of the United States—it is impossible for the complainants to sustain the present suit. The suit proceeds and the decree is rendered, as we have here already stated, upon the theory that Price and Seymour were copartners, and that the property purchased was copartnership property.

We have shown, as we think conclusively, that Price was not a copartner with Seymour under the contract between them, and that he did not possess any interest with him in the lands purchased, but that the lands constituted the separate property of Seymour. Price was, it is true, interested in the profits to be made in the sale of the land, according to the terms of the agreement. It is not, however, the interest of a partner, but the interest which every party to an executory contract has in having the stipulations in his favor performed by the other party. A personal action against the delinquent party, or his personal representatives, is the remedy for the breach of an agreement of this character. Resort can be had to equity only when special circumstances intervene to render the action at law unavailable. Undoubtedly Price could have maintained an action at law against the representatives of Seymour had a sale of the property been refused within the five years specified in the agreement, and recovered, as damages, a sum equal to one half the difference between the value of the property and the amount of its cost, interest thereon, and expenses. That he did not institute any such action, or make any claim upon them, is explained by the admission accompanying the record, that the property was at that time unsalable, and that it was uncertain whether, if a sale could have been made, it would have brought enough to repay the original investment and interest. The subsequent conduct of Price shows very clearly that he regarded his right to compensation dependent upon the possibility of effecting a sale at a profit at that time. He lived until July, 1854, more than fourteen years after the expiration of the five years, and he never asserted any claim under the contract. He never requested that the lands be sold, or asserted any interest in them or their proceeds. He uniformly treated the contract as at an end, and the heirs Seymour as the exclusive owners of the land and its proceeds. He subsequently acted as agent for them in paying taxes upon the property. He lived near the property, and it was natural that he should be employed

for that purpose. But if funds, even of trifling amounts, were not forwarded to him, he did not advance the money, but allowed the property to be sold. It is difficult to reconcile this conduct with the theory that he considered himself at the time as having a claim either upon the land or its proceeds. And it is still more difficult to account for his entire silence to all the world, to his own relatives and agents, as well as to the heirs of Seymour, respecting any claim upon the property or its proceeds, if he considered that in fact he possessed any. It remained for the administrator of his estate, nearly three years after his death, to discover that he possessed, during his life, unknown to himself, large and valuable interests in property which he had purchased for others, and in their name twenty-two years before. The claim now asserted is contrary to the express terms of the contract, and the construction given to it by Price himself. And even the administrator acted as agent for the heirs in paying taxes upon the property and in negotiating sales for them until he made the discovery of the supposed rights of his intestate.

It is urged, as an objection to the case made by the defendants, that they did not produce the letters of Price to them. It is assumed without any intimation to that effect on the part of the complainant, that these letters might have contained, and not being produced, must be presumed to have contained, something against the interests of the defendants. The objection may be answered by the suggestion that the complainant did not produce the letters of the heirs of Seymour to Price. If they had contained any recognition of the claim now asserted in behalf of Price's estate, there be no doubt that they would have been brought forth. If it be proper to invoke presumptions in respect to the contents of papers not produced, even when not called for, the presumption against the claim of the complainant must be regarded as very great. It is highly improbable that no allusion would be made by the heirs of Seymour to the interest of Price in the property, or to his claiming an interest, during a correspondence of fourteen years, if, in truth, he possessed or claimed any.

The case of *Stow v. Robinson*, 24 Ill., 532, decided by the Supreme Court of Illinois, presents similar features to the one under consideration, and is authority upon the point, that the remedy of Price, if the sale within the five years had been refused, was at law, for breach of the contract, and not in equity. The case was this: Robinson was the owner of a block of land in or near Chicago, and it was agreed between him and one Rathway that the block should be subdivided, and that Rathway should dispose of the lots for one fourth cash, the remainder to be secured by notes payable in one, two and three years, with interest, Robinson to give bonds for deeds on receiving the notes, and to execute conveyances when the notes were paid. Out of the proceeds obtained Robinson was to receive the purchase money of the block with interest, and the balance was to be equally divided between the parties; and for his share upon this division Rathway was to plat, survey, or subdivide the block, and advertise and sell the same at his own expense. Rathway, under the agreement, subdivided the

block into lots, and sold a portion of them, when Robinson stopped the sale, and refused to allow any further sale, or to execute any more title papers. Rathway having died, his heirs and personal representatives filed their bill to compel a performance of the agreement. The court held that by the agreement Rathway did not acquire any vested interest in the land itself, and if he was prevented from executing his part of the agreement, he had his remedy by an action at law for damages, and that his remedy was clearly not in equity.

The difference between this case and the one under consideration is circumstantial; the principle is the same in both. The services rendered in each were the meritorious cause for the compensation to be made by the owner of the land. In the case cited it was the platting, surveying, subdividing, advertising, and selling the land; in the case at bar it was the selection and purchase of the land. The difference in the services is not material. The contract stipulating for the services in the cases cited created in Rathway no interest in the land was held by Robinson; and for the same reason the contract in the case at bar, in our judgment, created in Price no interest in the land held by Seymour. If Price possessed no such interest, there can be no pretense that the land was subject to any trust for his benefit.

In our judgment the decree below should be reversed and the bill dismissed.

Cited—2 Blas., 340; 33 Ind., 77.

CHARLES F. STANSBURY, *Appt.*,

v.

THE UNITED STATES.

(See S. C., 8 Wall., 33-37.)

Secretary of Interior, promise of—additional pay to officers—clerks.

The written promise of the Secretary of the Interior is not a binding obligation on the government, where no authority of law existed for the promise.

The Act of August 23, 1842, declares that no officer of the government, drawing a fixed salary, shall receive additional compensation for any service.

The above Act embraced clerks in the departments, and its operation has not been withdrawn from them by the 12th section of the Act of Aug. 23, 1842.

[Mr. Justice FIELD did not sit in this cause.]

[No. 101.]

Argued Mar. 8, 1869. Decided Mar. 22, 1869.

APPPEAL from the Court of Claims.

The case is stated by the court.

Mr. Robert B. Caverly, for appellant: The defendants interposed the Statute of Aug. 23, 1842, sec. 2 (5 Stat. at L., 510), as a bar to petitioner's claim.

But petitioner insists that if the above Act, at its passage had any reference to clerks in the departments, it has been repealed so far as it related to them by subsequent enactments.

It was repealed as to them by the Act of Aug. 26, 1842, sec. 12, 5 Stat. at L., 525.

This Act enacts an independent rule for clerks or other officers in the departments. It

refuses pay to them for doing the duties of other clerks or officers, and refuses to pay them for extra services of any kind.

By this Act the former Act is repealed as to clerks, because it prescribes a rule involving the same subject-matter.

Bartlett v. King, 12 Mass., 545; *Ellis v. Paige*, 1 Pick., 45.

While this Act declares that a clerk shall have no pay for services done in the place of another, and no extra allowance whatever, it also in its legitimate effect declares that a clerk may have pay on a special contract in a distinct service, foreign to clerkships and extra allowances.

These statutes, we submit, were never intended to prevent the holding of two distinct offices at the same time, the one entirely foreign to the other. And it has been so adjudged.

Dev., 42; *Converse v. U. S.*, 21 How., 470 (62 U. S., XVI., 194), 5 Op. Crittenden, Atty-Gen., 765; 6 Op. Cushing, Atty-Gen., 88; 8 Op. Cushing, Atty-Gen., 825, and cases there cited; 9 Stat. at L., 100, Aug. 31, 1852.

The Statute of Aug. 23, 1842, relied upon as a bar to petitioner's recovery, is in derogation of private rights, and is to be construed strictly.

U. S. v. Hunter, 1 Pet. (C. C.), 10; *Smith v. Spooner*, 3 Pick., 230; *Sprague v. Birdsall*, 2 Cow., 419; *Seawall v. Jones*, 9 Pick., 414.

As against an equitable, meritorious claim, it can have no operation by implication.

Both of said Acts appear to have been repealed by subsequent Acts.

See, Act 1852, 10 Stat. at L., 100, sec. 18, and Act 1853, 10 Stat. at L., 211, sec. 3.

If the Acts of 1842 have been repealed even since the contract, then we submit that such repeal is by legal construction to have a retroactive operation, and the petitioner would be allowed to recover by the rules of common law and equity, the same as if such repealed statutes had never existed.

The Act of Aug. 31, 1852, proves what construction Congress gave to the former Acts in question, to wit: that up to that time clerks could hold two distinct offices at the same time and take pay accordingly; hence, this Act forbids it, if the clerk or officer is already receiving \$2,500, but not otherwise.

Petitioner having been commissioned to perform a distinct agency in a foreign country, such agency is to be regarded as inconsistent with a clerkship here. His clerkship for the time was in fact suspended during his nine months' absence, although the \$100 per month was not withheld from his family during period.

Messrs. Wm. M. Everts, Atty-Gen., T. L. Dickey, Asst. Atty-Gen., and T. H. Talbot, for appellee:

(The court declined to hear an oral argument for the appellee.)

I. No authority of law existed for the promise stated in the alleged appointments made by the Secretary of the Interior, of Apr. 25, 1851.

II. The absence of any appropriation for paying this claim stated by the Secretary of the Interior, was a lawful reason for not paying the same, which furnished no ground for a petition to the Court of Claims.

III. The allowance of this claim was positively prohibited by sec. 2 of the Act, Aug. 23, 1842 (Vol. V., p. 510); this, notwithstanding

ing the passage of sec. 12, of the Act Aug. 26, 1842 (Vol. V., p. 625).

IV. It is also prohibited by sec. 3, of the Act, March 8, 1839 (Vol. V., p. 349). *Hoyt v. U. S.*, 10 How., 141.

Mr. Justice Davis delivered the opinion of the court:

This suit is brought to recover for services rendered under the following circumstances:

In 1851, the appellant was appointed by the Secretary of the Interior an agent to proceed to Europe and prepare for the department an account of the London Industrial Exhibition; in which employment he was engaged in London and subsequently at Washington, in the preparation of his report for a period of seventeen months; but during all the time of this service, he held his place and drew his pay as a clerk in the Interior Department.

The Secretary promised in writing to pay his expenses and allow him a reasonable compensation for his services. The actual expenses of the agency were paid, but nothing more; of which treatment the appellant complains, and insists that the written promise of the Secretary to pay him the value of his services, is a binding obligation on the government. But not so, for no authority of law existed for the promise. The Secretary could not pay the claim, because there was no appropriation to pay it, and he was not authorized by Congress to create an agency to perform the service in question. He undoubtedly acted in good faith with Stansbury, and supposed that Congress would approve the mode he adopted for obtaining useful information, and ratify his proceedings; and his promise, under the circumstances, must be considered as a dependent one, to take effect, if Congress appropriated money to enable him to comply with it. Congress having failed to make the appropriation, the Secretary was justified in refusing to pay the claim.

But he was justified in his refusal on another ground. The payment of the claim was forbidden by positive law.

The 2d section of the Act of August 23d, 1842, declares that no officer of the government, drawing a fixed salary, shall receive additional compensation for any service, unless it is authorized by law and a specific appropriation made to pay it. When Stansbury was appointed in 1851, this law was in force, and afforded notice to all *employés* of the government, of the policy of Congress on the subject to which it relates. The law was passed to remedy an evil which had existed, of detailing officers with fixed pay to perform duties outside of their regular employment, and paying them for it, when the government was entitled, without this double pay, to all their services. The law prohibited, and intended to do so, the allowance of such claims as these, made by public officers, for extra compensation, on the ground of extra services.

But the appellant insists, if the above Act embraced clerks in the departments, its operation has been withdrawn from them by the 12th section of the Act of 26th of August, 1842. It is difficult to see how this conclusion is reached, because this section refuses to pay clerks or other officers, in the departments, for doing the duties of other clerks or officers, and refuses,

further, to pay them for extra services of any kind.

There is no inconsistency between the provisions of the two Acts, which were passed within a few days of each other, and were parts of a system, intended for the guidance of those in the employ of the government. These provisions furnished notice to all in authority, that in no event could clerks in the departments be paid for doing the work of their fellow-clerks, nor could they be paid for any other service, unless it was authorized by law and followed by an appropriation to pay for it.

Stansbury's appointment was not authorized by law, nor was there any appropriation to pay for the services which he expected to render the department.

It follows, therefore, that the transaction between Secretary Stuart and himself was in violation of the statute and cannot be the foundation of an action.

Judgment affirmed.

Cited—108 U. S., 38.

CHARLES GIBSON, *Plff. in Err.*,
v.

CHARLES P. CHOUTEAU AND JULIA
MOFFIT, Devises of PIERRE CHOUTEAU,
Deceased.

(See S. C., 8 Wall., 314-318.)

Jurisdiction over state judgments—opinion, or argument, not resorted to.

Where the record shows that the state court must, in rendering judgment, have passed upon several questions, only one of which is ground of jurisdiction in this court, and it does not appear that the decision was necessarily on that question, this court has no jurisdiction.

Neither the opinion of the state court nor the argument of counsel can be resorted to for the purpose of showing that a question of Federal cognizance was decided by the state court.

[No. 102.]

Argued Mar. 9, 1866. Decided Apr. 12, 1869.

IN ERROR to the Supreme Court of the State of Missouri.

The history and a statement of the case appear in the opinion of the court.

Messrs. John D. McPherson and Chas. Gibson (plaintiff in error, *p. p.*), for plaintiff in error.

Messrs. Britton A. Hill, L. F. Bogy, and Glover & Shepley, for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

The first question to be decided in this case, which is a writ of error to the Supreme Court of Missouri, is whether there is jurisdiction in this court.

The record shows that plaintiff below, who is also plaintiff here, filed his petition in the Land Court of St. Louis, claiming to recover of the defendants a tract of sixty-four acres of land. He states that Mrs. Mary McRee was, prior to Aug. 20, 1862, invested with the title by the United States, and on that day conveyed the same to him.

The defendants answer, denying plaintiff's right to the possession, denying that he has the title, denying Mrs. McRee's title, setting up the See 8 WALL.

Statute of Limitations and alleging that the title acquired by plaintiff was so acquired as agent of defendants, and in fraud of their rights. To this the plaintiff filed two or three replications, going into a minute history of the transaction in which the fraud was supposed to have originated, and denying it wholly.

On these pleadings the case was tried by the court without a jury, and the issue was found for plaintiff, his damages assessed at \$800, and judgment rendered for that sum and for the possession of the land. A bill of exceptions, of eighty pages, was signed, which is found in the record, filled with surveys, decrees and testimony of witnesses, some of which is evidently directed to the questions of fraud made in the pleadings. It also contains some ten or twelve prayers for instruction by plaintiff, which were refused by the court as rulings of law which relate to the validity of plaintiff's title. Also an instruction given by the court to the effect that the patent of the United States to Mrs. McRee invested her with the title which her deed transferred to plaintiffs, and that the patent having issued within the ten years next preceding the commencement of the suit, the Statute of Limitations could not be relied on as a bar.

On this record the case was carried to the Supreme Court of the State, where it was "affirmed in all things," Dec. 3, 1866. Three days after this, a motion for rehearing was filed, which was granted on the 10th day of the same month, and the judgment of affirmance set aside and the cause ordered to be docketed for a rehearing. This rehearing was had in March, 1867, and in April the following judgment was entered:

Charles Gibson, *Respondent*,

v.

Pierre Chouteau, Jr., C. P. Chouteau,
and John Cook, *Appellants*.

"Now again come the parties aforesaid by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis Land Court be reversed, annulled and for naught held and esteemed; that the respondent take nothing by his suit in this behalf, but that the appellants go thereof without day, and recover of the said respondent their costs and charges here expended, and have execution therefor. Opinion filed."

It is proper to state that by the Code of Practice in the State Courts of Missouri, an equitable defense may be set up in a common law action, there being no separate chancery jurisdiction in those courts.

The matter claimed by plaintiff to have been decided against him in the Supreme Court of Missouri, which gives this court jurisdiction is: that the Statute of Limitations of that State ran against the title of plaintiff while the same was in the United States, and before it had been transferred, by the patent of 1862, to Mrs. McRee. The question now to be considered is, whether we can see from this record, either by express words or by necessary legal intendment, that the court did decide that proposition.

The record presented to the Supreme Court questions the validity of Mrs. McRee's title, the transfer of her title to plaintiff, the trust asserted by which plaintiff's title inured to the

benefit of defendants, and the Statute of Limitations. On all these the court below must have found for plaintiff, for such a finding was essential to his recovery. The first judgment of the Supreme Court affirming the judgment of the Land Court must also have found all these issues for the plaintiff.

We are asked now to hold that the second judgment of the Supreme Court, which reversed that of the Land Court, was founded on the question of limitation. If we look to the language used in the judgment of the court in setting aside its judgment of affirmance and granting a rehearing, or in the final judgment of reversal, we can see nothing to justify that inference.

This court has decided, in the case of *Rector v. Ashley*, 6 Wall., 142 [73 U. S., XVIII., 733], following *Williams v. Norris*, 12 Wheat., 117, that the opinion of the court cannot be resorted to for the purpose of showing that a question of Federal cognizance was decided by the state court. In the present case it is said that the application for a rehearing was based exclusively on the question of the Statute of Limitation. That which is here called a motion for a rehearing is merely an argument of counsel setting forth numerous decisions of the courts, and many reasons of counsel why the statute should be held to be a bar; and it insists that this question had not received sufficient attention at the hands of the court. It is not easy to see how this argument can be regarded as a part of the record of the case. It can have no better claim to be so regarded than the opinion of the court, which accompanies the record.

If, however, it could be treated as part of the record, it affords no conclusive evidence that the rehearing was granted on that ground.

But if we could infer that the rehearing was granted because the court was of opinion that it had not well considered that question, it is to be remembered that the re-argument took place four months afterwards, that there is nothing to show what might then have been presented by counsel on either side, or what might have been considered by the court, for the case was fully opened, by setting aside the former judgment, to every consideration which could rightfully influence the decision. It is hardly a reasonable inference, under these circumstances, that the court did decide the case on the question of the Statute of Limitation, and certainly it does not appear that the case was necessarily decided on that question, or that the proposition was essential to the judgment.

It is our opinion, therefore, that under the repeated decisions of this court, this record presents no case of which we have jurisdiction.

The writ of error is, therefore, dismissed.

S. C.—13 Wall., 83.
Cited—21 Wall., 531; 92 U. S., 766; 95 U. S., 557; 98 U. S., 488; 106 U. S., 484.

JOHN E. REESIDE, *Appl.*,

v.

THE UNITED STATES.

(See S. C., 8 Wall., 38-44.)

Mail carrier, additional pay of.

Contractor for carrying the mail in southern States held entitled to one month's pay, in pursuance of his contract, on the Postmaster-General ordering the service to be discontinued in consequence of the civil war.

[No. 144.]

Argued Apr. 7, 1869. Decided Apr. 15, 1869.

APPPEAL from the Court of Claims.

A petition in this case was filed in the court below, by the appellant, to recover moneys alleged to be due him upon a contract for carrying the mails, service upon which had been suspended by the Postmaster-General. The court having dismissed the petition, the plaintiff took an appeal to this court.

The case is fully stated in the opinion of the court.

Messrs. T. J. D. Fuller, J. M. Carlisle, and J. S. Black, for appellant:

Apart from the supposed effect of the Act of July 28, 1861 (Vol. XII., p. 177), and the war which ensued, there would be no embarrassment in determining the question involved. It would then be the ordinary one of a valid contract being put an end to by one of the contracting parties, and the other contracting parties, being in no fault, would be entitled to recover the profits he would have realized, provided the contract had not been broken.

Phila., Ball. & Wil. R. R. Co. v. Howard, 13 How., 307; 2 Curt. (C. C.), 28; *Durkee v. Mott*, 8 Barb., 423; *Clark v. Maraglia*, 1 Den., 317; see, also, *J. Scarburgh's Op.*, *Com. of Claims*, 2d Sess., 36 Cong., in case of *Romons v. U. S.*

2. The contract was not determined by the rebellion. Inland intercourse between the loyal insurrectionary States did not cease and become illegal until the date of the President's Proclamation of Aug. 16, 1861. If the state of war is relied upon by the defense as an excuse or justification for putting an end to the contract, it cannot be invoked until that time, and the petitioner is entitled to his mail pay to that day, at all events.

The Postmaster-General assumed to act under the discretion imposed upon him by the Act of Feb. 28, 1861.

He might have discontinued the service under this Act, or he might, under the contract, have annulled the service and put an end to the contract. But he did neither. He simply suspended service for the time being, leaving the contract unimpaired and in full force.

He notified the claimant that he would be held responsible and be ordered to renew the same whenever, in the opinion of the Postmaster-General, it should be safe to do so.

The contractor had no notice whatever of the intention of the government to suspend the same; no time to remove his property, nor to make any shift for himself. But his pay is suddenly stopped and he is held liable for the remaining period his contract had to run, to resume at the pleasure of the department. Under this state of facts, as appears by the record, why should he not receive his full contract price for the thirteen months?

The remaining question to be considered is, concerning the rights and liabilities of the parties under the following clause in the contract:

"It is hereby stipulated and agreed, etc., etc., among others things, that the Postmaster-

75 U. S.

General may discontinue or curtail the service in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests require such discontinuance or curtailment for any other cause, he allowing one month's extra pay on the amount of service dispensed with.

Under this head the opinions of the Attorneys-General are cited from *Vol. IV.*, p. 141; *V.*, p. 246; *VI.*, p. 516; *VII.*, p. 487.

The claimant is entitled to recover the actual damages he sustained by the suspension of his contract.

At the time of the suspension, there was no legal interruption to the further performance of the contract.

Claimant is entitled to his month's extra pay at all events.

Meura. E. R. Hoar, Atty-Gen., and T. H. Talbot, for appellee:

So far, however, from showing that the order caused him any damage whatever, the case shows, and this court would take knowledge of the fact without such showing, that from Apr. 15, 1861, six weeks before the date of the order complained of, a state of actual war existed between the United States and the States (with others) * * * in which these contracts were to be executed.

Thus it appears that, before the order suspending the service on these contracts was issued, their execution had become virtually impossible, by reason of the above existing war. The mail which the appellant agreed to carry was the United States mail; none other. The United States mail could not be carried in territory occupied by the enemies of the United States.

The order of suspension was a mere recognition, on the part of the Postoffice Department, of this state of war, such as released the appellant from any further fruitless endeavor to execute his contracts, until further notice from that department.

As further cause of damage, the appellant alleges that "The Postmaster-General declined and refused to terminate said contracts under the clause in each of said contracts," whereby the petitioner might claim one month's pay, as liquidated damages; and that further, while suspending the service merely for the time being, the Postmaster-General held the petitioner liable to resume the service at any moment, etc.

The answer already made, to the other portion of the appellant's claim, answers these specifications also. The execution of the contract had become impossible by reason of the acts of the King's enemies, by reason of the ouster of the United States from its actual sovereignty over the territory through which the claimant's mail routes ran: had become so Apr. 15, while the appellant was paid to June 1, 1861.

This suspension, thus caused, cannot be held to be a suspension by the Postmaster-General, such as would give rise to a claim for one month's pay.

Mr. Justice Nelson delivered the opinion of the court:

This is a petition to the Court of Claims against the government, to recover damages for a breach of six several contracts with the Postmaster-General to carry the mail. The

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routes over which the mail was to be carried lay in the States of Arkansas, Mississippi, and Louisiana. The commencement of the service under the several contracts was at different periods, in 1859, 1860 and 1861, but terminated at one period, the 30th of June, 1862. The aggregate compensation annually for the services on all these routes, was \$65,568. The petitioner has been paid in full on each of the routes up to the 1st of June, 1861. On the 27th of May, 1861, the Postmaster-General issued an order suspending the service on all the routes till further order, to take effect May 31. The petitioner requested that, instead of suspending the service, the Postmaster-General would annul the contracts. But this was refused, and he was informed that he would be held responsible under them, and be ordered to renew the service whenever, in his opinion, it would be safe to do so. The petitioner resided in Washington, and as found by the court below, it would have taken him twenty days to have gone to Arkansas and have disposed of his property on his several routes. No part of his stage property was removed from them; and no special notice given to him afterwards, of a discontinuance of the service on the routes embraced within his contracts.

Each contract contained a provision that the Postmaster-General might discontinue or curtail the service, in whole or in part, whenever the public interests required it, he allowing one month's pay on the amount of the service dispensed with.

Upon this statement of the case, and it is supported by the facts found by the court below, it is difficult to see how the Government can avoid the payment of the month's pay upon any principle of justice or equity. The Postmaster-General, representing in this department the Government, refused to put an end to the contracts; but insisted upon a suspension only at his pleasure, and at the same time gave notice that the contractor would be held responsible for a renewal when he (the Postmaster-General) should deem it safe to renew them. Of course, the stage property must be kept on hand at the expense of the contractor, ready to render the service when ordered; and, according to the views of the Government, without either remuneration or any allowance for the same, not even one month's extra pay on the amount of service dispensed with, which, in express terms, is provided in the contract.

The only answer given to all this is, that a civil war existed between the United States and the States within which these mail routes lay, and that all intercourse with them was illegal upon the principles of international law. Assuming this to be so, the Government would have been justified in putting an end to the contracts; and, in the absence of any interference on the part of the Government, the contractor might also have terminated them. But the Government did interfere, and forbid the annulment or termination of the service, and insisted, notwithstanding a state of civil war, that the contract should continue, and the service be renewed at the pleasure of the Postmaster-General. The truth is (and this affords an explanation of the otherwise extraordinary dealings with this contractor) that, although a state of war existed between the United States

and several of the Southern States, or portions of them, the territorial limits within which it existed was not well defined. Even as late as July 18th, 1861, an Act of Congress was passed authorizing the President, under the particular circumstances stated therein, to issue a proclamation declaring any one of these States, or any part of it, to be in a state of insurrection against the United States, and thereupon all intercourse should cease between the same and the citizens thereof, and the citizens of the rest of the United States. 12 Stat. at L., 257. This Proclamation was not issued till the 16th of August following, when certain States, including Arkansas, Mississippi, and Louisiana, were first declared to be in a state of insurrection within the Act and all intercourse with the loyal States was prohibited. 12 Stat. at L., 1262, appendix.

This intercourse was but partially interrupted at the time these contracts were suspended; and although a disloyal feeling prevailed, and was apparently increasing, yet the policy of the Government was to conciliate the people, and separate them, if possible, from the leaders; and one of the means used for this purpose was to continue these mail and postal accommodations so long as any hope existed of preventing the rebellion or continuing peaceful relations. The suspension of these contracts, instead of putting an end to them at once, and the demand upon the contractor to keep his stage property on hand ready to render service, doubtless grew out of this policy.

The Act of 28th February, 1861, 12 Stat. at L., 177, provided that whenever, in the opinion of the Postmaster-General, the postal service cannot safely continued, etc., for any reason, he was authorized to discontinue the service till the same could be safely renewed. It was, doubtless, under this Act that he suspended the service in the present case. But this Act had no effect to control the legal import of the contracts, nor did it confer any greater power than he possessed under them. According to their terms, he had the power to discontinue or curtail the service on any route for any cause, allowing one month's pay.

It may, we think, be well doubted if the Postmaster-General had the power under this Act to discontinue the service, and still hold the contractor to renew it. It simply confers power "to discontinue," for any cause, "the postal service on said route, or any part thereof, and any postoffices thereon, till the same can be safely restored, and shall report his action to Congress." Nothing is said as to the duty or rights of contractors; and, in the absence of any provision on the subject, it would seem to be unreasonable to hold him responsible to renew the service at any future indefinite period. But it is unnecessary to decide this point.

The decrees reversed, and cause remanded, with directions to allow one month's pay under the contracts.

JOHN MAGWIRE, *Pf. in Err.*,

v.

MARY L. TYLER ET AL., *Defts. in Err.*

(See S. C., 8 Wall., 650-668).

When survey necessary to title to public lands—

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boundaries, how established—presumption as to jurisdiction—limitations—survey, how set aside.

Where the documentary evidences of title of claimant contain no sufficient boundaries, the concession in such a case creates no right of private property in any particular tract of land, without an antecedent survey and location.

A court of justice has no authority in law to ascertain and establish the boundaries, as that power is reserved either to the Executive Department or to Congress.

Where federal questions are directly involved in the pleadings, this court will not presume that the state court erroneously decided the case on other issues, in order to defeat its own jurisdiction.

A claim was not barred by the Statute of Limitation, where the suit was commenced in less than five months after the official survey was made.

Where the claim in question had no specific boundaries and attached to no particular land, a court of justice could not give claimant a remedy.

The Secretary of the Interior has power to set aside a survey.

The question of the want of jurisdiction of the commissioners may be revised in this court.

[No. 107.]

Argued Mar. 17, 1869. Decided Apr. 15, 1869.

IN ERROR to the Supreme Court of the State of Missouri.

This case arose upon a petition filed in the St. Louis Land Court, by the plaintiff in error, to recover possession of a certain tract of land, and for an accounting of the rents and profits accrued during the possession of said premises by the defendants.

A change of venue was subsequently allowed on petition of the plaintiff, to the St. Louis Court of Common Pleas. The case having been submitted on the plaintiff's petition, and the answers of all the defendants and exhibits and other evidence in the case, the court found in favor of the plaintiff, and entered a decree accordingly. The Supreme Court of Missouri having reversed this decree, on error, the plaintiff sued out this writ of error.

The case is fully stated by the court. See, also, the report of the case of *Magwire v. Tyler*, 1 Black, 195 (66 U. S., XVII., 187).

Messrs. T. Ewing, S. T. Glover, and Carlisle, for plaintiff in error.

Messrs. Britton A. Hill, P. Phillips, Curtiss, and J. R. Shepley, for defendants in error.

(The case was thoroughly argued by the above counsel; but as the argument was confined closely to the facts, no abstract is here given.)

Mr. Justice Clifford delivered the opinion of the court:

Complete titles to land in the territory ceded by France to the United States, under the Treaty concluded at Paris on the 30th of April, 1803, needed no legislative confirmation, as they were fully protected by the 8d article of the Treaty of Cession; but persons holding incomplete titles were required by the Act of the 2d of March, 1805, to deliver, before the day therein named, to the Register of the Land Office or the Recorder of Land Titles, in the district where the land was situated, a notice in writing, stating the nature and extent of the claim, together with a plat of the same, and also every grant, order of survey, and conveyance, or other written evidence of the claim, in order that the same might be recorded. 8 Stat. at L., 300; *U. S. v. Wiggins*, 14 Pet., 350; 2 Stat. at L., 326.

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Prior to the passage of that Act, the province ceded by the Treaty had been subdivided by Congress and organized into two territories, and the 5th section of the Act before referred to, made provision for the appointment of commissioners in each of those territories, to ascertain and adjudicate the rights of persons claiming such titles. Power was conferred on those commissioners to hear and decide, in a summary manner, all matters respecting such claims; and the provision was that their decisions should be laid before Congress, and be subject to their determination.

Amendments to that Act were subsequently passed before the title in controversy in this case was adjudicated; but it will not be necessary to enter into those details in this investigation, except to say that the 4th section of the Act of the 3d of March, 1807, provided that the decision of the commissioners, when in favor of the claimant, should be final against the United States. 2 Stat. at L., 283, 327, 353, 391, 440.

Present suit was commenced in the Land Court of St. Louis, but was subsequently transferred by change of venue to the Court of Common Pleas of that county. Claim of the plaintiff, as set forth in his petition, was for four by four arpents of land, being part of a concession made under Spanish rule by Governor Zenon Trudeau to Joseph Brazeau, and which was confirmed to the donee by the Land Commissioners appointed under that Act of Congress.

Accurate description of the land included in the claim, and of the several muniments of title proposed to be introduced to establish its validity, is given in the petition. Those muniments of title, as there described, are in substance and effect as follows:

1. The petition of Joseph Brazeau, a citizen of St. Louis, dated June 1, 1794, for a tract of land, situate in the western part of the town beyond the foot of the mound called La Grange de Terre, of four arpents in width, to extend from the bank of the Mississippi in the west quarter southwest, by about twenty arpents in depth, beginning at the foot of the hill, on which stands the mound, and ascending in a northwest course to the environs of Rocky Branch, so that the tract shall be bounded on the east side by the bank of the river, and on the other sides in part by the public domain, and in part by the lands re-united to that domain.

2. Ten days later the Governor executed a certificate, in which he declared that the tract belonged to the public domain, and certified that he had put the petitioner in possession of the four arpents front by twenty arpents in depth, and specified in a general way the boundaries of the tract. Next evidence of title, there described, was the concession of the Governor to Joseph Brazeau, bearing date on the 25th of June in the same year, in which he formally conceded to the donee, in fee simple, for him, his heirs, assigns, or whosoever may represent his rights, a tract of land *** of four arpents front by twenty arpents in depth, situate north of the town, *** to begin beyond the mound, extending north-northwest to the environs of Rocky Branch, bounded on one side by the bank of the river, and on the opposite by lands re-united to the public domain, through which

land passes the present concession, of which one end is to be bounded by the concession to one Eather, a free mulatto woman.

Invested with a title to four arpents front by twenty arpents in depth, as described in his concession, the donee, Joseph Brazeau, on the 9th of May, 1798, by a deed of that date duly executed before the Governor, sold, ceded, relinquished and transferred to Louis Labeaume "a concession of land to him given," as aforesaid, consisting of four arpents of land, to be taken from the foot of the hill called La Grange de Terre, by twenty arpents in depth, bounded by the Rocky Branch, or creek, at the extremity opposite to the hillock, east by the river, and west by the land belonging to the royal domain; the said Brazeau reserving to himself four arpents of land, to be taken at the foot of the hillock in the southern part of said land. *** selling only sixteen arpents in depth to the said Labeaume, who accepts the sale on those terms and conditions, and the instrument was signed by both parties. Reference must also be made to certain other ancient documents as showing the origin of the controversy, and as affording the means of ascertaining the true location of the premises claimed by the plaintiff.

Evidently the out-boundaries of the tract of land described in the deed include the entire concession previously obtained by the grantor; but the reservation, as plainly expressed in the instrument of conveyance, is of four arpents of land to be taken at the foot of the hillock in the southern part of the tract.

Rights of the parties, as described in the preceding instruments, may be easily ascertained and defined; but the purchaser of the four by sixteen arpents of that tract desired to enlarge his possession, and with that view he obtained from the Governor a concession to himself of an additional parcel of land, from the public domain. By his petition he asked the Governor to grant to him three hundred and sixty arpents of land, including that which he had antecedently acquired, and then held by purchase. Express reference is made to the tract he acquired by purchase, and he asked for twenty arpents in depth from the river, ascending to the Rocky Branch, west quarter south "by sixteen arpents front along the river, which is the same front as that of the petitioner's land."

Nothing could be more precise than that description, and the further statement of the petition was, that "the angle made by the perpendicular line from the road to the river by the creek, and by the river, will about complete the quantity," as described in the petition. On the 15th of February, 1799, the Governor made the concession, and in the same instrument he directed the surveyor "to make out the survey in continuation" of his antecedent purchase, and to put the interested party in possession of the described premises. Description of that concession, as given in the certificate of the surveyor, bearing date April 10, 1799, is that the tract is bounded on the north side by the bank of Rocky Branch and the public domain, on the south side by the lands of other donees, on the east by the river, and on the west side by vacant public lands; but it is evident that the boundaries of the tract, as given in the certificate of the surveyor, include the whole of the former concession, and that the certificate entirely over-

looks the fact that the donee of that tract reserved to himself four arpents of the same, "to be taken at the foot of the hillock in the southern part of said land."

Such a survey, however the error may have arisen, cannot have the effect to enlarge the rights of the purchaser, or to diminish or impair the rights of the grantor, to the four arpents reserved in that deed, and which were never conveyed to the grantee. Repetition of the reservation in the certificate of survey may have been omitted by mistake, but the proofs in the record to show that the boundaries as given in the certificate are erroneous, are full and satisfactory. Manifest differences exist between the concession of the Governor and the boundaries of the tract, as given in the certificate of the surveyor, which deserve particular notice. He takes the sixteen arpents front on the river, not from "the descent of the road into the creek," but from a point four arpents south of that line, making the distance from that line, or from the descent of the road into the creek to the south line of the concession as surveyed, twenty arpents instead of sixteen, as it should have been, whether tested by the deed of conveyance or by the terms of the concession.

Three lines only were called for by the concession, but the figure formed at the branch or creek by the survey is composed of four lines, which shows conclusively that the survey was erroneous. Plain duty of the surveyor, in executing the order of survey, was to follow the directions of the instruments of title, and inasmuch as the concession referred to the petition for description and boundaries, he was bound to give the interested party "the same front" as that he acquired by the conveyance described in the petition, and to be governed by the statement therein contained, that "the angle made by the perpendicular line from the road to the river" would complete the quantity of the land asked for by the petitioner. What he asked for was twenty arpents in depth by sixteen arpents front, which is the same front as that which he had previously acquired by purchase. This purchase included sixteen arpents in depth, and was a part of a concession of four arpents in front by twenty arpents in depth, which was, by the terms of the deed as well as by the true construction of the several documents constituting the evidences of title, to be taken from the foot of the hillock, and was bounded at the opposite extremity by Rocky Branch.

Compliance with the directions of the concession as expressed in the petition would have done exact justice to both parties, but the surveyor, instead of obeying those directions, commenced his field operations four arpents further down the river, and measuring south for quantity necessarily absorbed the whole reservation before described and adopted the northern line of the concession to the mulatto woman as the southern line of the tract he was ordered to survey. Doubtless the change of location was acceptable to the interested party, as it gave him better back land, and excluded from his concession the hilly broken land on Rocky Branch, but it left nothing between his south line and the north line of the concession belonging to the mulatto woman for the owner of the four by four arpents, as reserved in his own deed.

Support to these views is also derived from

the terms of the concession to the mulatto woman bearing date October 5, 1793, which, as therein described, has four arpents front, on its two extremities, and the description given of the location is that the northern portion of the grant is situated between the mound La Grange de Terre and the borders of the Mississippi River running down the river to the "complement and extension" of twenty arpents in depth, and is bounded on three sides by the public domain, and on the other side, to wit: the east-northeast side, by the bluff or high bank of the river.

Viewed in the light of these original documents, even when unaided by the maps in the case, it is quite clear how this controversy arose, but when the several documents are compared with the maps and the parol testimony in the record, the conclusion is irresistible that the reservation in controversy was bounded on the south by the north line of the concession to the mulatto woman, and on the north by the south line of the tract sold and conveyed to the party under whom the respondents claim.

Although the documents are genuine and regular in form, still the respective donees acquired nothing under them but what is called an incomplete title, as the Governor did not possess the power to do more than make a concession. He could not grant a patent, and as no such evidence of title had been obtained from the former government it became necessary for the plaintiff to prove that his claim had been confirmed under some Act of Congress. Evidence of the proceedings before the Board of Commissioners for the adjustment of such claims was accordingly introduced by the respective parties.

Entries in the minutes of the commissioners made September 8, 1806, show that Louis La-beaume presented a claim to the board for three hundred and seventy-four arpents of land, situate on the Mississippi, and that he produced a concession, duly registered, from Zenon Trudeau, for four by twenty arpents, dated 25th June, 1794, granted to one Joseph Brazeau, and another concession from the same Governor to himself for three hundred and seventy-four arpents, including the said four by twenty arpents, dated the 15th of February, 1799, which was the true date of his concession; also a survey of the same taken the 2d of March, and certified the 10th of April in the same year, together with a certificate from the Governor, dated May 12, 1798, of the sale of said four by twenty arpents by said Joseph Brazeau, reserving to himself four by four or sixteen arpents in superficies, which is the true meaning of the reservation as expressed in the deed.

Statement in the minutes also is to the effect that testimony was introduced showing that the original donee of the four by twenty arpents obtained the concession of that tract, and that he and the claimant had actually inhabited and cultivated the same or caused it to be inhabited and cultivated to that date. Proofs were also introduced as stated in the minutes, which showed that the original donee was the head of a family, and that he inhabited and cultivated the tract at a period sufficiently early to bring the case within the condition specified in the Act of Congress for ascertaining and adjusting such titles and claims to land.

Further statement in the minutes is, that the claimant subsequently abandoned his right to the concession of four by twenty arpents, and claimed directly under the concession to himself, which, as surveyed, it will be remembered, included the whole of the antecedent concession to his grantor; as well the four by four arpents, reserved in the deed to him from the donee of the tract, as the sixteen arpents which were actually conveyed.

Argument for the respondents is, that the minutes were made by the clerk of the Board, and not by the claimant, and the suggestion is doubtless correct, but it is not denied that the applicant presented his claim to the Board in two forms, and there does not appear to be any just ground to question any part of those several representations. Constituting as they do a part of the proceedings of the commissioners, they are the proper subjects of reference, but they are not very important except as tending to show that the true state of the respective claims was early before the board, and that the claimant knew that he had no title to the four by four arpents, reserved in his deed, which is also fully proved by all the documentary evidence of title exhibited in the record.

When considered in connection with the documentary evidence of title the clear interference from the minutes is, that the claimant shifted his ground before the commissioner to avoid the danger that they might refuse to confirm to him the four by four arpents to which he showed no title under his deed. Unless he had entertained doubts of his success in that particular, he would not have changed his position; but he gained nothing by it, as the Board rejected his claim because the concession to himself had not been duly registered.

Next entry in the minutes, as exhibited in the record, is the decree of confirmation, passed September 22, 1810, which is in substance and effect as follows, omitting unimportant words:

Louis Labeaume claiming three hundred and seventy-four arpents of land. * * * The Board confirm to him three hundred and fifty-six arpents to Joseph Brazeau, and order that the same, meaning the confirmation to the claimant, be surveyed agreeably to the concession from Zenon Trudeau to Louis Labeaume, and as respects the four arpents, agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume.

Nothing can be plainer than the fact that the commissioners fully understood the rights of these parties, and that they confirmed the four arpents therein described to the original donee; that they did not intend and did not confirm that tract to Labeaume, nor to anyone except to the rightful owner.

Supported, as these propositions are, by clear and irrefragable proofs, further argument upon the subject is unnecessary. Confirmation of the same, however, if any be needed, may be found in the certificate of the commissioners, which they issued to the party June 14th, 1811, in which they state that they have decided that Joseph Brazeau, the original claimant, is entitled to a patent for four arpents of land situate in the district of St. Louis, on the Mississippi, and they therein "order that the same be surveyed agreeably to a reserve made in a sale of Joseph Brazeau to Louis Labeaume,

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recorded in Book C, page 389, of the recorder's office, by virtue of a concession or order of survey from Zenon Trudeau, Lieutenant Governor." Obvious effect of these proceedings was to blot out forever the error committed by the Spanish surveyor, and to place the rights of the contestants upon their true basis. Attempts at injustice were defeated, but the hopes of cupidity were not entirely crushed.

Where the documentary evidences of title produced by the claimant contain no sufficient lines or boundaries to show that any definite and distinct parcel of land was severed from the public domain, the universal rule as settled by repeated decisions of this court is, that the concession in such a case creates no right of private property in any particular tract of land which can be maintained in a court of justice without an antecedent survey and location. *U. S. v. King*, 8 How., 788; *U. S. v. Forbes*, 15 Pet., 173; *The Houmas Claim*, 4 Op. Atty-Gen., 698.

Cases may be found in which it was held that where Congress had confirmed an incomplete title, and subsequently confirmed another and a different claim for the same land, that the elder confirmation defeated the younger. But the settled rule of the court is that, as between two claimants under the former government, setting up independent imperfect claims to the same parcel of land, the courts of justice have no jurisdiction to determine the controversy; that in such cases it belongs to the political power to decide to whom the perfect title shall issue. *Landes v. Brant*, 10 How., 370.

Congress, undoubtedly, might confirm such claims without any previous ascertainment of their location or boundaries, but they have decided, in respect to claims like these, not to exercise that power, and created a Board of Commissioners to adjudicate the claims; and this court held, when considering this very title that the judicial tribunals in the ordinary administration of justice had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey or for any other purpose, but that such a title, until the survey was made, attached to no land, nor could a court of justice ascertain its boundaries, as that power was reserved to the Executive Department of the Federal Government. *West v. Cochran*, 17 How., 414 (58 U. S., XV., 114).

Several cases determine that where there is a specific tract of land confirmed according to ascertained boundaries, the legal effect of the confirmation is to establish the right and locate the claim, but where the claim has no certain limits, and the decree of confirmation carries along with it the condition that the land must be surveyed, and severed, from the public domain and the concessions of other parties, then it is beyond controversy that the title of the claimant, although confirmed, attaches to no land, nor has a court of justice any authority in law to ascertain and establish the boundaries, as that power is reserved either to the Executive Department or to Congress. *Stanford v. Taylor*, 18 How., 412 [59 U. S., XV., 454]; *Bissell v. Penrose*, 8 How., 834.

Authority to appoint a surveyor of lands in that Territory was conferred by the 1st section of the Act of 29th of April, 1816, and it was therein made his duty, among other things, to

cause to be surveyed the lands in the same which have been or may hereafter be confirmed under the conditions therein provided. 8 Stat. at L., 325.

Application was accordingly made by Louis Labeaume that the tract confirmed to him might be surveyed, and Joseph C. Brown, a deputy-surveyor, appointed under that Act in November, 1817, complied with his request, and certified that he had "surveyed for the applicant two tracts in one," which was a direct acknowledgment that he had committed the same error as that made in the Spanish survey. Those two tracts were: first, the one consisting of three hundred and fifty-six arpents, as confirmed to Louis Labeaume, and the other was the four by four arpents confirmed to Joseph Brazeau, which was properly located by that survey in the southeast corner of his original concession. Correctness of that survey cannot be doubted, except that both tracts were included in one survey, and it was upon that ground that the Recorder of Land Titles, when it was presented to him to obtain a patent certificate, refused to issue one, holding that the confirmation certificates required separate surveys.

Express statement of the certificate of survey is, that the beginning of the survey was at the mouth of the branch, and the field notes show that the surveyor proceeded down the river, "bending therewith," to the mouth of an old ditch, where he placed a stone at the lower corner on the river.

In consequence of the refusal of the recorder to issue a patent certificate conforming to that survey, the Surveyor-General on the 2d of May, 1838, returned the same to the deputy-surveyor who made it, and gave him authority to resurvey the tract, but with instructions not to include within the lines of the new survey any more than the exact quantity of three hundred and fifty-six arpents, and under those instructions he, on the 8th of June, in the same year, certified a plat and description of survey of the tract confirmed to Louis Labeaume, including the whole of the Brazeau tract, beginning on the south line of his prior survey and running north for quantity, in plain violation of all the original documentary evidences of titles.

Second survey of Joseph C. Brown was also set aside, and the Secretary of the Interior on the 25th of July, 1851, decided, contrary to the views of the Land Office throughout the controversy, that those claiming under Labeaume were entitled to a patent to the land above the ditch according to Soulard's survey, and that the reservation of four by four arpents to Brazeau, and which he subsequently conveyed to Chouteau, was bounded on the north by Labeaume's south ditch, and that it extended to the foot of the mound. Directions were accordingly given that the necessary surveys should be made, and that patents should be issued in conformity with those principles.

New surveys of the respective lands were made in pursuance of those directions, and on the 26th of February, 1852, patent certificates, in a special form, were executed by the recorder of land titles. Both the patent certificates were founded upon that decision of the Secretary of the Interior, and the material matters certified in the one intended for Joseph Brazeau were, that the recorder was of the opinion that

the confirmation of four arpents was intended to mean four arpents front by four arpents in depth towards the west, or sixteen superficial arpents, and that the same had been surveyed in strict conformity with the decision of the Secretary of the Interior.

Extended comments upon those proceedings are not necessary, as they are obviously characterized by error and injustice from their inception to their final consummation. Patents were executed March 25, 1852, in conformity with the patent certificates; but the one to Louis Labeaume, or his legal representatives, contains an important reservation in these words, namely: "Saving and reserving any valid adverse right which may exist to any part" of the tract, which is also substantially repeated in the *habendum* clause of the patent.

Two months before the patent was executed locating the four by four arpents south of the ditch, the plaintiff, as the legal representative of the original donee, protested against the survey on which the patent certificate was issued, and the record shows that he never accepted the patent. None of the representatives of the donee ever asked for that survey, nor ever consented to receive the patent, and on the 4th of February, 1853, the Secretary of the Interior recalled it, and it was promptly returned as having been improvidently issued. Justice and truth were both subverted in the course pursued, as the patent gave no title to any land whatever to the patentee, because the location was upon an elder concession. Doubt as to the power of the Secretary to recall the patent cannot be entertained, as the point has been directly decided by this court. Brazeau's representatives, say this court, in the case of *Maguire v. Tyler*, 1 Black, 199 [66 U. S., XVIII., 140], refused to accept the patent for the sixteen arpents, and caused it to be recalled, and his claim, therefore, stands before the court just as it existed in 1810, when the Board of Commissioners confirmed it as valid.

Objection is made to the jurisdiction of this court to hear the case and decide the controversy under the 25th section of the Judiciary Act; but there is no proper ground for doubt upon the subject.

Explicit description of the premises claimed, and of the title under which they are claimed, is set forth in the petition, and the answer in several forms alleges in substance and effect that the pretended confirmation to Joseph Brazeau was wholly void for want of jurisdiction in the Board of Commissioners over the case; and that no title to any land ever passed to him thereunder, and that the patent—meaning the one executed without his consent, and recalled at his request as having been improvidently issued—vested in his legal representatives the only title to land he ever had by virtue of his claim and confirmation.

Additions might be made to these selections from the answer, but it is unnecessary, as the respondents do not deny that there are issues in the pleadings involving questions re-examinable in this court under that section of the Judiciary Act; but what they contend is, that the answer presented other defenses not re-examinable in this court, and they insist that the Supreme Court of the State, for aught that appears to the contrary, may have decided the causc

against the plaintiff, and reversed the decree of the Court of Common Pleas upon some of the defenses set up in the answer which are not re-examinable in this court. Certain it is that federal questions are directly involved in the pleadings, and if it appears that none of the other defenses afford any legal answer to the suit, the conclusion must be that the case is properly here, as this court will not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction. *Neilson v. Lagow*, 12 How., 110.

Respondents pleaded the Statute of Limitations, that they and those under whom they claim had been in the actual adverse and continuous possession of the premises for more than twenty years next before the commencement of the suit. Such a defense could not have been adjudged good in this case without a direct denial of the foundation of the plaintiff's claim, as will be readily seen by a brief reference to the facts. When the patent, improvidently issued, was recalled, the claim of Brazeau stood before the court just as it existed in 1810, when it was confirmed as valid.

Having never been surveyed at the request of the confirmee, or by order of the Land Office, and never patented to the claimant, it remained as it had been throughout, an incomplete title attached to no land, and it could not be converted into a complete title, except by legal survey and by a patent executed in due form, as required by law.

Conscious that he had a good claim, and undismayed by the law's delay, Brazeau again applied to the Land Department, and requested that steps might be taken for the protection of his rights; and after a full examination of the case, the Secretary of the Interior, on the 9th of April, 1862, ordered that a survey of the four by four arpents confirmed to him should be made, to be taken from the southeast part of the tract surveyed to the other claimant, and referred the matter to the Commissioner of the General Land Office to have the survey made in accordance with the order.

Corresponding survey was made on the 8th of May in that year, and on the 10th of June following, the patent was executed and duly signed by the President. Particular reference is made in it to the survey for the description of the tract, and the patent contains the same reservation as that contained in the patent to the other claimant. Prior to the execution and delivery of that patent the title was in the United States, as is apparent from the documents exhibited in the record. Conceded originally to Joseph Brazeau, his incomplete title to the same remained unextinguished throughout the whole period of the litigation. He never sold the claim of four by four arpents to the other claimant, nor did he ever request that it should be surveyed or located in any place other than the one where it was ascertained to be by the first survey, and it is equally true that Labaume never had any concession of that tract; that he never purchased it; and never had any title of any kind to any part of the concession, except the sixteen arpents as described in his deed from the rightful owner of the residue of the tract.

Even those most interested to do so will hardly contend, in view of these circumstances, See 8 WALL.

that the court below could have sustained the defense set up in the answer, that the claim was barred by the Statute of Limitations, as the suit was commenced in less than five months after the official survey was made. Before that time the legal title was in the United States, and the claim of the plaintiff attached to no particular land. Obviously the same facts are also a complete answer to the defense set up by the respondents of a former recovery founded on the decree in the case of *Magwire v. Tyler*, before cited, as the title to the land at that date was in the United States and continued to be so for a long time after the commencement of that suit.

Power to revise the surveys of confirmed claims was, by the Act of the 4th of July, 1836, conferred upon the Commissioner of the General Land Office, subject in certain cases to an appeal to the Secretary of the Treasury, but since the passage of the Act of the 8d March, 1849, such supervision is devolved upon the Secretary of the Interior. 5 Stat. at L., 108; 9 Stat. at L., 395.

Plaintiff in that suit claimed title under the survey made by Joseph C. Brown, in 1817, and he denied that the Secretary of the Interior had the power to set it aside, but this court held that the Secretary, under the last named Act of Congress, had that power and, consequently, that the claim in question had no specific boundaries, and that it attached to no particular land, so that a court of justice could not give him a remedy.

Theory of the plaintiff in that case was, that the survey, under which he claimed to maintain the suit, had been illegally set aside, and if he had been right, the court would have had jurisdiction of the merits, as the case was one brought here from a state court, where the distinction, as to the remedy between legal and equitable titles, is not observed. But the respondent insisted that the survey had been legally set aside, and the court so held; and, in that state of the case, this court could not decide anything, under the 25th section of the Judiciary Act, except the question as to the power of the Secretary of the Interior to set aside that survey.

Some of the judges were of the opinion that there was no jurisdiction of the case, but it is apparent that those who were of a different opinion never for a moment supposed that the decree in the case would determine the ultimate rights of the parties. By affirming the decree rendered in the court below in that case, this court decided that the survey then in question was legally set aside by the Secretary of the Interior, but the court did not consider the merits, and did not decide anything upon that subject.

The respondents also allege that some of their number were innocent purchasers, without notice, but the defense is not sustained by the proofs, and there does not appear to be any foundation for the theory that the decree of the Supreme Court of the State was placed upon any such ground.

Want of jurisdiction in the commissioners is also set up in the answer, and the argument is that the Supreme Court of the State may have decided that the decree of confirmation was a nullity on that account. Unsupported, how-

ever, as the proposition is by anything appearing in the recorded proceedings of the Board, it does not seem to be necessary to enter into any extended argument to show its fallacy. Suffice it to say that the question involved in the proposition is one which may be revised in this court, and the proper answer to it is, that if the court below so decided, the decision, in our opinion, was clearly erroneous.

A part from the question of jurisdiction, it is also contended by the respondents, that the patent under which the plaintiff claims is void, because the land therein granted is included in their patent, which is the elder title, but the error of the proposition consists in the theory of fact on which it is founded. Their patent does not include the same land. On the contrary, the land included in the plaintiff's patent was excepted out of their patent by the reservation therein contained, because it was a valid adverse right to four by four arpents of land within those boundaries, existing at the time their patent was executed.

Decree of the Supreme Court of the State reversed, with costs, and the cause remanded, with directions to affirm the decree of the St. Louis Court of Common Pleas.

Mr. Justice Nelson did not sit in this case.

S. C.—40 Mo., 408; 1 Black, 195.
Cited—18 Wall., 263; 17 Wall., 273, 280, 282; 98 U. S., 211, 215; 2 Sawy., 406, 409; 47 Mo., 125; 57 Mo., 475; 67 Mo., 704.

MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS AND THE MEMPHIS GAYOSO GAS COMPANY, *Appts.*,

v.

THOMPSON DEAN.

(See S. C., 8 Wall., 64-76.)

Suit by stockholder—contract by city for gas.

A stockholder of a company cannot file a bill in the United States Court, in his own name, against a wrong-doer, where the company has itself brought a suit in a state court for the same purpose, and which is still pending.

A contract of a city with a company to furnish gas for the city for a specified time, is not violated by the establishment therein of another gas company, nor by the city taking stock in the latter company.

[No. 155.]

Argued Apr. 8, Oct. 6, 7, 1869. Decided Oct. 18, 1869.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The bill in this case was filed in the court below, by the appellee, a stockholder in the Memphis Gas Light Company, to enjoin the authorities of the City of Memphis from holding a certain proposed election, or from subscribing to the stock of the Gayoso Gas Company, and to enjoin the said Gayoso Gas Company from laying pipes in the City of Memphis, and from manufacturing gas and selling the same to the inhabitants of said City. The defendants put in separate answers. That of the

NOTE.—Concurrent jurisdiction of tribunals. See note to Smith v. McIver, 22 U. S. (9 Wheat.), 532.

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Memphis Gas Light Company set up the commencement, by itself, of a suit in a state court of competent jurisdiction, to protect its own rights and those of its stockholders in the premises. The court having entered a decree in favor of the complainant, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Fred. P. Stanton, for appellants:

The second plea denies the allegation of the bill, that the Memphis Gas Light Company had refused to take the necessary steps to assert and maintain the rights of its stockholders; on the contrary, it shows the commencement of a suit in the Chancery Court of Memphis for that purpose, and tenders a copy of the record in proof of it. But this fact is not only shown by the plea and the record exhibited, but it is equally admitted by the bill itself, in its "Exhibit B." In this exhibit the President of the Gas Light Company informs the complainant that the bill had been filed in the Chancery Court, and a partial injunction obtained.

Under the circumstances existing at the time, as thus shown by the pleadings, Thompson Dean, as one of the stockholders of the Memphis Gas Light Company, had no right to file his bill in the court below, in order to protect the interests of the Company. He could only do so in case the Company refused to do it.

Dodge v. Woolsey, 18 How., 344 (59 U. S., XV., 406).

The third plea relies upon the actual pendency of the prior suit in the Chancery Court of Memphis. The preliminary injunction granted by the *Chancellor* was in the following words:

"Upon complainant giving bond with security in the sum of \$5,000, the clerk and master will issue the writ of injunction restraining defendants from laying their gas pipes above those of complainant, or so near to them as to cause injury to them.

I decline ordering an injunction restraining defendants from proceeding with their gas works, as I do not see that any exclusive privilege has been conferred on complainant.

WM. M. SMITH, *Chancellor.*

Sept. 12, 1867."

This injunction was in full operation when Dean filed his bill in the court below; and it is evident that he went into the Circuit Court of the United States in order to evade the jurisdiction of the local court—to appeal from the decision of *Chancellor* Smith, who had refused to recognize the monopoly claimed by the Gas Light Company. He made the Mayor and Aldermen parties to the proceedings, probably because he supposed that would enable him to avoid the plea of a prior action pending. But the fact of additional parties being included in the second suit, does not alter the application of the principle. The true test is the identity of the matters in issue—the rights claimed and the relief sought. In both cases the foundation of the proceeding is the same. Both rely upon the monopoly claimed by the elder Gas Company—the exclusive right, said to be granted in their charter, to make and sell gas in Memphis. The absurd proceeding against the city authorities depends wholly on this claim; for unless the exclusive right claimed

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can be established, there is no pretense of any right in a citizen of New York to interfere with the proposed acts of the Mayor and Aldermen. If that exclusive right can be established, then the injunction against the City would be wholly useless, inasmuch as an injunction against the new Company would effectually suspend their work, in spite of the people or public authorities of Memphis.

Story, Eq. Pl., sec. 736-745; Cooper, Eq. Pl., 273; Miltford, Ch. Pl., 248.

2. But the main point in the present case, and that on which the judgment of this court is especially desired, has reference to the exclusive rights claimed by the Memphis Gas Light Company under its charter. The Company asserts a right to the complete monopoly of making and selling gas in Memphis. This extraordinary claim is based upon the language of the 8d section of the Act to authorize the establishment of the National Gas Light Company, which is adopted in the Act establishing the Memphis Gas Light Company.

"Sec. 8. It shall be the duty of said Company to establish within three years from the first day of January, 1850, a gas manufactory within the City of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas light as may be required."

In one of the latest cases decided by this court, the following rule is laid down:

"In the case of the Charles River Bridge, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized that charters are to be construed most favorably to the State, and that in grants by the public, nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: That all rights which are asserted against the State, must be clearly defined and not raised by inference or presumption; and if the charter is silent about a power, it does not exist." *The Binghamton Bridge*, 8 Wall., 75 (70 U. S., XVIII., 137).

It is scarcely necessary to cite the following list of cases, in which the question in some of its forms has been considered by this court:

Beatty v. Lessee of Knowler, 4 Pet., 152; *Prov. Bk. v. Billings*, 4 Pet., 514; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420; *Mills v. S. Clair County*, 8 How., 581; *Bridge Props. v. Hoboken Co.*, 1 Wall., 116 (68 U. S., XVII., 571; *Turnpike Company v. The State*, 3 Wall., 211 (70 U. S., XVIII., 180).

Messrs. D. K. McRea, Humes, and Pres-ton, for appellee:

1. The plea to the jurisdiction states three grounds: 1. "That although the complainant is a non-resident stockholder of Tennessee, yet his Company is a resident Corporation of Tennessee." This is no valid objection, if case stated for relief shows that the president and directors of the old Company were guilty of a breach of duty in neglecting to assert properly the rights of the Company, so as to permit their value to be injured or destroyed. *Dodge v. Woolsey*, 18 How., 344 (59 U. S., XV., 406).

The second ground stated in the plea is, that the president and directors of the old Company

have not refused to take all necessary and proper steps to protect the rights of complainant; and the old Company, on the contrary, had filed a bill in the Chancery Court of Memphis, seeking the same relief and urging the same matters of complaint as in this bill, and defendants exhibit a copy of that record. But it will be seen that to that bill the Mayor and Aldermen were not parties, and none of the allegations against them of fraudulent and powerful combination with the new Company, in violation of its contract with the old Company and of its charter, are set forth. If the claims of the old Company are legally valid, to the exclusive privileges as alleged by them, both under their charter and under their contract of 1852 with the corporate authorities of Memphis, then the alleged action of the Board of Mayor and Aldermen, in seeking to lend its aid to the new Company by subscribing \$250,000 of stock, was a gross and dangerous fraud against the old Company and its stockholders. The president and directors of the old Company, showing clearly that they knew and appreciated the rights of their Company and the injuries sought to be inflicted on their chartered privileges, were guilty of the non-performance of a confessed official obligation, in refusing to take steps against the Board of Mayor and Aldermen, which amounted, in the language of Judge Wayne, delivering the opinion of this court in the case of *Dodge v. Woolsey*, 18 How., 345 (59 U. S., XV., 406), to a breach of trust. Therefore, one of the stockholders was forced in self defense to sue and call upon the Circuit Court of the United States, as a Court of Chancery, to stop this gross fraud of the City, by whose powerful aid alone, in all probability, the attack by adventurers upon its chartered privileges could be made successful. *Dodge v. Woolsey* (*supra*).

The plea was overruled properly because it is defective. It is double, informal and multifarious, since it contains more defenses than one. It avers, first, as one ground of defense, that although the complainant is a non-resident of Tennessee, yet the old Company is not. In the second and third grounds of the plea, there is alleged the pendency of another suit. A plea containing more defenses than one is bad. Various facts can never be pleaded in one plea, unless they are all conducive to one point, on which the defendant must rest his defense; otherwise it will be open to the charge of duplicity and multifariousness.

Story, Eq. Pl., sec. 653, *et seq.*; *R. I. v. Mass.*, 12 Pet., 657; 2 Dan. Ch. Pr., 102; *Goodrich v. Pendleton*, 3 Johns. Ch., 384.

2. We insist that by the express terms and words of the charter of the Memphis Gas Light Company, an exclusive privilege of erecting, establishing and constructing public gas works at Memphis, and of manufacturing and vending gas by means of such public works to the inhabitants and corporate authorities of Memphis, was granted to the Memphis Gas Light Company for the duration of its charter; that this grant is a contract, the subsequent grant of the same branch of it to the Gayoso Gas Company by the Legislature of Tennessee, impairs its obligation within the prohibition of the Constitution of the United States, and hence the subsequent grant is void.

This privilege of establishing, erecting and

constructing gas works and manufacturing and vending gas, by means of public works, to the inhabitants and corporate authorities of Memphis, is a franchise; that is to say, "a privilege or immunity of a public nature, which cannot be legally exercised without legislative grant." This court, in the case of *Bk. of Augusta v. Earle*, said: "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right." *Ang. & Ames, Corp., secs. 4, 787; Bk. of Augusta v. Earle, 13 Pet., 595.*

The franchise of the Memphis Gas Light Company has another feature distinguishing it from the ordinary privileges of other private corporations. By the express terms of the charter it involves public duties and charges. What ever gas lights any inhabitant of the City or the corporate authorities of the City may require, this Company is expressly bound by its charter to supply, and that, too, at a reasonable price, to be regulated by the price of gas in other southwestern cities, and never to exceed one cent per cubic foot for gas. Such is the duty of this Company by the express provisions of the charter, and such is the *jus publicum*.

See, Charter, secs. 2, 3, 4, 5, 7; *Charles Riv. Bridge v. Warren Bridge*, 11 Pet., 630; 2 Dane, Abr., ch. 67, p. 683; *Charles Riv. Bridge v. Warren Bridge*, 7 Pick., 496.

Now, this being a franchise burdened with these public duties and charges, the owners must, as a reasonable equivalent, be protected in their property, their franchise.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Western District of Tennessee.

The bill was filed by Dean, who is a stockholder in the Memphis Gas Light Company, against this Company and the Memphis Gayoso Gas Company, both incorporated by the Legislature of Tennessee, and also against the City of Memphis, for the purpose of restraining the Gayoso Gas Light Company from laying down gas pipes within the City of Memphis, and from furnishing the City with gas, and the City of Memphis from subscribing to the stock of this Company.

The ground upon which the claim is made to restrain this Company is: that the previous Company, of which the complainant is a member, had conferred upon it by its charter an exclusive right to supply the City with gas, and that the Legislature was thereby disabled from conferring the same privileges upon another Company; and, in respect to the City of Memphis, that it is precluded from subscribing to the stock of the new Company, by a special agreement entered into between the City and the Memphis Gas Light Company.

The complainant charges in his bill that he has applied to the President and Directors of the Memphis Gas Light Company, of which he is a member, to institute the proper legal proceedings for the purpose of enjoining the Gayoso Company from laying down gas pipes in the City; and also, the City from subscribing to stock of the same, and that they have refused.

To this bill the respondents plead in abatement, in substance: that the Memphis Gas Light Company had not refused to take all proper and legal steps to maintain its rights and the rights of its stockholders; but, on the contrary, it had filed a bill in a Court of Chancery of the State against the new Company, having full jurisdiction of the case, and the same grounds are set forth and relied on as in the complainant's bill to enjoin it, as will appear from the record which is produced; that the suit is still pending in this court; and that an application was made for a preliminary injunction against the new Company, which was granted, so far as to restrain it from laying gas pipes so near the gas pipes of the Memphis Gas Light Company as to cause any injury to them; but the court refused to restrain the Company from proceeding with its works, intimating an opinion that the complainant Company possessed no exclusive privileges to furnish gas to the City. The record of the suit of chancery is an exhibit, and substantiates all the facts set forth in the plea. The Memphis Gayoso Gas Company and the City of Memphis also put in separate answers; but from the view we have taken of the case, it will not be material to refer to them more particularly. The cause was set down for hearing by consent of parties "on the bill and exhibits, and on the answer of the Memphis Gayoso Gas Company and exhibits, and the answer of the Mayor and Aldermen of the City;" and the court, after hearing, determined that the complainant was entitled to the relief prayed for, and decreed perpetual injunctions against the new Company and the City. The cause is now before us on appeal.

The judgment of the court in the case of *Dodge v. Woolery*, 18 How., 331-345 [59 U. S., XV., 401-406], authorizes the stockholder of a company to institute a suit in equity in his own name against a wrong-doer, whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their stock, in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. See, also, *Bronson v. La Crosse R. R. Co.*, 2 Wall., 283-303 [69 U. S., XVII., 725, 729]. This refusal of the Board of Directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the Company. There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join. The plea in abatement in the record is founded upon this view of the law. It not only denies the refusal, but avers the institution of a suit in a court of competent jurisdiction, and in which the ground of complaint is substantially the same as set forth in the complainant's bill. This is a plea to the person of the complainant. Pleas to the person, says Mr. Daniell (1 Dan. Ch. Pr., 744), like pleas to the jurisdiction, do not necessarily dispute the validity of the rights, which are made the subject of the suit, but object to the plaintiff's ability to sue, or

the defendant's liability to be sued respecting them. And *Judge Story* observes, "They object to the plaintiff that he is by law disabled to sue in a court of justice, or that he cannot institute a suit alone, or that he is not the person he pretends to be, or that he does not sustain the character he assumes."—Eq. Pl., 545. These are properly pleas in abatement, or at least in the nature of abatement. *Ib.*, 549, and n. 2.

It is insisted, however, on the part of the learned counsel for the appellee, that the suit in the state court did not cover all the grievances set forth in his bill, as the directors were required to proceed against the City of Memphis, which was not a party defendant in that suit, but is in the present one. The charge in his bill is, that the city authorities passed an ordinance authorizing the Mayor to hold an election to test, the sense of the voters of the City as to the propriety of subscribing \$250,000 to the stock of the Memphis Gayoso Company, and he apprehends that the influence of the corporate authorities will be exercised on the voters favorable to the Company, and will proceed to subscribe to its stock; and further, that the City had entered into a contract with complainant's Company to furnish the lamps of the City with gas for twenty years, and that this action of the City is in violation of that contract; and the bill prays that the City may be enjoined from holding the election or subscribing to the stock. This is the branch of the case relied on to show that the suit in the state court was not a compliance with, or a fulfillment of, the request of the complainant to the directors of the Memphis Gas Light Company to institute legal proceedings.

But, admitting all this to be true, it furnishes no valid ground for making the Memphis Gayoso Gas Company a party, and agitating over again the same question which was pending in the state court, namely: whether or not the Memphis Gas Light Company had an exclusive right to furnish the City of Memphis with gas. There is no necessary connection between that suit, or the subject-matter involved in it, and the one against the City. The former turns upon a construction of the charter of the Memphis Gas Light Company; the latter, upon a written contract between this Company and the City. The question here has no connection with that of the exclusive privileges of the Company under the charter. If any suit was desired, or advisable, against the City, it should have been a separate one founded on the contract.

Besides, the suit against the City was premature. Until the question was decided whether or not the Memphis Gayoso Gas Company was valid, and had a right to establish itself in the City of Memphis, the suit against the City was founded on a hypothetical case. If held by the state court, on the final hearing, that the Memphis Gas Company had the exclusive right, the existence of the other Company must cease, and the suit against the City would be superfluous.

The suit is premature, also, for the reason it is founded on a contingency, that a majority of the voters of the City will vote in favor of a city subscription to the stock. The bill seeks to enjoin the City from holding the election, See 8 WALL.

for fear a majority may favor subscription; and then, that the City will subscribe. The complainant should have waited till after the result of the election, and, if it had been against making any subscription, no suit would have been required; if in favor, it would have been time enough to have filed the bill.

But, over and beyond all these objections, we are satisfied that there is nothing in the provisions of the contract that can be made available to estop the City from subscribing to the stock. It secures to the complainant's Company the exclusive privilege of supplying the public lamps in the streets of the City with gas for twenty years, at one half the price which is charged to private persons. This is the essence of the contract. There are other details to enable the Company to fulfill its portion of the stipulations, such as the privilege of laying down its pipes in the streets, and of exercising all the rights under the charter within the limits of the City, without any other tax or charge than upon the estimated value of their house and lot, and \$100 per annum. The City agrees to take fifty public lamps to begin with, to be extended thereafter according to the public wants. All the obligations, whatever they may be, to be found in the contract on the part of the City, are binding upon it, and if broken, the courts will afford the proper remedy. The establishment of another company therein will not change its nature or obligation, much less abrogate it. To this extent the City is bound, but no further. There is neither an express nor implied obligation not to take stock in any other company.

The idea that the subscription to the stock of the new Company would aid or encourage its establishment in the City, and hence would operate as a violation of the contract, finds no support in that instrument.

The result of our opinion is, that the only question that it was competent for the complainant, as a stockholder of the Memphis Gas Light Company, to compel the directors to present to a court of justice, was that involving its exclusive right, under the charter, to furnish the City of Memphis with gas; and as that had been presented to a court of competent jurisdiction, in a suit then pending, he is disabled, according to the settled rule on this subject, from instituting a suit in his own name in another court.

Decree below reversed, and case remitted to the court below, with directions to dismiss the bill.

Cited—10 Biss., 198; 4 Dill., 23; 8 Blatchf., 402, 405; 1 Sawy., 68, 69; 1 Wood, 18; 2 Wood, 421, 619; 66 Ind., 408; 24 Mich., 473; 31 Hun, 306.

JOHN H. McKEE, Claimant of 187 BALES of COTTON, 100 COILS OF ROPE, 16 BALES, 8 ROLLS and 160 PIECES OF BAGGING, and 29 PIECES OF LEATHER, *Appt.*,

v.

THE UNITED STATES.

(See S. C., 8 Wall., 163-167.)

Purchase of cotton from Confederate States, illegal—permission or license will not authorize—seizure.

Unlicensed business intercourse with an enemy during a time of war is not permitted.

A purchase of cotton made by a citizen of N. O., of the agent of the Treasury Department of the Confederate States within the Confederate lines, was illegal.

Such purchase is not protected by a permission given by the commanding officer of the Gulf Department to pass through the U. S. lines into Upper Louisiana, and bring away any property that he might purchase there.

Nor would a license in conformity with treasury regulations issued under the Act of July 13, 1861, to trade generally within the insurgent territory, authorize a purchase from an important official of the Confederate States.

Such property was liable to seizure at the place of purchase by the Federal forces, and to condemnation.

[No. 18.]

Argued Oct. 8, 1869. Decided Oct. 13, 1869.

A PPEAL from the District Court of the United States for the Southern District of Illinois.

This is a claim for a portion of the property captured by the naval forces of the United States, under the command of Admiral D. D. Porter, engaged in the "Red River Expedition," in the spring of 1864. The particular property embraced by the claim was seized Mar. 16, 1864, in the Town of Alexandria, on the Red River, Louisiana, and brought into the Southern District of Illinois for adjudication, with the other property captured upon the same expedition.

The district court having dismissed the claim, the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. R. M. Corwine and J. A. Campbell, for appellant:

1. It is not violative of the Non-Intercourse Act of July 13, 1861, for a citizen of a loyal State to trade with a citizen of a disloyal district, if such trading was in pursuance with a license and permit from the President of the United States or the Secretary of the Treasury, or anyone acting for either.

2. In such cases, the *status* of the citizen does not control and does not enter into the question.

3. Being a transaction between two citizens of the United States, the presumptions are all in favor of its validity, and the *onus*, to show that it is violative of some Statute of Congress, rests on the party who seeks to condemn the property.

4. Having once shown a permit or license to trade with the insurgent districts, the presumptions are all in favor of the transaction being done under and in pursuance of such authority, until the contrary appears.

5. The property of a citizen of the United States cannot lawfully be taken from him by any authority of the United States, except that authority springs out of the judgment of a court having jurisdiction of the person and the subject-matter.

6. There is no such thing as the law of nations operating within the territorial jurisdiction of the United States, more especially where that law is invoked to condemn the property of a citizen of the United States, found within its territory as prize of war *jure belli*.

7. Until the President has actually caused the seizure of property falling within the opera-

tion of the Statute of July 17, 1862, the statute is not operative, and no rights arise under it.

8. That statute having been passed in aid of the army while in active operation against the rebels, ceased to be effective after the war ended, and no seizure can now be made under it. It expired by its own limitation.

9. The title of a purchaser, made in good faith before actual seizure, is not affected by the political *status* of the vendor.

10. The Act of July 17, 1862, does not, in terms nor by implication, repeal the Act of July 13, 1861, in so far as it empowers the President of the United States to license and permit commercial intercourse with any part of any insurrectionary district in the United States.

11. During the existence of the rebellion, it was the policy of the authorities of the United States, civil and military, to encourage the purchase of cotton and sugar, the products of disloyal districts, and to afford loyal citizens every facility to effect such purchases. This policy found expression in the Acts of Congress and in the uniform practice of the President, the Secretary of War, the Treasury, his treasury aids, and the military authorities acting under Executive orders.

12. There was no lawful capture or seizure in this case, but the property was taken possession of and removed by the navy, for safety, to Cairo, with previous knowledge that it was the *bona fide* property of a loyal citizen, entitled to be respected as such.

13. These Confiscation Statutes, being *quasi* criminal, must be construed strictly.

Messrs. E. R. Hoar, Atty-Gen., J. Hubley Ashton, Asst. Atty-Gen., and C. Cushing, for the appellee:

The following propositions appear to be indisputable:

1. That the purchase of this property by John H. McKee was in direct violation of the Act of July 13, 1861, and no title thereto was acquired by him.

Andrew W. McKee, the vendor, was a citizen of the insurrectionary portion of Louisiana, while his vendee, John H. McKee, was a citizen and resident of New Orleans. The parties were not competent to make a contract in respect to property, without the license of the President, granted under the lawful regulations of the Secretary of the Treasury. Any contract attempted to be made without such license was null and void. The parties had no legal capacity to trade with one another.

No such license appears in the case. General Banks had no more authority to protect their trade by a permit or license of his own, than any private citizen in New Orleans.

2. That, independently of any question as to the character and validity of the license held by the claimant, no title could be acquired to any property owned by Andrew W. McKee, at the date of this transaction, by purchase, transfer or conveyance from him.

A. W. McKee was an officer or agent of the Government of the so called Confederate States and, as such, all property owned by him was confiscable under the 6th section of the Act of July 17, 1862; and by the same section, any sale of such property by McKee was, as a transfer of legal title, utterly void. 12 Stat. at L. 591.

In so far as the Confiscation Act of July 17, 1862, invalidated all sales and transfers of property belonging to persons within the 5th and 6th sections of the Act, it must be regarded as a repeal, by implication, of the provisions of the Act of July 13, 1861, which authorized the President to license commercial intercourse with such persons. If, therefore, the claimant had held a license duly issued under the authority of the President, at the time he purchased this property from A. W. McKee, such license would not have enabled him, at the date of that transaction, to acquire a valid title to the property as against the provisions of the Confiscation Act of July 17, 1862, referred to. They declared that any sale, transfer, or conveyance of any property belonging to the vendor should be absolutely, and to all intents and purposes whatever, null and void; and it is plain, therefore, that they repealed the provisions of the earlier Act of July 13, 1861, to the extent that they authorized the President to validate commercial intercourse with this vendor, and the acquisition of property by purchase from him.

Mr. Justice Davis delivered the opinion of the court:

This is a claim for property captured by the naval forces of the United States engaged in the Red River Expedition, in the spring of 1864.

The claim was dismissed by the court below, and the correctness of that decision presents the only question in the case.

It is a familiar principle of public law, that unlicensed business intercourse with an enemy during a time of war is not permitted. Congress, therefore, in recognition of this principle, when it declared, on the 13th day of July, 1861, that commercial intercourse between the seceding States and the rest of the United States should cease and be unlawful, after the proclamation of the President that a state of insurrection existed, authorized the President, in his discretion, to license trade. But in so far as it was licensed, it was to be conducted in accordance with the regulations prescribed by the Secretary of the Treasury. The President proclaimed the fact of insurrection, and provided for a limited commercial intercourse; and the Secretary of the Treasury fixed the manner in which this intercourse should be carried on. Under this Act of Congress, the Proclamation of the President, and the trade regulations established in pursuance of it, can the purchase of the property in question be protected?

It was made on the 4th of March, 1864, while the war was flagrant, by John H. McKee, a citizen of New Orleans, of A. W. McKee, a resident of Upper Louisiana, and the general agent of the Treasury Department of the Confederate States, to purchase and dispose of cotton in the State of Texas, and that part of Louisiana lying west of the Mississippi River.

Permission had been given the claimant, by the commanding officer of the Department of the Gulf, to pass through the United States lines into Upper Louisiana and bring away any property that he might purchase there. But who authorized him, while there, to make the purchase? There is no sufficient proof in the record that any treasury officer clothed him with this authority, and it is very clear that the power

of the military extended no further than to protect him in going into the lines of the enemy and bringing from there any property rightfully acquired. If, as is contended, and as the evidence tends to show, the military authorities went further and granted him also a license to trade, the answer is, that this court held in *The Ouachita Cotton* case, 6 Wall., 531 [73 U. S., XVIII., 935], that such a license was void.

But even if McKee had obtained the express permission of one of the treasury agents to go into the Confederate lines and buy cotton, it would not protect him, because the agent would have been acting outside the limits of his authority, as the regulations of the department, in force at the time, strictly prohibited commercial intercourse with localities beyond the lines of military occupation by the United States forces.

There is another view of this case, which is decisive of it, if the proof was ample that the claimant had a license in conformity with treasury regulations, issued under the Act of Congress of July 13, 1861, to trade generally within insurgent territory, for the reason that such a license could give him no right to buy property of A. W. McKee, who held an important official position from the Government of the Confederate States.

Section 5 of the Act of Congress, July 17, 1862, provides:

"That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons hereinafter named in this section and to apply and use the same and the proceeds thereof for the support of the Army of the United States."

The enumeration of persons includes, "Any person hereinafter holding an office or agency under the Government of the so-called Confederate States of America"; and the section thus concludes: "And all sales, transfers or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or use of such property or any of it, to allege and prove that he is one of the persons described in this section."

This statute prohibited a person occupying the position of A. W. McKee from selling his property, and it follows, as he had no capacity to dispose of it, that the claimant could acquire no title to it.

All licenses to trade issued under the Act of July 13, 1861, are controlled by the provisions of the Act of July 17, 1862, and must be restricted to a permission to trade with those persons who are not within the prohibitions of the later Act. It is a well settled principle of law, that in case of the repugnancy between two statutes, the later one must prevail over the former. In that particular in which the prior and the later Act cannot consistently stand together, the later Act must be taken, *pro tanto*, as a modification or repeal of the former.

The decree of the District Court affirmed.

Cited—9 Wall., 72; 21 Wall., 96; 1 Flipp., 312; 7 Blatchf., 409; 1 Dill., 381, 382, 573, 578; 1 Wood, 589; 37 N. J. L., 489; 1 Am. Rep., 149 (100 Mass., 599); 7 Am. Rep., 196 (32 Iowa, 303); 9 Am. Rep., 683 (35 Ind., 154); 56 Mo., 444.

Ex parte IN THE MATTER OF EDWARD M. YERGER, Petitioner.
(See S. C., 8 Wall., 85-106.)

Jurisdiction of this court, by habeas corpus—appellate jurisdiction.

In all cases where a Circuit Court of the United States has caused a prisoner to be brought before it and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court may, by the writ of *habeas corpus*, revise the decision of the circuit court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

This court has power, under such circumstances, to issue a writ of *habeas corpus* to a Military Commission, to produce a prisoner held on the charge of murder.

The Act of March 27, 1868, does not take away or affect the appellate jurisdiction of this court under the Constitution and the Acts of Congress prior to 1867.

[No. 17. Special.]

Argument as to jurisdiction Oct. 15, 1869. Decided Oct. 25, 1869.

MOTION and petition for writs of *habeas corpus* and *certiorari*.

The case is fully stated by the court.

Argument on the question of jurisdiction.

Massie P. Phillips, J. M. Carlisle, and Wm. Yerger, for petitioner:

The jurisdiction of this court to grant the writ of *habeas corpus*, to operate in the nature of a writ of error, for the purpose of inquiry into the cause of commitment by an inferior court, and of revising such judgment, has been fully settled beyond the reach of controversy.

This question arose at an early day in the history of the court, and has been repeatedly considered. The decisions are unvarying and uniform. The jurisdiction has been maintained in every instance, and as far as I have been able to find, only two judges—*Justices Baldwin and Curtis*—have expressed adverse opinions; and the opinion of the latter was limited to the special form of the judgment under review.

The Constitution, in sec. 9, art. I, declares that "The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it." The first Congress, treating this provision as mandatory, took immediate steps to render it efficient.

The 14th section of the Act of 1789, establishing judicial courts, declares that "All the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and that either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment, provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In *Ex parte Bollman and Swartwout*, 4 Cranch,

Certiorari in United States courts. See note to Clark v. Hackett, 66 U. S. (XVII.), 66.

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75, *Chief Justice Marshall*, delivering the opinion of the court, uses this language: "It may be worthy of remark, that this Act was passed by the first Congress of the United States sitting under a Constitution which declared that 'the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'" As this court has no original jurisdiction to award this writ, it must, if it ever exercises the power conferred by this statute, proceed by virtue of its appellate powers. But it is said the appellate power can only be exercised in a suit which has been begun in an inferior court. Conceding this, the question then arises, whether an application for the writ of *habeas corpus* in an inferior court is a suit, and whether the judgment of such court is a judgment in a suit to be revised by writ of error or appeal, or a proceeding in the nature of a writ of error. This question has been fully put at rest by the decision rendered here in *Milligan's case*, 4 Wall., 2 (71 U. S., XVIII., 281).

"But it is argued that the proceeding does not ripen into a cause until there are two parties to it. This we deny. It was the cause of *Milligan* when the petition was presented to the circuit court; it would have been the cause of both parties, if the court had issued the writ and brought those who had *Milligan* in custody before it. Webster defines the word 'cause' thus: 'A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right or supposed right.'"

One of the questions in *Weston v. Charleston*, 2 Pet., 449, was whether a writ of prohibition was a suit; and *Chief Justice Marshall* says: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him."

The case now under consideration is relieved of the objection in *Milligan's case* that there was only one party and, therefore, was no suit or cause. Here, the court below issued the writ and brought those before it, who held the petitioner in custody, and on the return made to the writ, rendered the judgment complained of. It was, therefore, not only a suit of the petitioner for redress, but was a cause pending in the circuit court, with two litigating parties, each represented by counsel, before it.

Judgment was the final judgment of the court against the petitioner, denying the right asserted by him under the Constitution and laws of the United States. This entitled him to invoke the appellate power of this tribunal to revise that judgment, if there is any mode by which it can be brought before the court. 2 Story (C. C.), 485.

The manner in which this court shall acquire control of a case in order to exercise the appellate power, is not restricted to any particular form. It may be by appeal or writ of error or otherwise, as the Legislature or the usage and practice of the court may direct. 2 Story, *Com. Const.*, 570.

"A writ of *habeas corpus*," says the Supreme Court of New York, in *Yates v. People*, 4 Johns., 317, "is in the nature of a writ of error."

In the case of *Bollman and Swartwout*, before referred to, the conclusion was reached,

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that this court, in the exercise of its appellate power, did have jurisdiction under the Act of 1789, to award writs of *habeas corpus* in order to examine into the cause of the commitment. *U. S. v. Hamilton*, 3 Dall., 17.

Whenever in a statute it is declared that it shall be lawful for a tribunal or officer to exercise power or jurisdiction in a given case, and the public interest or private right call for the exercise of the jurisdiction; then the words "shall be lawful" are held to be mandatory, not permissive.

See, cases of *Mayor of N. Y.*, 3 Hill, 614, and *Mason v. Pearson*, 9 How., 248.

In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but "to impose a positive and absolute duty."

Supervisors v. U. S., 4 Wall., 435 (71 U. S., XVIII., 419).

See, also, to the same point, a still later decision, affirming the doctrine here laid down. *Galena v. Amy*, 5 Wall., 705 (72 U. S., XVIII., 560); see, also, *Ex parte Burford*, 4 Cranch, 448; 1 Curt., 638.

The next case in order of time, in which the question of jurisdiction came before the court, is that of *Ex parte Watkins*, reported in 7 Pet., 568; 10 Curt., 569.

The question of jurisdiction was fully considered and sustained.

In *Ex parte Kaine*, 14 How., 103, no member of the court expressed an opinion that the court did not have power in the exercise of its appellate jurisdiction to award the writ, in order to "inquire into the cause of the commitment" made by the circuit court, and to review the judgment of that court.

An amendment was made to the Acts on the subject of writs of *habeas corpus* in 1867, and is styled "An Act to Amend an Act to Establish the Judicial Courts of the United States." The 1st section of this Act provides that "The several courts of the United States and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States," etc.

It will be seen at a glance, that the Act of 1867 greatly enlarged the jurisdiction of the courts of the United States, in granting the writs of *habeas corpus*, and extended it to many cases now embraced by the Act of 1789. It also gave new and additional remedies, by which the assertion of the right could be made more efficient, both by original and appellate proceedings.

The Act of 1867 did not repeal the Act of 1789; it conferred powers on the courts in addition to the authority already conferred by law.

It simplified the modes of proceeding, both in the original and appellate forum. It declared that "From the final decision of any judge, justice or court inferior to the circuit court, an appeal may be taken to the Circuit Court of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme

Court of the United States," etc. A direct appeal to the Supreme Court was thus allowed, "in addition" to the former appellate remedy, by the practice of the court to award the writs of *habeas corpus* and *certiorari* under the Act of 1789.

But in 1868, that portion of the Act of 1867 which gave a direct appeal to the Supreme Court, was repealed. The Act of 1868 is in the following language: "That so much of the Act approved February 5, 1867, * * * as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed." But this repeal of that part of the Act of 1867, allowing a direct appeal in every case, whatever its merits might be, had no effect upon the former remedies existing prior to that Act.

Under the Act of 1867, the right of appeal was absolute; it extended to every case. But under the Act of 1789, it was entirely competent for the court to refuse the writ of *habeas corpus* to operate in the nature of a writ of error, if, upon looking into the whole case, the court was satisfied that, on the facts and merits of the case, the party was not entitled to relief. The Act of 1867, then, was cumulative and additional. *Ex parte McCordle* (ante, 264).

The repeal of a statute by implication is never favored. *Dwarr. Stat.*, 532; *Galena v. Amy*, 5 Wall., 705 (72 U. S., XVIII., 560).

There was no repugnancy between the Acts of 1789 and 1867. They could consistently stand together.

The jurisdiction of this court, therefore, now stands as it stood prior to the Act of 1867, and I think it has been clearly shown that it may, as an appellate tribunal under the Act of 1789, by the writs of *habeas corpus* and *certiorari*, obtain jurisdiction to review the judgments of an inferior court, which erroneously deprives a party of his liberty, or without sufficient cause commits him into custody.

Mr. E. R. Hoar, Atty-Gen., for United States, *contra*:

1. The Supreme Court of the United States can grant a writ of *habeas corpus ad subjiciendum* only in the exercise of its appellate jurisdiction, and by means of such writ can revise only the proceedings of those tribunals, over which and in respect to which it has appellate control and authority.

The leading case upon this subject is *Ex parte Bollman and Swartwout*, 4 Cranch, 75, who had been committed by the Circuit Court of the District of Columbia on a charge of treason against the United States. The only point of difficulty in that case was upon the construction of the 14th section of the Judiciary Act of Sep. 24, 1789, 1 Stat. at L., 81.

It was held that, by the sound construction of this section, the power to award writs of *habeas corpus* in order to examine into the cause of commitment, is given to the Supreme Court, and the argument was rejected; that the restrictive words of the first sentence of the section "which may be necessary to the exercise of their respective jurisdictions," limited the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of

the United States mentioned in the Act to exercise their respective jurisdiction in some cause which they are capable of finally deciding. To the objection that an inquiry by *habeas corpus* into the cause of commitment in a criminal case was an exercise of original jurisdiction in a case not within the constitutional grant of original jurisdiction to the Supreme Court, Chief Justice Marshall replied: "The jurisdiction which the court is now asked to exercise, is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."

Before the case of *Bollman* and *Swartwout* the court had issued writs of *habeas corpus* in two cases of commitment for criminal offenses. The first was *U. S. v. Hamilton*, 3 Dall., 17, in which the prisoner was charged with high treason, a capital offense, and had been committed upon a warrant of the District Judge of Pennsylvania. The prisoner was admitted to bail. Section 88 of the Judiciary Act, 1 Stat. at L., 91, authorized this. The second was *Burford's* case, 3 Cranch, 448, where the party has been committed by a defective warrant of certain Justices of the Peace, and brought before the Circuit Court of the District of Columbia on *habeas corpus* which, after hearing, passed an order given in full by Mr. Justice Curtis, in *Kaine's* case, 14 How., 124, remanding the prisoner to jail until he entered into a recognizance to keep the peace. It was under this order of the circuit court that Burford was imprisoned when he petitioned to the Supreme Court for a writ of *habeas corpus*.

After *Bollman* and *Swartwout*, the case next in order is *Ex parte Kearney*, 7 Wheat., 38, which was an application for *habeas corpus* by a prisoner in custody under a commitment of the Circuit Court of the District of Columbia, for contempt as a witness. The writ was refused on the ground that the writ was not a proper remedy in case of commitment for contempt by a court of competent jurisdiction.

Ex parte Watkins, 8 Pet., 198, was the case of a prisoner in jail in the District of Columbia, under a judgment of the circuit court in a criminal prosecution. The application for the writ was refused on the ground that the judgment was of a court of general and final criminal jurisdiction, and justified the imprisonment.

Ex parte Watkins, 7 Pet., 568, was the case of a party in custody, under writs of *capias ad satisfaciendum*, issued out of the Circuit Court of the District of Columbia.

On the question of jurisdiction the court said: "The question turns on this: whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the Constitution allows this court to exercise original jurisdiction, the writ must be denied. If the latter, then it may be awarded, since the Act of 1789, sec. 14, has clearly authorized the court to issue it."

In *Holmes v. Jennison*, 14 Pet., 540, a writ of *habeas corpus* was, on the petition of George Holmes, issued by the Supreme Court of Vermont, and on the return thereto by the sheriff, stating the warrant of the Governor to be the cause of his detention, he was remanded by the court. Holmes prosecuted a writ of error to the Supreme Court of the United States. The

writ of error was dismissed, the court being equally divided.

Ex parte Barry, 2 How., 65, was a petition by an alien for a *habeas corpus* to obtain the custody of his infant child. "The application," said the court, "in effect, seeks the exercise of original jurisdiction in the matter upon which it is founded." The writ was refused.

Ex parte Dorr, 8 How., 108, was an application for the writ by a party imprisoned on state process; but the court refused it.

Barry v. Mercier, 5 How., 103, was a case brought up by a writ of error to the Circuit Court of the Southern District of New York, in which the circuit court refused to grant a writ of *habeas corpus*, prayed for by a father to take his infant child out of the custody of its mother. It was held that the Supreme Court had no appellate power in the case, and the writ was dismissed for want of jurisdiction.

Metzger's case, 5 How., 176, was that of an application for the writ by a prisoner committed to the custody of the Marshal by the district judge at his chambers, under the French Treaty of Extradition.

This court refused the writ, on the ground that there is no form in which an appellate power can be exercised by it over the proceedings of a district judge at his chambers.

In *re Kaine*, 14 How., 108, one question argued was, in the language of Mr. Justice Nelson, whether the prisoner was or was not held in confinement under the order of the circuit court, or whether the decision of the circuit court was the cause of commitment. For if it was, it was admitted that this court had jurisdiction to inquire into it; and if it was not, the decision of the circuit court was not within the exigency of the writ; forms no part of its subject-matter; and was not within the appellate control of the Supreme Court. The application was denied on the merits.

In *Ex parte William Wells*, 18 How., 307 (59 U. S., XV., 421), the President granted "a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life," and Wells accepted the pardon with the condition. Wells applied to the circuit court for a writ of *habeas corpus*, which was granted; and that court, after the hearing, remanded him to the penitentiary. Wells then petitioned the Supreme Court for a writ of *habeas corpus*, which was denied.

Ex parte Milligan, 4 Wall., 2 (71 U. S., XVIII., 281), came before the Supreme Court upon a certificate of a division of opinion between the justices of the circuit court, and arose under the Act of Mar. 3, 1863, 13 Stat. at L., 755, and has no application to the case at bar.

Ex parte McCordle, 6 Wall., 318 (73 U. S., XVIII., 816), was a motion to dismiss an appeal from the Circuit Court of the District of Mississippi, under the Act of Feb. 5, 1867, 14 Stat. at L., 885. This right of appeal was taken away by the Act of Mar. 27, 1868, 15 Stat. at L., 44. *Ex parte McCordle* (ante, 264).

It abundantly appears from the foregoing cases, that to bring a case within the appellate jurisdiction of this court in the sense requisite to enable it to award the writ of *habeas corpus* under the Judiciary Act, it is necessary that the commitment should appear to have been by

a tribunal whose decisions are subject to revision by this court.

This court cannot exercise any appellate control by appeal, writ of error or any other proceeding over the Military Commission, by virtue of whose sentence the petitioner is imprisoned; nor has this court power, in any form nor by any procedure, to revise the proceedings of that Commission in the case of the petitioner.

I. This court has appellate power only in cases provided for by Congress; (*Durousseau v. U. S.*, 6 Cranch, 807) and Congress has not provided by law for a review by this court of the acts and proceedings of this or any other Military Commission exercising jurisdiction under the authority or color of authority of the United States. Every existing statutory regulation of the appellate power of this court, excludes and excepts from that jurisdiction, cases adjudicated by such tribunals.

II. But, independently of this, whatever jurisdiction was possessed by this Military Commission, was not a part of that judicial power which is defined in the 3d article of the Constitution; and, therefore, this court could and can have no appellate control or authority over that body.

Benner v. Porter, 9 How., 244; *Ins. Co. v. Canter*, 1 Pet., 545.

The appellate power of this court cannot extend beyond the action of the inferior courts established by Congress to take original jurisdiction under the Constitution, and which exercise judicial power therein conferred. *U. S. v. Ritchie*, 17 How., 538 (58 U.S., XV., 288).

III. The addressing a writ of *habeas corpus* to the military commander in Mississippi, would be an exercise of original and not of appellate jurisdiction by this court. He does not hold the petitioner under any order or decree of the circuit court, but by military power. The order of the circuit court merely left the matter as it found it. The military commander could discharge the prisoner at his pleasure, notwithstanding the action of the circuit court.

IV. The *habeas corpus*, issued with the *certiorari* as an adjunct to the appellate power, is only permitted where the custody of the prisoner is an essential part of the judgment or decree from which the appeal is taken.

V. The repeal of the Statute of March 27, 1868, of so much of the Act of Feb. 5, 1867, as granted appellate power to this court in cases of this nature, was intended, and should be construed, as taking away, not the whole appellate power in cases of *habeas corpus*, but the appellate power in cases to which that Act applied. It did not mean merely to substitute a cumbrous and inconvenient form of remedy for a direct and simple one. *Ex parte McCordle* (*ante*, 264).

VI. The Statute of 1867, providing for military government in Mississippi, necessarily suspended the writ of *habeas corpus* in that State, which it was within the clear constitutional authority of Congress to do.

Mr. Chief Justice Chase delivered the opinion of the court:

Upon the prayer of the petitioner addressed to the Circuit of the United States for the Southern District of Mississippi, a writ of *habeas corpus* was directed to certain military offi-

cers holding the petitioner in custody, commanding them to produce his body and abide the order of the court.

In obedience to this writ, the petitioner was brought into court by Major-General R. S. Granger, who made return in due form, certifying the cause of detention to be, that the petitioner had been arrested and was held for trial, upon a charge of murder, by a Military Commission, under an Act of Congress of the 2d of March, 1867, "To Provide for the More Efficient Government of the Rebel States."

Upon this return the petitioner was ordered into custody of the Marshal, and the court proceeded to hear argument. It was admitted that the petitioner was a private citizen of the State of Mississippi; that he was being tried by the Military Commission, without a jury and without presentment or indictment by a grand jury; and that he was not and never had been connected with the Army or Navy of the United States, or with the Militia in actual service in time of war or invasion.

Upon this case the circuit court adjudged that the imprisonment of the petitioner was lawful, and passed an order that the writ of *habeas corpus* be dismissed, and that the prisoner be remanded to the custody of the military officer by whom he had been brought into court, to be held and detained for the purposes and to answer the charges set forth in the return.

To obtain the reversal of this order and relief from imprisonment, the petitioner now asks for a writ of *certiorari* to bring here for review the proceedings of the circuit court, and for a writ of *habeas corpus* to be issued under the authority of this court, to the officer to whose custody he was remanded.

Upon the suggestion of the Attorney-General, made in view of the importance of the questions which will probably arise if the case is brought to hearing, we have heard preliminary argument upon the jurisdiction of the court to issue the writ prayed for, and have carefully considered the reasonings which have been addressed to us.

The argument, by the direction of the court, was confined to the single point of the jurisdiction, and I am now to state the conclusions to which we have come.

The general question of jurisdiction in this case resolves itself necessarily into two other questions:

1. Has the court jurisdiction, in a case like the present, to inquire into the cause of detention, alleged to be unlawful, and to give relief, if the detention be found to be in fact unlawful, by the writ of *habeas corpus*, under the Judiciary Act of 1789?

2. If, under that Act, the court possessed this jurisdiction, has it been taken away by the 2d section of the Act of March 27, 1868, 15 Stat. at L., 44, repealing so much of the Act of February 5, 1867, 14 Stat. at L., 385, as authorizes appeals from circuit courts to the Supreme Court?

Neither of these questions is new here. The first has, on several occasions, received very full consideration, and very deliberate judgment.

A cause, so important as that which now invokes the action of this court, seems, however, to justify a reconsideration of the grounds upon

which its jurisdiction has been heretofore maintained.

The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defense of personal freedom.

In England, after a long struggle, it was firmly guarantied by the famous *Habeas Corpus Act* of May 27, 1679, 3 Brit. Stat. at L., 397, 8 Hallam, Const. Hist., 19, "for the better securing of the liberty of the subject," which, as Blackstone says, "is frequently considered as another Magna Charta." 3 Bl. Com., 135.

It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors.

Naturally, therefore, when the confederated Colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words:

"The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

We find, accordingly, that the first Congress under the Constitution, after defining, by various sections of the Act of September 24, 1789, the jurisdiction of the District Courts, the Circuit Courts and the Supreme Court in other cases, proceeded, in the 14th section, to enact, "that all the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. at L., 81. In the same section, it was further provided "that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment; provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

That this court is one of the courts to which the power to issue writs of *habeas corpus* is expressly given by the terms of this section has never been questioned. It would have been, indeed, a remarkable anomaly of this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the *Habeas Corpus Act* of Charles II. expressly declares those courts to possess.

But the power vested in this court is, in an important particular, unlike that possessed by the English courts. The jurisdiction of this

court is conferred by the Constitution, and is appellate; whereas, that of the English courts, though declared and defined by statutes, is derived from the common law, and is original.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, and to large classes of cases determined by the character of the parties, or the nature of the controversy.

That part of this judicial power vested in this court is defined by the Constitution in these words:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

If the question were a new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other cases than those expressly enumerated in the Constitution; and especially, in view of the constitutional guaranty of the writ of *habeas corpus*, to cases arising upon petition for that writ.

But, in the case of *Marbury v. Madison*, 1 Cranch, 137, it was determined upon full consideration, that the power to issue writs of *mandamus*, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.

It was pronounced in 1803. In 1807 the same construction was given to the provision of the 14th section relating to the writ of *habeas corpus*, in the case of *Bollman and Swartwout*, 4 Cranch, 100.

The power to issue the writ had been previously exercised in *Hamilton's case*, 3 Dall., 17 (1795), and in *Burford's case*, 3 Cranch, 443 (1806), in neither of which cases does the distinction between appellate and original jurisdiction appear to have been made.

In the case of *Bollman and Swartwout*, however, the point was brought distinctly before the court; the nature of the jurisdiction was carefully examined, and it was declared to be appellate. The question then determined has not since been drawn into controversy.

The doctrine of the Constitution and of the cases thus far may be summed up in these propositions:

(1) The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.

(2) The appellate jurisdiction of this court, conferred by the Constitution, extends to all other cases within the judicial power of the United States.

(3) This appellate jurisdiction is subject of such exceptions, and must be exercised under such regulations as Congress, in the exercise to its discretion, has made or may see fit to make.

(4) Congress not only has not excepted writs

of *habeas corpus* and *mandamus* from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.

We come, then, to consider the first great question made in the case now before us.

We shall assume, upon the authority of the decisions referred to, what we should hold were the question now for the first time presented to us, that in a proper case this court, under the Act of 1789, and under all the subsequent Acts, giving jurisdiction in cases of *habeas corpus*, may, in the exercise of its appellate power, revise the decisions of inferior courts of the United States, and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress.

It remains to inquire whether the case before us is a proper one for such interposition. Is it within any such limitation? In other words, can this court inquire into the lawfulness of detention, and relieve from it if found unlawful, when the detention complained of is not by civil authority under a commitment made by an inferior court, but by military officers, for trial before a military tribunal, after an examination into the cause of detention by the inferior court, resulting in an order remanding the prisoner to custody?

It was insisted in argument that, "to bring a case within the appellate jurisdiction of this court in the sense requisite to enable it to award the writ of *habeas corpus* under the Judiciary Act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this court."

This proposition seems to assert, not only that the decision to be revised upon *habeas corpus* must have been made by a court of the United States, subject to the ordinary appellate jurisdiction of this court, but that having been so made, it must have resulted in an order of commitment to civil authority subject to the control of the court making it.

The first branch of this proposition has certainly some support in *Metzger's* case, 5 How., 176, in which it was held that an order of commitment made by a district judge at chambers cannot be revised here by *habeas corpus*. This case, as was observed by Mr. Justice Nelson in *Kaine's* case, 14 How., 103, stands alone; and it may admit of question whether it can be entirely reconciled with the proposition, which we regard as established upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress.

But it is unnecessary to enter upon this inquiry here. The action which we are asked to revise was that of a tribunal whose decisions are subject to revision by this court in ordinary modes.

We need consider, therefore, only the second branch of the proposition, namely: that the action of the inferior court must have resulted in a commitment for trial in a civil court; and the inference drawn from it, that no relief can be had here, by *habeas corpus*, from imprisonment under military authority, to which the petitioner may have been remanded by such a court.

This proposition certainly is not supported by authority.

See 8 WALL

In *Kaine's* case all the judges except one, asserted, directly or indirectly, the jurisdiction of this court to give relief in a case where the detention was by order of a United States Commissioner. The lawfulness of the detention had been examined by the Circuit Court for the Southern District of New York upon a writ of *habeas corpus*, and that court had dismissed the writ, and remanded the prisoner to custody. In this court relief was denied on the merits, but the jurisdiction was questioned by one judge only. And it is difficult to find any substantial ground upon which jurisdiction in that case can be affirmed, and in this denied.

In *Wells' case*, 18 How., 308 [59 U. S., XV., 423], the petitioner was confined in the penitentiary, under a sentence of death, commuted by the President into a sentence of imprisonment for life. He obtained a writ of *habeas corpus* from the Circuit Court of the District of Columbia, was brought before that court, and was remanded to custody. He then sued out a writ of *habeas corpus* from this court, and his case was fully considered here. No objection was taken to the jurisdiction, though there, as here, it was evident that the actual imprisonment, at the time of the petition for the writ, was not under the direction of the court by whose order the prisoner was remanded, but by a different and distinct authority.

In this case of *Wells*, Mr. Justice Curtis again dissented and, on the point of jurisdiction, Mr. Justice Campbell concurred with him. The other judges, though all, except one, were of opinion that the relief asked must be denied, agreed in maintaining the jurisdiction of the court. Judge Curtis, who regarded the question as left undetermined in *Kaine's* case, admitted that the jurisdiction was asserted in this, and stated the ground of judgment affirming jurisdiction to be that, "as the circuit court had had the prisoner before it, and has remanded him, this court, by a writ of *habeas corpus*, may examine that decision and see whether it be erroneous or not."

Since this judgment was pronounced, the jurisdiction, in cases similar to that now before the court, has not hitherto been questioned.

We have carefully considered the argument against it, made in this case, and are satisfied that the doctrine heretofore maintained is sound.

The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent, in respect to the writ of *habeas corpus*, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the Act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the circuit and district courts is original; that given by the Constitution and the law to this court is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.

As limited by the Act of 1789, it did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or

committed for trial before some court of the United States, or required to be brought into court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first in 1833, 4 Stat. at L., 634, to prisoners confined under any authority, whether state or national, for any act done or omitted in pursuance of a law of the United States, or of any order, process or decree of any judge or court of the United States; then in 1842, 5 Stat. at L., 539, to prisoners being subjects or citizens of foreign States, in custody under national or state authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867, 14 Stat. at L., 885, to all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in the light of it that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this court. We are not at liberty to except from it any cases not plainly excepted by law; and we think it sufficiently appears from what has been said that no exception to this jurisdiction embraces such a case as that now before the court. On the contrary, the case is one of those expressly declared not to be excepted from the general grant of jurisdiction. For it is a case of imprisonment alleged to be unlawful, and to be under color of authority of the United States.

It seems to be a necessary consequence that if the appellate jurisdiction of *habeas corpus* extends to any case, it extends to this. It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States. It is proper to add, that we are not aware of anything in any Act of Congress, except the Act of 1868, which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the Act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

These considerations forbid any construction

giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are.

We are obliged to hold, therefore, that in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

This conclusion brings us to the inquiry whether the 2d section of the Act of March 27, 1868, takes away or affects the appellate jurisdiction of this court under the Constitution and the Acts of Congress prior to 1867.

In *McCardle's* case, [*ante*, 264], we expressed the opinion that it does not, and we have now re-examined the grounds of that opinion.

The circumstances under which the Act of 1868 was passed were peculiar.

On the 5th of February, 1867, Congress passed the Act, to which reference has already been made, extending the original jurisdiction by *habeas corpus* of the District and Circuit Courts, and of the several judges of these courts, to all cases of restraint of liberty in violation of the Constitution, treaties or laws of the United States. This Act authorized appeals to this court from judgments of the Circuit Court, but did not repeal any previous act conferring jurisdiction by *habeas corpus*, unless by implication.

Under this Act, one *McCardle*, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for the writ of *habeas corpus*. The writ was issued, and a return was made; and, upon hearing, the court decided that the restraint was lawful, and remanded him to custody. *McCardle* prayed an appeal, under the Act, to this court, which was allowed and perfected. A motion to dismiss the appeal was made here and denied. The case was then argued at the bar, and the argument having been concluded on the 9th of March, 1869, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing Act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constituted majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

The effect of the Act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be

presumed that an Act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.

It is quite clear that the words of the Act reach, not only all appeals pending, but all future appeals to this court under the Act of 1867; but they appear to be limited to appeals taken under that Act.

The words of the repealing section are, "that so much of the Act approved February 5th, 1867, as authorizes an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may be hereafter taken, be, and the same is hereby repealed."

These words are not of doubtful interpretation. They repeal only so much of the Act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court. They affected only appeals and appellate jurisdiction authorized by that Act. They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the Act of 1789. They reach no Act except the Act of 1867.

It has been suggested, however, that the Act of 1789, so far as it provided for the issuing of writs of *habeas corpus* by this court, was already repealed by the Act of 1867. We have already observed that there are no repealing words in the Act of 1867. If it repealed the Act of 1789, it did so by implication, and any implication which would give to it this effect upon the Act of 1789, would give it the same effect upon the Acts of 1833 and 1842. If one was repealed, all were repealed.

Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former Act can stand together with the new Act. It is true that exercise of appellate jurisdiction, under the Act of 1788, was less convenient than under the Act of 1867, but the provision of a new and more convenient mode of its exercise does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new Act is expressly declared to be "in addition" to the authority conferred by the former Acts. Addition is not substitution.

The appeal given by the Act of 1867 extended, indeed, to cases within the former Acts; and the Act, by its grant of additional authority, so enlarged the jurisdiction by *habeas corpus* that it seems, as was observed in the *McCardle* case, "impossible to widen" it. But this effect does not take from the Act its character of an additional grant of jurisdiction, and make it operate as a repeal of jurisdiction theretofore allowed.

Our conclusion is that none of the Acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of *habeas corpus*, were repealed by the Act of that year, and that the repealing section of the Act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the Act of 1867.

We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of *habeas corpus*, conferred by the Constitution, recognized by law, and ex-

ercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication, through the operation of the Acts of 1867 and 1868.

The suggestion made at the bar, that the provision of the Act of 1789, relating to the jurisdiction of this court by *habeas corpus*, if repealed by the effect of the Act of 1867, was revived by the repeal of the repealing Act, has not escaped our consideration. We are inclined to think that such would be the effect of the Act of 1868, but having come to the conclusion that the Act of 1789 was not repealed by the Act of 1867, it is not necessary to express an opinion on that point.

The argument having been confined, by direction of the court, to the question of jurisdiction, this opinion is limited to that question.

The jurisdiction of the court to issue the writ prayed for is affirmed.

Dissenting, *Mr. Justice Miller.*

Cited—18 Wall., 168; 23 U. S., 23; 97 U. S., 519, 543; 100 U. S., 342, 351, 374, 375; 108 U. S., 553; 3 Blatchf., 94; 3 Cliff., 443.

DAVID B. MOREY, WILLIAM C. SMITH
AND FRANCIS B. RICHARDSON, *Appts.*,

HAMILTON D. LOCKWOOD.

(See S. C., 8 Wall., 230-242.)

Amended specification of patent—infringement.

The 13th section of the Act of 1836 authorizes a surrender and an amended specification of a patent, when the patent issued is inoperative or invalid by reason of a defective or insufficient description or specification.

The change of a patent which is one of form and not of substance, constitutes no defense to a bill for an infringement.

[No. 140.]

Argued Oct. 14, 1869. Decided Oct. 25, 1869.

APPEAL from the Circuit Court of United States for the District of Massachusetts.

The bill in this case was filed in the court below, by the appellee, to obtain an injunction against the infringement of a certain patent, and an accounting for all gains and profits previously acquired by such infringement.

A decree having been entered granting the relief prayed for, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Geo. S. Boutwell and Henry F. French, for appellants:

Their invention, if valid for anything, is valid only to the extent of the claim in their original patent.

The Davidsons were not the inventors of elastic tubing, for Herman E. Davidson admits its existence and his knowledge of it at the time when he claims to have begun his experiments.

Nor were they the inventors of an elastic bulb or chamber, for these are shown in different forms in defendants' exhibits "D," "C," "H," "B," and "I," and in complainant's exhibit "17."

They were not the inventors of the valvular arrangement: for this is shown in many of the exhibits.

They did not invent the spheroidal form of an elastic bulb; for that is described as old by Herman Davidson.

Nor did they invent "a syringe having an elastic sac with flexible tubes terminating in valve boxes containing valves arranged for the purpose of eduction and ejection when the sac, tubes and valve boxes are in or nearly in the same axial line," for these devices, with precisely the same arrangement, are shown in the barrel syringe.

Nor were they the inventors of a syringe having an elastic bulb or chamber, flexible tubes and a suitable valvular arrangement; for both the Thiers Syringe and the barrel syringe fall within this description, which is the substantial part of, and is quoted from, the claim in the re-issued patent.

The re-issued patent claims "a syringe having an elastic bulb or chamber, flexible tubes and a suitable valvular arrangement when organized, so as to operate substantially as described."

It cannot be claimed that any single element of the instrument is new. Every part is old. The claim is substantially, if not technically, for a combination. It is the arrangement or organization which is claimed as new and useful.

If the fair and natural construction of the re-issued claim includes any syringe of which the Davidsons were not the original and first inventors, then the claim is broader than the invention, and so is void.

We submit that such construction clearly includes both the Maw and the Thiers Syringe.

The original claim describes a bulb in the words, "prolate spheroidal shaped elasticsac." The word "chamber" was not there. It was not in the *caveat*, and it was used in the re-issued claim with a purpose and meaning.

It is in no sense a synonym with bulb. Every bulb is a chamber, but a chamber is not necessarily a bulb.

Unless the court can say that chamber means nothing more than bulb, the claim is broader than the invention, when construed in reference to the Maw Syringe.

The drawings are part of the description, and it may be said that the claim is only for a syringe with bulb or chamber tubes and valves, organized in the particular manner shown in the drawings.

Now, the drawings in the re-issue are the same as in the original patent, and show the tubes and bulb in the same axial line.

But the complainants are compelled to go further, and say that their re-issue covers not only the form shown in their drawings, but all other forms where the same parts are "organized so as to operate substantially as described;" using the word "operate" in the sense to produce effect.

This, we submit, is not a fair construction.

The word *operate* relates to the mechanism of the syringe, not to the final result of its use.

In this sense all modern syringes operate alike. They not only inject fluids, but they do so by means of pressure upon elastic chambers, through flexible tubes and valves.

If this is what is meant by operating as described, then the claim is too broad, as including the old Maw and Thiers Syringes already exhibited.

The original patent was neither "inoperative" nor "invalid," nor was the specification defective or insufficient, and the re-issue was, therefore, without authority of law.

Burr v. Duryee, 1 Wall., 531 (58 U. S., XVII., 650); *Case v. Brown*, 2 Wall., 320 (69 U. S., XVII., 817).

The patent is wholly void, as well for the invention claimed in the original patent, as for the broader claim found in the re-issued patent, because syringes containing all that is claimed as the invention of the Davidsons were known and used in this country long before their alleged invention.

The syringe made by the appellants is a combination of old parts, substantially different from the Davidson syringe in structure and effect.

1. Our bulb is not their bulb, but different in this, that ours has but one aperture, while theirs has two.

2. The arrangement or organization differs in this, that in ours the fluid in the bulb is above the point of delivery, and we have gravity to aid in expelling it; while in theirs one half of the fluid is below the center of the bulb.

3. Ours has a three way piece not found in theirs, and which cannot be used with theirs.

4. Ours is so constructed as to receive other pipes for various purposes.

These differences, we submit, constitute ours a different instrument, different in its combination of parts and different in its mode of operation.

The principles involved in the discussion are too familiar to the court to require particular statement. *McCormick v. Talcott*, 20 How., 405 (61 U. S., XV., 931).

That the complainant is limited to the peculiar combination of devices invented and described, is well settled.

Case v. Brown, 2 Wall., 320 (69 U. S., XVII., 817); *Burr v. Duryee*, 1 Wall., 531 (58 U. S., XVII., 650).

Messrs. B. R. Curtis and Causten Browne, for appellee:

The original patent, the application for which was filed Apr. 2, 1856, shows, in the description and drawing, identically the same instrument that is described and drawn in the re-issued patent.

The claim is made at the time, of such original application, was substantially the same that is now granted by the re-issue.

In April, 1856, the Patent Office rejected such original claim, as having been anticipated by the patent of Pearsall & Gilbert.

In May 22, 1856, the patent attorneys of the Davidsons wrote to the Patent Office, acquiescing in the rejection, and submitting an amended and restricted claim, on which, after some objections at the Patent Office, the original patent was finally granted.

This limitation of claim resulted from actual inadvertence and mistake.

The Patent Office afterwards admitted and corrected its own mistake, by granting the re-issue patent with the claim as originally made.

The appellants have in evidence, against the novelty of the invention, two instruments, the priority of which the appellee does not now deny; but he does deny that they contain the patented invention.

1. The Thiers Syringe.

This was an instrument of French manufacture. It had two flexible tubes, with suitable valves, but it did not have an elastic bulb or chamber substantially like that shown in the patent.

(a) It was not made of elastic material, but of a metal base plate and a rubber hood set upon it; the rubber hood forming one substantial part of the chamber to be collapsed, and the metal base plate forming the other substantial part thereof.

(b) The chamber was not expanded by the elasticity of the material, but by means, wholly or partly, of a metal spring placed within the chamber.

(c) The necessary prolongation of the flow of the pressure after the collapsing of the chamber has ceased, was accomplished, not by the reaction of the chamber alone, as in the Davidson instrument, but by that and an air-chamber acting in connection with it.

2. The "Maw" Syringe.

This was an instrument of English manufacture. It had two flexible tubes with suitable valves, but it did not have an elastic bulb or chamber substantially like that shown in the patent.

The chamber was partly elastic and partly rigid, the middle portion being formed of a cylindrical elastic tube with rigid metallic heads, which formed a material portion of the inclosure, and by their connection with the elastic part of the chamber, counteracted or prevented the compression of the chamber to properly expel the fluid.

It is important to observe the practical difference between mere couplings of metal to connect the elastic chamber with the flexible tubes, and to contain the valves and metal pieces, "Forming," as Hibbard express as it, "a material portion of the inclosure, and by their connection with the elastic part of the chamber, counteracting or preventing the compression of the chamber" to properly expel the fluid.

In the former case, which is the case of the patent syringe, the "inclosure" or chamber, as the reservoir for receiving, by its expansion, the enema through one tube, and for supplying, by its compression, the enema through the other tube, is complete, irrespective of the couplings.

But in the latter case, which is the case of the "Maw" syringe, the metal ends or heads are substantial parts of the reservoir, the elastic part of which is a mere cylinder, and of course has not the character or capacity of an elastic reservoir at all.

The difference between the "Maw" syringe and the patent syringe as regards the construction of the elastic chamber, is proved to be important practically.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Massachusetts.

The bill was filed by Lockwood, to enjoin the defendants from infringing letters patent granted to Charles H. and Herman E. Davidson, March 31, 1857, for a new and useful improved syringe; and which was surrendered

and re-issued on the 25th day of April, 1865, with an amended specification.

The original specification described the improvement, in substance, to consist of an oval, or spheroidal elastic bulb, with flexible tubes and metallic valve boxes, containing valves arranged for the purpose of eduction and ejection, when the elastic tubes and metallic valve boxes were attached to such a bulb in, or nearly in, its greatest axial line. The bulb and flexible tubes are composed of India rubber, or of any suitable material of sufficient elasticity and flexibility, as is necessary and required by the patentee, in the use or operation of the instrument. The specimens exhibited were all made of India rubber.

The operation of the instrument is as follows: immerse the end of the eduction pipe in the enema, compress the bulb with the hand, which will expel the air from within, then releasing the grasp, the bulb will recover its form by means of its elasticity, and the partial vacuum will be filled with the enema; then insert the injection pipe and repeat the operation of compressing the bulb, until the required quantity of the enema is administered. Having described the invention, what the inventors claimed as new was "the combination of the prolate spheroidal shaped elastic sac, with flexible tubes terminating in valve boxes containing valves arranged for the purpose of eduction and ejection, when the sac, tubes and valve boxes are in, or nearly in, the axial line, the whole operating together, substantially in the manner and for the purposes set forth."

The amended specification is, substantially, the same as the original, leaving out that part which describes the bulb or sac, tubes and valve boxes, attached and so arranged as to be "in, or nearly in, its greatest axial line;" and as it respects the claim, which is a follow is as follows: "What is claimed as the invention of Charles H. and Herman E. Davidson, is a syringe, having an elastic bulb or chamber, flexible tubes, and a suitable valvular arrangement, when organized, so as to operate substantially as described."

Several objections are taken to this re-issued patent, among others, and which is the most material, that the claim is broader than the invention. The proofs in the case show that the improvement was made in the summer or fall of 1852. A *caveat* was filed in the Patent Office in the fore part of January, 1853. The petition, together with the accompanying description, is dated at Charlestown, 8th of January of that year. In that description the petitioners state that their improvement consists in using a spheroidal cylindrical or globular sac or bulb, to which are attached, and communicating with it, flexible tubes or pipes; to the ends of these pipes are connected valve boxes, with suitable valves therein, so that by the alternate action of compression and expansion, the desirable quantity of injection may be administered without removing the instrument to refill it. The invention is described in the *caveat* substantially the same as in the original and amended specification.

When application was made by the attorney of the inventors to the Commissioner of Patents, with a claim substantially the same as the one in the amended specification, objection was

made at the office on the ground that they were anticipated by Messrs. Pearsall and Gilbert, according to their invention published in the Franklin Journal; and the commissioner refused to grant the patent except with a claim as found in the original specification, and especially without the clause, "when the sac, tubes and valve boxes are in, or nearly in, the axial line," etc.

The specification in this form was supposed to have taken the improvement out of the objection of the prior one by Pearsall and Gilbert.

Subsequently it was discovered by the patentees or their assignee, and also by the commissioner himself, that the invention of Messrs. Pearsall and Gilbert furnished no legal objection to the claim of the Davidsons as first presented to the office, and on a surrender by the assignee, he was allowed to amend it as found in the re-issued patent. The prior improvement relied on, it is true, had a rubber sac, but the tubes were metal and inflexible.

The 18th section of the Act of 1836 authorizes a surrender, and an amended specification, when the patent issued is inoperative, or invalid, by reason of a defective or insufficient description or specification; or, "if the error has, or shall have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention." We do not doubt that the commissioner had full authority to grant the amendment; and, under the special circumstances of the case, it would seem to have been a duty, as the inventors were led into the error by himself, as may be seen from his letter when the patent was originally granted.

The amendment was very material, as the language of the original claim tied the patentees down to the syringe, consisting of the parts mentioned, to an instrument in which they were arranged in an axial or straight line; tying them down to the mere form of the construction, regardless of the substance and legal import of the invention. While the original specification and claim remained, it was competent for anyone to evade the patent, and enjoy the substance of the improvement by a change in the mere form of the construction, that is, by an arrangement of the several parts in any form, if not in an axial or straight line; And this is what the defendants are endeavoring to accomplish, and would have accomplished if the amendment of the claim had not been allowed.

They have constructed a syringe with the same parts and materials as used by the patentees; but, instead of arranging them in an axial line, the bulb or sac is placed above the point of delivery and discharge of the enema, extending its hollow neck so that the tubes may connect with each side of it. The only difference, even in form, between this and the patentees' is, that the latter, in the axial line, tubes connect with the ends of the bulb; in the former they connect, not with the ends of the bulb, but with the sides of its hollow neck. The enema passes from the eduction pipe through the neck or throat into the bulb, and is forced through the discharge pipe by the same means as used by the patentees. The mode of operation is precisely the same in both instruments. The change is one of form and not of substance, and upon well established principles of

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patent law, constitutes no defense to a bill for an infringement. *Curtis, Patents*, 260, 261, and *note* 1, p. 264, *n.* 2.

As bearing upon this point it may be stated that the patentees themselves first constructed and used this form of syringe; but, becoming satisfied that the other form was the best, recommended it in their specification accordingly. They are protected, however, against the use of any form, as will be seen by the authorities referred to, that embodies substantially their ideas and mode of operation.

On the question of novelty there are two specimens of syringe produced by the defendants that are chiefly relied on as disproving it: one called the *Maw syringe*, and the other the *Thiers*. The first differs from the patentees' in this, that the cylindrical bulb, or chamber, is made so rigid both in the material and from its metallic ends, or heads, that it is not sufficiently elastic to be adapted to practical use; and for this reason it failed and went out of the market.

The *Thiers syringe* differed from the patentees' in this, that part of the bulb or chamber is metal, and part rubber; and the elastic portion is aided by a spring inside of the chamber. There is, also, an air-chamber attached to the delivery pipe. The whole construction and arrangement is different from the patentees', as they have dispensed with the metal portion of the bulb, the spring, and the air-chamber, and substituted a simple India rubber bulb.

The rest of the proof on the point is conflicting, and we agree with the court below, that the weight of it is decidedly with the complainant.

Decree below affirmed.

Cited—98 U. S., 468; 4 *Cliff.*, 129.

MOSES WARING, *Plff. in Err.*,

THE MAYOR, ALDERMEN AND COMMON COUNCIL OF THE CITY OF MOBILE, JONES M. WITHERS, Mayor, AND JOHN PARHAM, Tax Collector.

(See S. C., 8 Wall., 110-123.)

Imported goods, by whom entered—sales by importer not taxable—goods, after sale by importer, taxable.

Goods imported from a foreign country must be entered at the custom house of the port where the vessel arrives with intent to unload the cargo, and by the owner or consignee.

Sales by the importer are exempt from state taxation.

Merchandise in the original packages, when once sold by the importer, is taxable as other property. [No. 128.]

Argued Oct. 12, 1869. Decided Oct. 25, 1869.

IN ERROR to the Supreme Court of the State of Alabama.

The bill in this case was filed in the local Chancery Court in Mobile, praying that the collection of a certain tax might be enjoined, and that the tax might be adjudged null and void. A decree was entered granting the relief and perpetually enjoining the collection of said tax. The Supreme Court of Alabama, on

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appeal, reversed the decree and dismissed the bill, whereupon the complainant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Masra. J. A. Campbell, Geo. N. Stewart, and P. Hamilton, for appellant:

It is confidently maintained that the voyage was not completed at the time the salt became the property of the plaintiff; it was still *in transitu*, and in progress of importation.

See *Andrews*, Rev. Laws, sec. 62, 63; 1 Stat. at L., 639; *Harris v. Dennis*, 8 Pet., 308; *U. S. v. Vowell*, 5 Cranch, 368; *Arnold v. U. S.*, 9 Cranch, 104; *Meredith v. U. S.*, 18 Pet., 494.

Our case is not impaired by the admission that Waring was not the importer, as technically defined for revenue purposes by the Acts of Congress (1 Stat. at L., 673), so that he could himself, in his own name, make entry of the goods at the custom-house. Still, there is no prohibition against his becoming a purchaser during the voyage of importation, and the full protection of his title against even the United States, seeking to subject the property to payment of a debt by the technical importer.

Conard v. Atlantic Ins. Co., 1 Pet., 386; *Conard v. Pacific Ins. Co.*, 6 Pet., 202.

These goods in the hands of this plaintiff, remained imports up to and at the time they passed from him by sale, in the manner in which he sold them; that is, in the original, unbroken packages.

Exemption from state interference is secured to the article, and is not affected by the character of the party dealing with it.

McCulloch v. Md., 4 Wheat., 316; *Brown v. Md.*, 12 Wheat., 419; *License Cases*, 5 How., 575; *Almy v. California*, 24 How., 169 (65 U. S., XVI., 644); *Harris v. Dennis*, 3 Pet., 292.

Mr. P. Phillips, for appellee:

Where merchandise is not sold "*en bloc*," but by weight, count or measure, the sale is not perfect, and the thing sold remains at the risk of the seller until they are weighed, counted or measured.

Troplong, Com. de la Vente, 86-88; *Magee v. Billingsley*, 3 Ala., 639.

When we ascertain where the loss falls, we ascertain where the ownership is.

Tarting v. Baxter, 6 Barn. & C., 360; *Simmons v. Swift*, 5 Barn. & C., 857.

The Act of Congress, 1799, ch. 36, 62, designates specifically who are considered as importers and entitled to make entry of merchandise. It limits this right to the "owner or original consignee, or in his absence or sickness, his agent or factor."

Harris v. Dennis, 3 Pet., 292; *U. S. v. Lyman*, 1 Mason, 500.

The theory of the appellant, that while the merchandise remained in unbroken packages, it is to be regarded as an import, without reference to the question who imported it, is expressly overruled in the recent case of *Perreear v. Com.*, 5 Wall., 479 (72 U. S., XVIII., 609).

Mr. Justice Clifford delivered the opinion of the court:

Merchants and traders, engaged in selling merchandise in the City of Mobile, in the State of Alabama, are required by an ordinance passed by the corporate authorities, to pay a See 8 WALL.

tax to the city equal to one half of one per cent. on the gross amount of their sales, whether the merchandise was sold at private sale or at public auction; and if they were so engaged the six months next preceding the first day of April, 1866, they were also required, within fifteen days thereafter, to return, under oath, to the collector of taxes, the gross amount of their sales during that period of time; and the provision was, that if any such merchant or trader neglected or failed to make such return, he should be subject to such a fine, not exceeding \$50 per day, as the Mayor of the City might impose for each day's failure or refusal.

Sales of merchandise were made by the complainant within that period to a large amount, and he was duly notified that he was required to make return, under oath, of the gross amount of such sales, and having neglected and refused to comply with that requirement within the time specified in the ordinance, the Mayor of the City caused a summons to be issued and duly served, commanding the complainant to appear before him, as such Mayor, to answer for such neglect; but he refused to obey the commands of the summons, and thereupon a warrant was issued, and he was arrested and brought before the Mayor to answer for such contempt; and, after hearing, he was sentenced to pay a fine of \$50 for a breach of the before mentioned ordinance. Subsequently, a second notice of a similar character was given, and the complainant still neglecting and refusing to make the required returns, he was again summoned to appear before the Mayor to answer for the neglect, but he refused a second time to obey the commands of the precept, and, thereupon, such proceedings were had that he was again found guilty of contempt, and was sentenced to pay an additional fine of \$50.

Regarding these proceedings as unwarranted, the complainant filed a bill in equity against the Mayor and Tax Collector of the City, in the local Chancery Court, in which he prayed that the respondents might be enjoined from collecting the fines adjudged against him, and from any attempt to collect the tax, and that the tax might be adjudged to be null and void. Proofs were taken and the parties were heard, and the final decree of the *Chancellor* was, that the complainant was entitled to the relief asked, and that the injunction should be made perpetual: but that decree, on the appeal of the respondents to the Supreme Court of the State, was, in all things, reversed, and the Supreme Court entered a decree that the bill of complaint should be dismissed. Whereupon the complainant in the Chancery Court sued out a writ of error, under the 25th section of the Judiciary Act, and removed the cause into this court.

Exemption from state taxation in this case is claimed by complainant, upon the ground that the sales made by him were of merchandise, in the original packages, as imported from a foreign country, and which was purchased by him, in entire cargoes, of the consignees of the importing vessels before their arrival, or while the vessels were in the lower harbor of the port.

By the terms of the Act of the 22d of July, 1813, it is provided, "that from and after the first day of August next, the Town of Mobile

shall be, and the same is hereby established the sole port of entry for the district, including the shores, waters and inlets of the Bay and River Mobile, and of the other rivers, creeks, inlets and bays emptying into the Gulf of Mexico, east of the said River Mobile, and west thereof to the eastern boundary of the State of Louisiana."

3 Stat. at L., 35.

Mobile is the sole port of entry of the district and, next to New Orleans, is the largest cotton market in the United States; but vessels of large draft cannot cross the inner bar and, consequently, are compelled to anchor in the lower harbor, some twenty or twenty-five miles below the City. Small vessels, such as can cross the inner bar, go up to the wharves to discharge and receive cargo, but large vessels, such as are usually employed to transport cotton, find their only anchorage in the lower harbor, where they are unloaded on their arrival, and where they receive their cargoes for the return voyage. Loading and unloading are accomplished by means of lighters, which sometimes are furnished by the ship and sometimes by the shipper, for the purpose of loading; and sometimes by the importer, and sometimes by the vendee of the merchandise, for the purpose of unloading, and for transporting the same to the private stores of the purchasers or the public warehouses.

The Edwin v. Cotton Co., 1 Cliff., 325; *Bulkley v. Naumkeag Cotton Co.*, 24 How., 389 [65 U. S., XVI., 601].

Ships frequently go there in ballast for cargoes of cotton, and those going there for that purpose from Liverpool frequently carry salt, using it in many cases as ballast instead of the articles more usually employed, which do not pay freight. Such shipments are made by the owners or charterers of the vessel, and the salt, whether stowed as cargo or used as ballast, is usually consigned to the agents of the vessel. Purchases of salt imported under such circumstances were made by the complainant to a very large amount, and the record shows that he sold the salt at his place of business in the City to traders and large consumers in the original packages. The contracts to purchase were made before the goods were entered at the custom-house, with the consignees of the salt, sometimes before and sometimes after the arrival of the vessel at the anchorage in the lower harbor, but the terms of the contract in all cases were that the risk should continue to be in the shipper until the salt was delivered to the complainant over the side of the vessel into his lighters. He agreed to furnish the lighters and to bring them alongside of the vessel, and the contract was that the salt, when it was transhipped into the lighters of the complainant, became his property, and he assumed the risk and expense of transporting the same to the wharf and from thence to his own warehouse or place of business; but if the goods were lost before such delivery the agreement to purchase was not obligatory.

Viewed in the light of these conceded facts, the defendants contend that the complainant was not the importer of the salt; that the salt was imported by the owners of the vessel, and that the sale of the salt as made by the consignees to the complainant was a sale of imported merchandise.

Goods imported from a foreign country are required to be entered at the custom-house of the port where the vessel voluntarily arrives with intent to unlade the cargo, and the settled law is that no one but the owner or consignee, or in case of his sickness or absence, his agent or factor, is authorized to discharge that obligation.

The Mary, 1 Gall., 206; *The Boston*, *Ibid.*, 239; *U. S. v. Lyman*, 1 Mas., 482; 1 Stat. at L., 655; *Conard v. Pac. Ins. Co.*, 6 Pet., 262; *Gray v. Lawrence*, 8 Blatchf., 117.

Importers of foreign merchandise must conform to the requirements of law and the regulations of the Treasury Department. American ships are forbidden to bring goods from any foreign port into the United States unless the master thereof shall have on board a manifest in writing, signed by the proper person, describing the goods and the vessel, and containing the name of the port where the goods were taken on board, and the name of the port for which the same are consigned or destined.

1 Stat. at L., 644.

Masters commanding any such ships, laden with such goods, on their arrival within four leagues of our coast, or within any of the bays, harbors, ports or inlets thereof, are required, upon demand, to produce such manifest to such officer of the customs as shall come on board their ship, for his inspection, and it is made the duty of the said officer of the customs to certify the fact of compliance with that requirement and the day when it was so produced. Next requirement is that the master shall, within twenty-four hours after the arrival of any such ship at any port established by law, or within any harbor, inlet or creek thereof, repair to the office of the chief officer of the customs and make a report of the arrival of the vessel. He may, if he sees fit, present his manifest at the same time, but if he omits so to do, the requirement is, that he shall, within forty-eight hours, make a further report in writing to the collector of the district, which report shall be in form and shall contain all the particulars contained in the manifest.

1 Stat. at L., 649.

Imported goods may be entered for consumption or for warehousing, but it will not be necessary to refer to the course of proceeding when the goods are deposited in warehouse, as all the importations in this case were entered for consumption. Such entry must be in writing and must be made to the collector of the district within fifteen days after the required report is filed by the master. The form of the entry is prescribed by law and by the regulations of the Treasury Department, and the provision is that the owner or consignee making the entry shall also produce to the collector and naval officer, if any, the original invoice or invoices of the goods, or other documents received in lieu thereof or concerning the same, in the same state in which they were received, with the bills of lading for the importation.

1 Stat. at L., 656; Gen. Reg. (1857), 145.

Goods imported in any ship or vessel from any foreign port or place are required to be landed in open day, and the express provision of law is that none such shall be landed or delivered from such ship or vessel "without a per-

mit from the collector and naval officer, if any, for such unloading and delivery."

1 Stat. at L., 665.

Congress, therefore, has prescribed the rule of decision, and while that provision remains in force, no goods brought in any ship or vessel from any foreign port or place, unless falling within some exceptional rule, can lawfully be unladen or delivered from any such ship or vessel within the United States without a permit from the collector for such unloading and delivery; and the 62d section of the same Act provides that "All duties on goods, wares and merchandise imported shall be paid or secured to be paid before a permit shall be granted for landing the same;" which shows, to a demonstration, that all the salt in this case was imported before the property in the same became vested in the complainant.

1 Stat. at L., 673.

Authority to grant a permit does not exist until the duties are paid or secured to be paid, and the duties are never paid or secured to be paid before the goods are imported, nor before they are entered for consumption. Before the permit is received by the inspector on board the ship or vessel, no one has authority to remove the hatches or to break bulk, but the cargo is under the charge of the officer of the customs. Following the notice of the arrival of the vessel and the exhibition of the manifest, the next step is to make the entry, which should always be accompanied by the invoice and bill of lading. Examination of the entry is usually made by the entry clerk, and if found to be correct, the collector proceeds to estimate the duties "on the invoice, value and quantity," and if the estimated amount of duty is paid or secured to be paid as required by law, the collector certifies the invoice and grants a permit in due form for the delivery of the cargo, first designating the packages, one in ten, to be sent to the public store for examination, and marking the same on the entry, invoice and permit.

Gen. Reg. (1857), 145.

Reference need not be made to the subsequent proceedings of the appraisers, weighers and gaugers, preparatory to the liquidation of the duties, as no one pretends that any of those acts can be performed before the goods are imported.

In order to obtain a permit to discharge the salt into the lighters in this case, the proof is full to the point, that a deposit of coin had to be made at the custom-house by the consignees, and that the duties were finally paid by them as liquidated, after the true weight of the salt was ascertained by the return of the weighers. They made the entries, presented the invoices and bills of lading, made the necessary deposit of coin for the estimated amount of the duties, and procured the permits; and when the duties were finally liquidated as required by law and the regulations of the Treasury Department, they adjusted and paid the balance.

Whether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was, that the risk should continue to be in the owner or consignees until they delivered the salt into the complainant's lighters, alongside of the vessel. Delivery, under the terms of the contract, could not be made before the vessel arrived, nor before

the salt was legally entered at the custom-house, as the hatches could not be removed for any such purpose until the permit was received from the collector.

Undoubtedly goods at sea may be sold by the consignees to arrive, and if they indorse and deliver the bill of lading to the purchaser, and he accepts the same under the contract as the proper substitute for the actual delivery and acceptance of the goods, the effect of the transaction is to vest a perfect title in the purchaser, discharged of all right of stoppage *in transitu* on the part of the vendor and indorser of the bill of lading. *Andenreid v. Randall*, 7 Am. L. Reg., 684; *Newsom v. Thornton*, 6 East, 41; *Pratt v. Parkman*, 24 Pick., 42.

Nothing of the kind, however, was done in this case. On the contrary, the agreement was, that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations, the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise.

Opposed to that view is the suggestion that goods are not regarded as having been imported into the United States until the vessel transporting the same from the foreign market has arrived at some one of our maritime ports with the intent to unlade the cargo. Where the voyage is not ended, and there is no obstruction to prevent its being continued, the rule in that behalf is as contended by the complainant. Decided cases to that effect are quite numerous and decisive, as applied in controversies involving the inquiry, whether the goods imported in a given case are affected by a new law or the repeal of an old one, whereby import duties are increased or diminished. *U. S. v. Vowell*, 5 Cranch, 372; *The Mary*, 1 Gall., 209; *The Boston*, *Id.*, 245; *U. S. v. Arnold*, *Id.*, 353; *U. S. v. Lindsey*, *Id.*, 365; *Harrison v. Vose*, 9 How., 381; *U. S. v. Lyman*, 1 Mas., 482; *Meredith v. U. S.*, 13 Pet., 494.

Well founded exceptions, however, exist to that general rule, and among the number is one created by the 85th section of the principal collection Act. 1 Stat. at L., 694.

By that section it is provided that where a ship or vessel shall be prevented by ice from getting to the port or place at which her cargo is intended to be delivered, the collector of the district may receive the report and entry of such ship or vessel, * * * and grant a permit for unloading or landing the goods imported, at any place within his district, which shall appear to him most convenient and proper. Variations from the usual course of proceedings in such matters are also necessarily made at all the ports and places where lighters are required in loading and unloading ships and vessels engaged in commerce and navigation.

More than half a century has elapsed since the Act of Congress was passed establishing the Town of Mobile the sole port of entry for that district, and the record furnishes abundant reason to conclude that the course of proceedings throughout that entire period, in respect to imported goods brought there from foreign countries in ships and vessels whose draft was such that they could not cross the inner bar, has been the same as that heretofore described. Perma-

ment as the obstruction to navigation is, the case is much stronger even than the one for which provision is made in the principal collection Act, and after such long acquiescence by all interested in the course pursued by the officers of the customs, the court is of the opinion that the proceedings may well be sustained.

Congress has the power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes, and the Constitution also provides that no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, with a view to raise a revenue for state purposes. The State of Maryland passed a law requiring all importers of foreign articles, enumerated in the law, and other persons selling the same by wholesale, before they should be authorized to sell the imported articles, to take a license, for which they were required to pay \$50, and in case of refusal or neglect, the provision was, that they should forfeit the amount of the license tax and be subject to a fine of \$100. *Brown v. Maryland*, 12 Wheat., 437. Subsequently an importing merchant, resident in the State, refused to pay the tax, and the state court sustained the validity of the state law, and imposed on him the penalty therein prescribed. Dissatisfied with the judgment he removed the cause into this court by writ of error, and this court held, Marshall, Ch. J., giving the opinion of the court, that the state law was a tax on imports, and that the mode of levying it, as by a tax on the occupation of the importer, merely varied the form in which the tax was imposed without varying the substance; that while the articles imported remained the property of the importer in his warehouse in the original forms or packages in which they were imported, a tax upon them was too plainly a duty on imports to escape the prohibition of the Constitution, but the court admitted that whenever the importer has so acted upon the thing imported that it has become incorporated and mixed with the mass of property in the country, it must be considered as having lost its distinctive character as an import, and as having become subject to the taxing power of the State.

Sales by the importer are held to be exempt from state taxation because the importer purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the State. *Brown v. Maryland*, 12 Wheat., 437, 443; *Amy v. California*, 24 How., 173 [85 U. S., XVI., 646].

But the sales of the goods imported in this case were made by the shippers or consignees, and the complainant was the purchaser, and not the first vendor of the imported merchandise, and it is settled law in this court that merchandise in the original packages once sold by the importer is taxable as other property. *Percear v. Commonwealth*, 5 Wall., 479 [72 U. S., XVII., 609].

When the importer sells the imported articles,

or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer.

Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

Decree affirmed.

Cited—10 Wall., 449; 15 Wall., 296; 97 U. S., 573; 100 U. S., 677; 8 Cliff., 386; 4 Cliff., 148, 149; 28 Am. Rep., 800 (13 Nev., 263); 39 Am. Rep., 286 (38 La., 843).

JOSIAH M. MILLS AND FLORA M. MILLS,
Plffs. in Err.,

v.

NATHANIEL SMITH.

(See S. C., 8 Wall., 27-33.)

Verdict of jury, not reviewable—notice of deed—purchaser, when protected—jury practice.

This court has no right to order a new trial, because the jury has erred in their verdict on the facts.

To constitute notice of a previous deed, to a purchaser of land, it is necessary that he should have actual notice of it or of some fact which would satisfy a prudent man that there had been a transfer of the land.

If either the purchaser or his grantor was a purchaser in good faith, then the purchaser is protected.

After having correctly submitted the case to the jury, the court is not bound to answer a catechism of questions.

[No. 156. Dec. Term, 1868.]

Submitted Oct. 14, 1869. Decided Nov. 1, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment, brought in the court below by the plaintiffs in error, to recover a half section of land in the State of Illinois.

This tract of land was a military bounty granted by the government to Ziba Parmely, for services in the war of 1812; the patent issued July 29, 1818, to Parmely, he residing in the State of Connecticut.

Feb. 11, 1837, Parmely sold the land to Edwin A. Lacy and received payment in full therefor, and at that day executed and delivered a deed to Lacy, conveying the land, which deed was never recorded, and as they suggest, May 20, 1848, there was not any information left to his family respecting the location of land or of the deed. Lacy left a widow, now Flora M. Mills, one of the plaintiffs, and one son named Andrew H. Lacy.

Aug. 14, 1854, Benjamin Lombard, Jr., one of the Lombard family, went to Mr. Parmely in Connecticut and made representations which induced him to give a quitclaim deed to James Lombard, another of the Lombard family, conveying the land in question, which deed was recorded Aug. 28, 1854, in Stark Co., Ill.

Nov. 14, 1854, William F. Lacy, a brother of the deceased, having heard of Lombard's visit to Parmely, and obtaining a quitclaim deed

for his military tract, which he had understood years prior to have been sold to his brother, applied to Mr. Parmely and obtained a deed conveying the land to Andrew Lacy, son and only heir of Edwin A., deceased, which deed contained a recital and statement to the effect that the land had been sold to Edwin A. Lacy in his lifetime and paid for; that no deed had been given, or if there had been, it was lost. This deed was recorded Nov. 25, 1854, in Stark Co., Ill.

Dec. 5, 1855, Andrew H. Lacy died, leaving a will giving all his property, both personal and real, to his mother, which was duly proved and admitted to probate.

The defendant claimed to have purchased the land of James Lombard in 1854 or 1855.

The trial below having resulted in a verdict and judgment in favor of the defendant, the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. E. S. Smith, for plaintiffs in error:

1. The deed from Parmely to Andrew H. Lacy, only heir of Edwin A. Lacy, dated the 14th, and recorded the 25th of November, 1854, and the deed of Feb. 11, 1887, which was lost and discovered in the possession of the defendant, should, under the circumstances, be considered together and of record, Nov. 25, 1854, giving full title to the heir.

2. The deed from Parmely to Lombard, having been obtained upon false representations and with notice that Edwin A. Lacy has purchased the land and paid for it, was void and conveyed no title whatever to Lombard, he being a wrong-doer, and guilty of a direct fraud upon upon Parmely as well as Lacy, and cannot be protected in a court of justice.

3. The record of the deed from Parmely to Andrew H. Lacy, Nov. 25, 1854, containing recitals and statements directly connected with the title and sale to Lacy, was notice to the defendant of everything contained in the deed. Therefore, the defendant had no right to take a title from Lombard after Nov. 25, 1854, to the prejudice of the plaintiffs.

It is a general rule and well settled, that when the notice or information is substantially equivalent to knowledge, it may come from third persons and be as effectual as it would be if it came from the parties in interest.

Curtis v. Mundy, 3 Met., 405; *Boling v. Ewing*, 9 Dana, 76; *Roberts v. Stanton*, 2 Munt., 129; *Lewis v. Bradford*, 10 Watts, 67.

A statement of any fact which shows that the title purchased or about to be purchased is subject to the legal or equitable claims of other persons, is sufficient notice and will estop a purchaser after receiving such notice.

Ripple v. Ripple, 1 Rawle, 386.

It is not necessary in any case to constitute notice that it should be in the shape of a distinct and formal communication. *Barnes v. McClinton*, 8 Pa., 67; *Doyle v. Teas*, 4 Scam., 302.

Whatever is sufficient to direct the attention of a purchaser to the prior rights and equities of third persons, and to enable him to ascertain their nature by inquiry will operate as notice.

Sigourney v. Mann, 7 Conn., 324; *Booth v. Barnum*, 2 Conn., 186; *Havley v. Cramer*, 4

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Cow., 717; *Doyle v. Teas*, 4 Scam., 202; *Blaisdell v. Stevens*, 16 Vt., 179; *Stafford v. Ballou*, 17 Vt., 329.

The general doctrine is well settled in this country as well as in England, that a purchaser of a legal title will be liable to all equities of which he had actual and constructive notice at the time of the purchase. *Wormley v. Wormley*, 8 Wheat., 421; *Caldwell v. Carrington*, 9 Pet., 86; *Langdon v. Woolfolk*, 2 B. Mon., 105.

The Recording Act applies only to parties who have acted with good faith, and cannot be made the means of fraud and oppression.

R. S., Ill., 159, sec. 253.

Unrecorded deeds are good against subsequent conveyances recorded when notice of fraud is shown to have existed.

Mr. H. M. Wead, for defendant in error:

Had Nathaniel Smith notice of the deed from Ziba Parmely to Edwin A. Lacy on the 11th February, 1837, when he purchased of Lombard? The solution of this question is easy.

Mr. Smith, in his testimony, says that he purchased the land of Lombard one or two years before he got his deed. He thinks it was the same fall that Lombard purchased of Parmely, and he paid \$500 down and went into possession of the land.

These recitals in the deed from Parmely to Andrew H. Lacy were absolutely false.

But are these recitals notice? Can a vendor sell and convey his land; then convey it a second time to another person, and put recitals in his last deed, which shall deprive the first vendee of his purchase? The recitals were not only false in fact, but amounted to nothing as notice. As well might any other statement of the vendor be placed on record as notice. By our recording laws, nothing is notice but the conveyance itself; not such other matters as parties may choose to insert in it. These statements are not entitled to go upon the record, and not being so, were not notice.

St. John v. Conger, 40 Ill., 535; *Long v. Dollarhide*, 24 Cal., 218.

But suppose we admit that the recitals were properly in the deed and on the record, they are tantamount to saying to Smith: "Your title is all right. The original sale to Edwin A. Lacy never was consummated until after the conveyance by Parmely to Lombard, and the deed from Parmely to James Lombard was, in point of fact, the first deed ever made, the first deed ever recorded, and as you purchased of Lombard you have nothing to fear."

The recitals are also an admission too strong to be controverted that Lombard never had notice of any prior conveyance from Parmely to Edwin A. Lacy.

If either Lombard or Smith was an innocent purchaser, then Smith is to be protected. And no one can read the evidence and fail to arrive at the conclusion that neither had notice of the prior conveyance to Andrew A. Lacy, because the existence of that conveyance was not known until long after the commencement of this suit.

St. John v. Conger, 40 Ill., 535.

It is well settled in England and in this country, that if a person purchase for a valuable consideration, with notice, he may shelter himself under the first purchaser.

Lead. Cas. in Eq. by Hare & W., pp. 50, and 99, and cases there cited; *Lowther v. Carlton*, 2 Atk., 242; *Alexander v. Fendleton*, 8 Cranch, 462; *Boone v. Chiles*, 10 Pet., 177; *Dana v. Newhall*, 13 Mass., 498; *Trull v. Bigelow*, 16 Mass., 406; *Bell v. Twilight*, 18 N. H., 159; *Varick v. Briggs*, 6 Paige, 323; *Pierce v. Fausnce*, 47 Me., 507; *Suiter v. Turner*, 10 Ia., 517; *Willis v. Henderson*, 4 Scam., 19.

Mr. Justice Grier delivered the opinion of the court:

The counsel, in their arguments in this case, seem to have forgotten that this court have no right, to order a new trial because they may believe that the jury may have erred in their verdict on the facts. If the court below have given proper instructions on the questions of law, and submitted the facts to the jury, there is no further remedy in this court for any supposed mistake of the jury.

On examining the charge of the court below, we find a clear exposition of the legal questions arising in the case.

The jury were properly instructed that the deed of Parmely, the patentee, to Edwin Lacy, in 1837, would confer a good legal title on the plaintiff independently of the recording laws. But as this deed was not recorded, the question to be determined was, whether the defendant, who claimed title under the same patentee, through a deed dated 14th of August, 1856, and recorded, was a *bona fide* purchaser without notice, and had paid value for the land. It was contended that a recital in a deed from Parmely to one Andrew Lacy after the deed to James Lombard was recorded, and under which the defendant claims, would operate as constructive notice to a third party. But the court instructed the jury that it was necessary that the purchaser should have actual notice of the previous deed, or of some fact which would satisfy a prudent man that there had been a transfer of the land. In conclusion, after various propositions for specific instructions, amounting substantially to the instructions already given, the court summed up by saying to the jury: "Gentlemen, you will see that the question turns entirely on the view you may take from the evidence, upon the fact whether these two persons are purchasers in good faith, without notice; that is, Benjamin Lombard, Jr., and the defendant." "If either of them is a purchaser in good faith," said the court, "then the defendant is protected. You must find that they both had knowledge before you can find a verdict for the plaintiff. If they both had knowledge of this pre-existing title, then, as a matter of course, the plaintiff's title stands good, otherwise not."

We see no error in these instructions.

After having thus correctly submitted the case to the consideration of the jury, the court were not bound to answer a catechism of questions which could only confuse their minds and lead to erroneous conclusions.

The judgment of the Circuit Court is affirmed.

Cited—16 Wall., 516; 22 Wall., 131; 95 U. S., 106; 3 Wood, 66.

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ALLISON NAILOR, *Pff. in Err.*,

v.

VIOLET A. WILLIAMS, Administratrix of
WILLIAM H. WILLIAMS.

(See S. C., 8 Wall., 107-109.)

Insufficient exception.

Exceptions to overruling the objections to questions put to a witness, where the answers of the witness are not given, show no error.

[No. 157.]

Submitted Oct. 19, 1869. Decided Nov. 1, 1869.

IN ERROR to the Supreme Court of the District of Columbia.

This action was brought in the Circuit Court of the District of Columbia by the plaintiff in error, to enforce payment of a claim held by him as assignee of one Davis, against the estate of William H. Williams. Said claim was for the interest of Davis in the proceeds of the sale in Louisiana, of certain slaves purchased as convicted criminals of the State of Virginia, by said Williams and Davis in 1840. The defendant set up in defense the transcript of certain criminal proceedings had in Louisiana against Williams for taking said criminal slaves into that State. From which proceedings it appears that Williams was indicted for said offense, and was convicted and fined in a large amount.

The trial resulted in a verdict and judgment in favor of the defendant. A motion for a new trial was overruled by the Supreme Court of the District of Columbia in General Term, and final judgment entered in favor of the defendant. Whereupon the plaintiff sued out this writ of error.

The question presented in this court is one of evidence growing out of the trial below. The facts upon which it rests sufficiently appear in the opinion of the court.

Messrs. Brent and Phillips, for plaintiff in error:

On cross-examination of a witness who had merely proved in chief the notice of the assignment and the promise of Williams, the defendant proposed to inquire whether the plaintiff was not, at the date of said assignment, engaged in trading negroes. To which the plaintiff objected, and the court having overruled the objection and allowed the inquiry to be made, the plaintiff excepted. Nothing could be more irrelevant than this general inquiry of the witness.

At the date of the transaction, the buying and selling of slaves at chattels was lawful, and the inquiry did not propose to connect itself with the consideration of the assignment from Davis to Nailor, in any way or with any matter testified to in chief. The only tendency and object of the inquiry was to excite, in 1867, the prejudices of the jury against a plaintiff who, twenty years before, might have dealt in slave property.

It is submitted that the court erred in allowing the first question to be asked, because,

1. It was irrelevant, and if so, it was error to admit it. 9 Gill., 258.

Davis was the debtor of Nailor, and in order to secure this indebtedness, assigned his interest in these negroes as collateral security; and

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the sole questions before the court and jury were:

Had Williams notice of this assignment? Did he promise as above stated? Did he receive the money?

These facts are not in the slightest manner affected by the business of Nallor, which can throw no light upon the issues. The general practice or business of the plaintiff is not admissible in evidence, as ruled by this court in the case of *Thompson v. Bowie*, 4 Wall., 472 (71 U. S., XVIII., 426).

2. It was new matter, not responsive to the examination in chief; and notwithstanding it may have been relevant, it could not have been asked on cross-examination. The defendant, if it was relevant, should have called the witness himself, when he came to make his defense. *Phila. & Trent. R. R. Co. v. Stimpson*, 14 Pet., 461.

Not being matter of cross-examination, the question was a leading one, as the witness was then in the attitude of being the defendant's own witness, nor do we consider this case as prejudiced by the ruling of this court in *Johnson v. Jones*, 1 Black, 225 (66 U. S., XVII., 121). On the contrary, it is there held that if the question is irrelevant, it is inadmissible.

The second exception is equally well taken, because,

1. It is not admissible to impeach the credit or respectability of a witness by interrogating him as to the character of his business, when that business has no reference to the subject-matter of the suit, and can in no manner elucidate the issue. 1 Greenl. Ev., sec. 458.

2. That even if such evidence is admissible, it should have been confined to the business carried on by the witness at the time of the trial, and not extend back some ten years, the date of the assignment. Greenl. Ev., sec. 459.

3. For the reasons set forth by us in considering the first exception.

Messrs. Bradley and Carlisle, for defendant in error:

The question of the discretion of the court below:

To permit the inquiries, is supposed to have been fully stated in *Johnson v. Jones*, 1 Black, 210 (66 U. S., XVII., 117); and that under the ruling of this court in that case, there is no ground for either of these exceptions.

Mr. Justice Miller delivered the opinion of the court:

Two questions were asked on the trial of this case, by the defendant, on the cross-examination of a witness introduced by the plaintiff. The questions were objected to, the objection overruled and the witness required to answer. The bills of exception, one being taken as to each question, do not inform us what answer the witness gave, or whether, in fact, he answered at all.

If a question is asked of a witness on the stand, the answer to which is pertinent and legal testimony, and the court refuses to permit the witness to answer, this error which a revising court will correct, because the injury to the party consists in the refusal of the court to permit the answer to be given, and he can do nothing more to prove the wrong done him than to show that he asked a legal question, See 8 WALL.

the answer to which, by the action of the court, was denied him.

But where a question is asked which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, the injury done the party is by the answer, and notwithstanding the erroneous ruling of the court, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it works him no injury. If it does, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of which a revising court can take notice.

For this reason, and also because there is nothing in the bill of exceptions which enables us to say that the questions themselves exceeded the reasonable license which a court, in its discretion, may allow in cross examination, we are of opinion that no error is shown by these bills of exception.

As they constitute the only matters alleged against the judgment of the court below, it is affirmed.

Cited—101 U. S., 543; 23 Mich., 26.

THE PRESIDENT, MANAGERS & COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY, *Ptff. in Err.*,

v.

THE PENNSYLVANIA COAL COMPANY.

(See S. C., 8 Wall., 276-291.)

Judgment on demurrer—courts will not imply a contract.

When a demurrer to the answer is put in, and the declaration is insufficient, judgment will be for defendant.

Where language to express a contract is entirely wanting in the instrument, courts will not imply one.

Contract construed not to contain a covenant on the part of the Coal Company, that it would transport on the canal all the coal brought over its railroad connecting with the canal.

[No. 170.]

Argued Oct. 21, 1869. Decided Nov. 1, 1869.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the plaintiff in error, to recover damages for an alleged breach of covenant by the defendant in failing to transport over the plaintiff's canal all the coal transported from defendant's mines. The covenants sued upon were originally entered into by and between the Delaware and Hudson Canal Co., a Corporation created by and under the laws of the State of New York, and The Wyoming Coal Association, an incorporated Company. The Pennsylvania Coal Co., incorporated by and under the laws of the State of Pennsylvania, subsequently acquired the property and rights of The Wyoming Coal Association, and by a new covenant with the Delaware and Hudson Canal Co., became substituted in the place of The Wyoming Coal Association in the first named covenants.

Those portions of the covenants which the

plaintiff relied upon to establish, by necessary implication, his claim against the defendant, are as follows:

"Whereas, the railroad owned and used by the said President, Managers and Company of the Delaware and Hudson Canal Company, in connection with their canal, for the purpose of transporting coal to market, is not, in the judgment of the managers of the said Company, even with the improvements made therein, sufficient to convey a quantity of coal at all equal to the quantity which the said canal is capable of transporting in its present condition;

And whereas, it may be desirable to enlarge the said canal for the purpose of reducing the cost to the said Company of transporting its coal thereon, even if the quantity so transported should not be extended, thus greatly increasing the present disparity between the relative capacities for transportation of the said canal and the said railroad;

And whereas, the manifest interest of the said Company is, that in either event the surplus capacity for transportation of the said canal should not remain unemployed, and that the said surplus capacity should be allowed to be used at a reasonable rate of tolls by any other company which shall hold lands for the purpose of mining coal, and shall connect such lands, by railroad or otherwise, with the said canal, for the purpose of transporting coal thereon, which the said Company could not so hold or connect;

And whereas, influenced by these considerations, and aware that no company could prudently undertake to construct a railroad connecting with the said canal without a certainty of being allowed to transport on the said canal, at a permanent rate of tolls, the said Delaware and Hudson Canal Company, by resolution adopted by its managers Apr. 28, 1847, did, for the purpose of creating motive and inducement for capitalists to invest their funds in the construction of a railroad or railroads to be connected with the canal of this Company, at or near the mouth of the Wallenpaupack River, offer to the acceptance of any who might avail themselves of the same, a permanent tariff of tolls on all coal entering the said canal by any such railroad;

Now, therefore, in consideration of the premises, and of acts done and investments made with a view to the transportation of coal on the canal of the said Delaware and Hudson Canal Company, as well as of the mutual undertakings herein contained and of one dollar paid by the managers of the said Wyoming Coal Association to the said Company, the receipt whereof is hereby acknowledged, the President, Managers and Company of the Delaware and Hudson Canal Company, do, for themselves and their successors and assigns, hereby covenant and agree to and with each and all of the persons who are original members of the said 'The Wyoming Coal Association,' by subscription to its original capital of \$300,000, and their respective executors, administrators and assigns, that the said, the President, Managers and Company of the Delaware and Hudson Canal Company, and their successors and assigns will at all times hereafter furnish to any and all boats owned or used by the said 'The Wyoming Coal Association' for the time being, or its assigns, for the

purpose of transporting coal, entering the said canal by railroad connecting with the said canal at or near the mouth of the Wallenpaupack River; or containing coal entering as aforesaid, belonging to, or transported by, or on account of the said The Wyoming Coal Association for the time being, or its assigns; or containing coal, entering as aforesaid, in which, or the transportation of which, the said The Wyoming Coal Association for the time being or its assigns, may be in any manner interested, or the transportation of which under the provisions of this agreement, the said The Wyoming Coal Association for the time being, or its assigns may authorize or require all the facilities of navigation and transportation which the canal known as the Delaware and Hudson Canal shall afford, when in good and navigable condition and repair, to boats owned or used by any other company or persons or belonging to or used by or containing coal transported by, for or on account of the said Delaware and Hudson Canal Company or its successors or assigns, the said President, Managers and Company, and their successors and assigns, charging and collecting a toll on the coal transported in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established in the manner following, viz.:

And in case of an enlargement of the said canal, the said President, Managers and Company and their successors, and assigns may also charge and collect an additional toll on the coal transported in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established after the completion of the said enlargement in the manner following, viz.:

Provided, nevertheless, and this covenant is upon the express condition that until the said canal shall be enlarged so as to permit the transit of boats of larger tonnage than the present, the said President, Managers and Company and their successors and assigns, shall not be bound to allow the quantity of coal transported in pursuance of this agreement to exceed in any one season 400,000 tons, and that after the said canal shall be so enlarged, the said President, Managers and Company and their successors and assigns shall not be bound to allow the quantity of coal transported in pursuance of this agreement, to be increased so as to exceed in any one season one half of the whole capacity for transportation of the said canal, exclusive of the tonnage employed in the transportation of articles other than coal.

And in consideration of the mutual undertakings herein contained, the said The Wyoming Coal Association does, for the persons who are originally members of the said association and their respective executors, administrators and assigns, hereby promise and agree to and with the said The President, Managers and Company of the Delaware and Hudson Canal Company and their successors and assigns, that the said Association for the time being will use all of its influence to cause the speedy construction of a railroad from the coal lands owned by the said Association to the Delaware and Hudson Canal, at or near the mouth of the Wallenpaupack River; and that if the construction of such a railroad shall not be commenced within one year from the date hereof, and completed within three years from the date hereof, then and in that case the Presi-

dent, Managers and Company and their successors may declare this agreement null and void."

The judgment having been given for the defendants, on demurrer, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. E. H. Owen and S. P. Nash, for plaintiff in error:

1. Though a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations, when that is necessary to carry out the intention of the parties and prevent the contract from being ineffectual.

Churchward v. Queen, L. R., 1 Q. B., 178; *Barton v. McLean*, 5 Hill, 256; *Bealey v. Stuart*, 7 Hurlst. & N., 758; *McIntyre v. Belcher*, 14 C. B. N. S., 654; *Whittle v. Frankland*, 2 Best & S., 49; *Pilkington v. Scott*, 15 Mees. & W., 657; *Rigby v. Great W. Ry. Co.*, 14 Mees. & W., 811; *Wood v. Copper Miner's Co.*, 7 Q. B., 906; *Great N. R. Co. v. Harrison*, 12 Com. B., 576; *Elderton v. Emmens*, 4 Com. B., 479; 6 Com. B., 160; 13 Com. B., 495, and 4 H. of L. Cas., 624.

See, also, the American cases of *Barton v. McLean*, 5 Hill, 254; *Richards v. Edick*, 17 Barb., 260; *Whidden v. Belmore*, 50 Me., 357.

The obligation can be so defined as to be enforced equitably and according to the true spirit of the agreement.

The subject-matter of the contract was the transportation, not the mining of coal.

Ingenuity may always suggest difficulties in defining the obligation which a vague contract imposes, but this will not divert the court from pronouncing against a clear breach.

The interpretation is to be according to the equity and fair meaning of the whole arrangement if this does not conflict with the positive provisions of the agreement.

See *Paley*, as cited in *Chit. Cont.*, 74; *Potter v. Ont. & Lio. Co.*, 5 Hill, 147.

The plaintiff's canal was primarily for the transportation of coal. The contract substantially requires of plaintiff to reserve for the use of defendant one half of the capacity of the canal. Yet it insists on keeping this obligation over the plaintiff to the discouragement of enterprise that might employ the full capacity of the canal, while it claims the option of using it itself or not. This must be conceded to be unconscionable and oppressive.

The construction claimed by plaintiff imposes no hardship on the defendant. It has only to relieve the Canal Company from the contract, to be relieved itself.

The canal is a public work. The charter was granted for a public benefit—the increased supply of coal. Plaintiff was limited to a maximum rate of tolls. Non-user would be a ground of forfeiture. But defendant claims to control one half the capacity of the canal without using it, thus substantially reducing by one half the benefits to the community of a great public work.

Messrs. Wm. M. Everts and Charles F. Southmayd, for defendants in error:

The indenture contains no expressed agreement of the defendant to transport upon the canal all its coal, or any particular quantity or portion of it. The instrument contains no lan-

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guage to that effect, nor anything like it, nor tending towards it.

Upon a critical examination of the cases in which parties have been held subject to the obligation of a covenant not in terms expressed in the instrument (excepting the cases of technical words which import a covenant in law), they will all be found to rest upon this principle of construing the language to effectuate the intent with which it appears to have been used. If any case be found going beyond the due application of this principle, we submit that it is not good law.

Portage v. Cole, 1 Saund., 819 i; *St. Albans v. Ellis*, 16 East, 352; *Randall v. Lynch*, 12 East, 179; *Shrewsbury v. Gould*, 2 B. & Ald., 489; *Rhodes v. Bullard*, 7 East, 116; *Gerrard v. Clifton*, 7 T. R., 676; *Clifton v. Walmsley*, 5 T. R., 564; *Seddon v. Senate*, 18 East, 63; *Op. Lord Ellenborough*, 74.

This instrument contains no language having any reference whatever to any such stipulation on the defendant's part as is now claimed to exist.

Where an instrument contains an express stipulation or covenant upon a particular subject-matter, the implication of further covenants upon the same subject-matter is excluded.

Noke's case, 4 Co., 80; *Kent v. Welch*, 7 Johns., 258; *Whallon v. Kauffman*, 19 Johns., 97, and cases there cited.

The contract in question contains an express covenant by the defendant in relation to the construction of the railroad which would naturally supply coal for transportation on the canal under the contract, which covenant is cautiously drawn and manifestly goes as far as the defendant chose to go in respect to an engagement to furnish coal for transportation, or having that tendency.

Even if the plaintiff had undertaken to grant to the defendant the exclusive use of one half the capacity of the canal, in disparagement of the rights of other transporters, whether of coal or other articles, such grant would have been void in law.

Commonwealth v. D. & H. Can. Co., 48 Pa., 295, Op., 302; *Beekman v. R. R. Co.*, 3 Paige, 45.

Thus it is seen that the pretended hardship upon the plaintiff of being obliged, in virtue of this contract, to keep one half the capacity of its canal unused by itself or others, awaiting the defendant's use, while the defendant may use it as much or as little as it pleases, has no real foundation.

Mr. Justice Clifford delivered the opinion of the court:

Covenant broken is the foundation of the claim of the plaintiffs, as set forth in the declaration. Reduced to a concise statement, the alleged cause of action is that the defendants covenanted and agreed with the plaintiffs, in the articles of agreement mentioned in the declaration, that all the coal mined by them on their coal lands and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be transported from that place to tide-waters upon the plaintiffs' canal, and that they would pay to the plaintiffs the toll prescribed in the agreements for the use of their canal in such trans-

portation; and the alleged breach is that the defendants have not kept those covenants and agreements.

Service of the writ having been made, the defendants appeared and pleaded twelve special pleas in addition to the plea of *non est factum*. Issues were tendered by the defendants in the first, third, fourth, fifth and sixth pleas, which was duly joined, and the plaintiffs having demurred to the second, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth pleas, the defendants joined in the several demurrers.

Particular description of the objections taken by the plaintiffs to the several special pleas demurred to is unnecessary, as the defendants concede that they are bad if the declaration sets forth a good cause of action, but they insist that the declaration is also bad and insufficient, and that they, the defendants, are entitled to judgment because the first fault in pleading was committed by the plaintiffs in the declaration. Judgment in the circuit court was for the defendants, and the plaintiffs sued out a writ of error and removed the cause into this court.

Articles of agreement were concluded on the 31st day of August, 1847, between the plaintiffs and a certain unincorporated association, called the Wyoming Coal Association, and on the 29th day of July, 1851, the parties to this suit entered into certain other articles of agreement, in which it is recited, among other things, that the Corporation defendants, prior to that date, had, at the request of the Coal Association, made and constructed the railroad described in the first mentioned agreement, and that all the business and interests of the Coal Association had been assigned and transferred, and become fully vested in the said defendants, and the parties therein covenanted and agreed with each other that the former agreement between the Coal Association and the plaintiffs shall stand, and be deemed and taken to be "the contract of the parties to these presents in the same manner" as if the defendant Corporation had originally been the party of the second part to the same, instead of the Coal Association.

Both of these agreements are incorporated into the declaration, and in determining the rights of the parties in this case, they may both be regarded as they would be if both had been executed by the defendants as well as by the plaintiffs, as all the obligations contracted by the Coal Association have been assumed by the defendant Corporation. All covenants upon the merits of the controversy contained in the first agreement, as well as those contained in the last, must be considered as covenants between the parties to this suit; and viewed in that light the plaintiffs covenanted and agreed with the defendants in the first agreement to furnish, at all times thereafter, to the boats of the defendants navigating the canal of the plaintiffs, all the facilities afforded by the Canal Company to boats used by other parties or by the plaintiffs themselves, charging and collecting only a certain toll per ton gross weight, to be adjusted each year and regulated in a prescribed manner by the market value of coal, but subject, nevertheless, to the proviso that the plaintiffs should not be bound to allow the

quantity of coal to be transported in pursuance of the articles of agreement to exceed in any one season four hundred thousand tons, unless they should enlarge their canal; nor in that event to exceed one half of the whole capacity of the canal for transportation, exclusive of the tonnage employed in the transportation of other articles than coal. Other covenants on the part of the plaintiffs are contained in the original agreement, but none of them are of a character to afford any aid in the solution of the questions involved in the pleadings.

Following the covenants of the plaintiffs are certain unimportant covenants made by the defendants, but in conclusion the defendants also promise and agree, "in consideration of the mutual undertakings herein contained," that they will use all their influence to cause the speedy construction of a railroad from the coal lands which they own to the canal of the plaintiffs, to connect with the same at the point or place therein described; and they also agree that if the construction of such railroad shall not be commenced within one year and be completed within three years, the plaintiffs may declare the agreement null and void.

Based upon these two agreements the declaration alleges that the defendants constructed the railroad therein described and put the same in operation as therein required; that the canal of the plaintiffs at that date did not permit the transit of boats of a tonnage exceeding fifty tons; that relying upon the covenants and undertakings of the defendants they immediately entered upon the work of enlarging their canal, and that they continued to prosecute the work with diligence and at great expense until the same was completed; that the canal, as so enlarged, permits the transit of boats of the tonnage of one hundred and twenty-five tons, making the capacity of the canal for transportation, in each season of navigation, eighteen hundred thousand tons; that the defendants, claiming the benefits and privileges of the covenants and agreements, did, after the completion of their railroad, construct and procure a large number of boats to be used upon the said canal in the transportation of coal brought over their railroad, and did thereafter for the period therein mentioned transport all the coal which they brought over their railroad upon the canal of the plaintiffs to its eastern terminus at tide water, as contemplated by the agreements; that they, the plaintiffs, have at all times been ready and willing to furnish to the boats owned and used by the defendants for the purpose of such transportation, all the facilities of navigation the canal ever afforded to their own boats, or to the boats owned or used by any other person or company.

Such facilities were sufficient, as the plaintiffs allege, for the transportation of all the coal mined by the defendants and transported by them over their said railroad during the period laid in the declaration, but the plaintiffs allege that the defendants, not regarding their covenants and undertakings to transport all their coal, to the extent aforesaid, over the canal of the plaintiffs, and to pay them the prescribed rate of toll for such transportation, did not nor would they perform that covenant and agreement, but induced another railroad company to construct a branch road and connect the same

with their railroad at the place where the latter road connects with the canal of the plaintiffs, and that they thereafter, during the period alleged in the declaration, diverted a large quantity of their coal transported over their railroad from the plaintiffs' canal, and transported the same from the place of such connection to tide-waters over the railroad of such other company, to the damage of the plaintiffs, as they say, in the sum of \$900,000.

Defects of form in the declaration or in the several pleas, filed by the defendants are waived, as it is well settled that defects of substance only are open to a party who has pleaded to the merits, or to one who has replied to an antecedent pleading. *Aurora v. West*, [ante 42]; *Clearwater v. Meredith*, 1 Wall., 38 [68 U. S., XVII., 608].

Particular examination of the several special pleas to which demurrers were filed, need not be made, as it is conceded that they were framed upon the theory that the declaration is insufficient. Judgment, therefore, must be for the plaintiffs if it be held that the declaration alleges a good cause of action, but if not, then the judgment of the circuit court must be affirmed, because if that conclusion be adopted, the first fault in pleading was committed by the plaintiffs. *Aurora v. West* [supra].

Obviously the decision of the question must depend upon the construction to be given to the first agreement therein set forth, as it is quite clear that the declaration is well drawn if that agreement, when properly construed, will support the allegations that the defendants covenanted and agreed that all the coal mined on their coal land, and transported over their railroad to the place where the railroad connects with the canal of the plaintiffs, should be sent forward from that place to tide-waters upon their canal, and that the defendants also covenanted and agreed that they would pay to the plaintiffs the rate of toll therein prescribed for the use of the canal in such transportation.

Provision is made by the agreement, it is admitted, that the rates of toll to be charged by the plaintiffs shall be permanently reduced, and the plaintiffs contend that the defendants, in consideration of that stipulation, assumed a correlative obligation to send all their coal brought over their railroad to market upon the plaintiffs' canal. Express covenant to that effect, it is conceded, is not to be found in the articles of agreement, but the plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words. *U. S. v. Babbitt*, 1 Black, 61 [66 U. S., XVII., 96].

Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party con-

tracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract. *Churchward v. The Queen*, Law Rep., 1 Q. B., 195.

Three other examples are put in the case cited which it may be well to notice as illustrating the general principle, and as showing its true boundary when properly limited and applied. They were first adduced at the bar, but were subsequently adopted and confirmed by the court in substance and effect as follows:

1. If one person covenants or engages by contract to buy an estate of another at a given price, the law will imply a corresponding obligation on the part of such other person to sell, although the contract is silent as to any such obligation, as the person contracting to purchase cannot fulfill his contract unless the other party will consent to sell. *McIntyre v. Belcher*, 14 C. B., N. S., 664; *Portage v. Cole*, 1 Saund., 819, 1.; *Whidden v. Belmore*, 50 Me., 360; *Bar ton v. McLean*, 5 Hill, 258.

2. So if one person engages to work and render services which require great outlay of money, time and trouble, and he is only to be paid according to the work he performs, the contract necessarily implies an obligation on the part of the employer to supply the work.

3. Persons often contract to manufacture some particular article, and in such cases the law implies a corresponding obligation on the part of the other party to take it when it is completed according to the contract, because if it were not so the party rendering the services and incurring the expense in fulfilling his contract could not claim any remuneration. *St. Albans v. Ellis*, 16 East, 352; *Randall v. Lynch*, 12 East, 179; *Shrewsbury v. Gould*, 2 Barn. & Ald., 489; *Gerrard v. Clifton*, 7 T. R., 676; *Aspden v. Austin*, 5 Q. B., 671; *Great Northern Ry. Co. v. Harrison*, 12 C. B., 576.

4. Instruments inartificially drafted, or where the language employed is obscure, imperfect or ambiguous, are always open to construction, and the primary rule in all such cases, whether the contract is or is not under seal, is the intention of the parties; but the power of a court of common law extends no further than to collect such intention from the language employed as applied to the subject-matter, in view of the surrounding circumstances. *Tipton v. Feitner*, 20 N. Y., 425.

5. Courts of law cannot incorporate into a sealed instrument what the parties left out of it, even though the omission was occasioned by the clearest mistake; nor can they reject what the parties inserted, unless it be repugnant to some other part of the instrument, and none of the authorities cited by the parties in this case, when properly applied, are inconsistent with the views here expressed. *Bealey v. Stuart*, 7 H. & N., 753; *Whittle v. Frankland*, 2 Best & S., 49; *Pilkington v. Scott*, 15 Mees. & W., 657; *Rigby v. Great W. R. R. Co.*, 14 Mees. & W., 811; *Seddon v. Senate*, 13 East, 74.

Examined in the light of the rules here suggested, the court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support

the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement. Language to express any such contract is entirely wanting in the instrument, nor is there any covenant on the part of the plaintiffs from which any such implication can legally arise.

Reference is made by the plaintiffs to the provision of the agreement extending certain facilities to the boats of the defendants and covenanting for a permanent reduction in the rates of toll upon the plaintiffs' canal, as calling for a different construction of the articles of agreement, but it is quite obvious that those concessions were made as inducements to the defendants to locate and construct the contemplated railroad from their coal lands to the plaintiffs' canal, so as to form a continuous line of transportation from the coal mines, over the canal, to tide waters. Great advantages were expected to result from the completion of that railroad, and it is quite evident that the plaintiffs were willing to accept the prospect of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement.

Principal covenant of the defendants was, that they would use all their influence to cause the speedy construction of the railroad, and the plaintiffs proffered the concessions described in the agreement to encourage the enterprise and secure its early completion. *Commonwealth v. Del. & H. Can. Co.*, 48 Pa. St., 302.

Support to these views might be drawn from the recitals in the first agreement and from the proceedings of the plaintiff Corporation, but it does not seem to be necessary to pursue the subject, as the only covenant of any importance made by the defendants was the one before mentioned, that they would use all their influence to cause the speedy construction of the railroad; and the second agreement contains the recital that the covenant in that behalf had been fully performed as agreed, before the second articles of agreement were executed between the parties.

Unsupported as the declaration is by anything else contained in the record, it is clear that it must be adjudged insufficient, and as the first fault in pleading was committed by the plaintiffs, it follows that the judgment of the circuit court was correct.

Judgment affirmed, with costs.

Cited—2 Flipp., 497; 50 N. Y., 271; 74 N. Y., 23; 79 N. Y., 161.

JEREMIAH CLARK, FLORINDA CLARK
AND SAMUEL F. FEW, *Appts.*,

vs.
WILLIAM S. REYBURN.

(See S. C., 8 Wall., 318-324.)

Strict foreclosure—what defects of parties and of decree will vitiate.

A decree of strict foreclosure which does not find the amount due, which allows no time for the payment of the debt, and the redemption of the estate, and which is final and conclusive in the first instance, cannot be sustained.

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Beneficiaries under the trust deed should have been made parties—a decree against the trustee alone does not, in such a case, bind the *cestuis que trust*.

[No. 120.]

Argued Oct. 7, 1869. Decided Nov. 1, 1869.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The bill in this case was filed in the court below, by the appellee, for the foreclosure of a certain mortgage. Judgment having been given for the plaintiff in that court, the defendants took an appeal to this court.

A full statement of the case appears in the opinion of the court.

Mr. L. B. Wheat, for appellants:

The court erred in rendering a decree of strict foreclosure against all of the appellants; certainly as to Florida Clark and Few, without giving time nor fixing a day in which the defendants below should pay or be foreclosed.

3 Barb. Ch. Pr., 186, 193; 2 Dan. Ch. Pl. and Pr., 1016, and cases in reference thereto, collected in the case of *Perrins v. Dunn*, 4 Johns. Ch., 140; see, also, 2 Van Santvoord Eq. Pr., 121; *Strawn v. Cogswell*, 28 Ill., 463; *Mills v. Heeney*, 35 Ill., 173.

If the bill on which the case was heard was properly filed against all three of the appellants, then by filing the same, Reyburn waived the alleged foreclosure and sale against Jeremiah Clark mentioned in the bill.

Perry v. Barker, 18 Ves., 198; 2 Dan. Ch., Pl. and Pr., 1271.

The decree mentioned in the bill did not bar nor in any manner affect, neither Florida Clark nor Few, any more than as though it had not been rendered, unless it had the effect of merging the mortgage in that decree.

Pope v. North, 33 Ill., 440; *McArthur v. Franklin*, 16 Ohio St., 193; *Leonard v. Villars*, 23 Ill., 379; *Graen v. Dixon*, 9 Wis., 553; *Hodson v. Treat*, 7 Wis., 268; *Vroom v. Dimas*, 4 Paige, 526; *Bradley v. Snyder*, 14 Ill., 263; *Gage v. Breuster*, 31 N. Y., 218; *Anson v. Anson*, 20 Ia., 58.

The case of *Chick v. Willets*, 2 Kan., 385, shows that mortgages in Kansas do not convey the legal title, but are mere liens, nothing more.

The rights of parties in foreclosure cases in said United States District Court, are the same as though the mortgage had been enforced in a state court.

Bronson v. Kinzie, 1 How., 311; *Ward v. Chamberlin*, 2 Black, 430 (67 U. S., XVII., 319); *Dexter v. Arnold*, 8 Sumn., 152; *Russell v. Ely*, 2 Black, 575 (67 U. S., XVII., 253).

Messrs. E. Stillings and J. S. Black, for appellees:

NOTE.—*Strict foreclosure of mortgages.*

The ancient practice, to bar the equity of redemption, was, by bill in chancery to procure a decree for a strict foreclosure of the right to redeem, by which means the lands became the absolute property of the mortgagee. This is what is known as strict foreclosure, and is the common remedy of a mortgagee in England, though a sale may be ordered there. 4 Kent. Com., 131; *Monday v. Monday*, Ves. & B., 223; *Coots, Mortg's*, 510; *Fisher, Mortg's*, 1, 2.

A strict foreclosure has been regarded as a severe remedy, since it transfers the absolute title without any sale, no matter what the value of the premises. *Bolles v. Duff*, 43 N. Y., 469; *Lansing v. Goelet*, 9 Cow., 352.

The severity of foreclosure without a sale is mitigated by the practice of enlarging the time to re-

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The first objection is, that no time was given within which to pay the money due or to be foreclosed for. The whole matter was in the discretion of the court, under all the circumstances of the case.

11 Leigh (Va.), 299; *Perine v. Dunn*, 4 Johns. Ch., 140; 2 Dan. Ch., 1017.

The Courts of Equity of the United States cannot be bound by the laws of the State, as to the remedy to enforce the rights of parties. *Clark v. Smith*, 13 Pet., 195.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity. Reyburn is the complainant. Florida Clark and Few only were made defendants by the original bill. She answered. Few filed a plea and demurred. On the 5th of May, 1863, leave was given to the complainant to amend his bill, and leave was given to Mrs. Clark to withdraw her answer. It had been filed as her answer in a former case, and refiled in this case. The court ordered it to be restored to the files from which it had been taken. The complainant thereupon filed an amended bill whereby Jeremiah Clark was brought into the case as a defendant.

The amended bill states the following case: That on the 30th of April, 1859, Jeremiah Clark executed to the complainant his promissory note for \$5,250, payable twelve months from date, with interest after maturity at the rate of twenty-five per cent. per annum. On the same day, Clark and wife executed to the complainant a mortgage upon the real estate therein described, conditioned to secure the payment of the note. The mortgage was acknowledged by the grantors, and duly recorded. Clark failed to pay the note at maturity. The complainant, on the 5th of October, 1861, filed his bill of foreclosure against the same parties who are defendants in this suit. Before the hearing, the bill was dismissed as to Mrs. Clark and Few. It was adjudged and decreed that

there was due from Jeremiah Clark \$8,565.77; that he should be forever barred and foreclosed of any interest in the mortgaged premises, and that they should be sold by the Marshal, and the proceeds applied to the payment of the amount found due. On the 27th of December, 1861, the Marshal sold the premises to the complainant for \$7,000, and on the 28d of that month executed to him a deed for the property. That there was still due to the complainant upon the decree the sum of \$1,884.25, for the payment of which, the interest of Florida Clark in the mortgaged premises is chargeable. That the defendant, Few, under a deed from Clark and wife to him in trust, claims to have the interest of a trustee in the property, which interest accrued subsequently to that of the complainant, and is inferior and subject to his mortgage. The prayer of the bill is for a decree of foreclosure as to the interest of Florida Clark and Few in the mortgaged premises, and for general relief.

Few filed an answer which sets forth, that about the 12th of January, 1860, Clark and wife executed to him, in trust, a deed for the same premises described in the mortgage; that the persons for whose benefit the deed was made were Florida Clark, the wife of Jeremiah Clark, and their children, then born or thereafter to be born, and the lawful heirs of such children, with certain limitations as to the further disposition of the property as set forth in the deed, a copy of which, it is stated, is annexed to the answer of Mrs. Clark to the amended bill in this case. As to all the other matters set forth in the bill, he avers that he has no knowledge, and he disclaims all interest in the matter in controversy, except as such trustee. He prays that the court will adjudge fairly between the parties in interest, and that he may be dismissed with costs.

Clark and wife failed to answer. The trust deed referred to in the answer of Few, as made a part of the answer of Mrs. Clark, is not in the

deem from six months to six months or for shorter periods according to the equity arising from the circumstances. 4 Kent, Com., 181; *Edwards v. Cunliffe*, 1 Madd., 287; *Perine v. Dunn*, 4 Johns. Ch., 140; *Anon.*, 3 Eq. Cas. Abr., 606, n. 37; *Procter v. Oates*, 2 Atk., 129; *Novosielecki v. Wakefield*, 17 Ves., 417.

Action is properly brought by mortgagee in possession under title from mortgagor to cut off subsequent liens; or by purchaser in good faith under void or doubtful foreclosure; or by such purchaser at a sale valid against all parties except defendant—as a judgment creditor, or grantee or mortgagee subsequent to the mortgage who was not made a party to the foreclosure, and generally where a party as an outstanding subsequent incumbrancer has a right to redeem against the party in possession. *Kendall v. Treadwell*, 14 How. Pr., 165; 8 C. & A. 4bb. R., 16; *Bolles v. Duff*, 43 N. Y., 469; 8 C. 10 Abb. Pr. N. S., 209; 8 C. 41 How. Pr., 355; *Benedict v. Gilman*, 4 Paige, 58; *McKinstry v. Merwin*, 3 Johns. Ch., 400; *Watson v. Spence*, 20 Wend., 200.

The judgment recovered is that the person entitled to redeem do so within a certain specified time, or in default of such redemption, that the title rest absolutely in the plaintiff; or the court may adjudge a foreclosure and sale as in an ordinary foreclosure suit. *Benedict v. Gilman*, 4 Paige, 58; *Kendall v. Treadwell*, 14 How. Pr., 165; 8 C. 5 Abr. Pr., 16; 2 Barb. Ch. Pr., 188; 2 Van Sant. Pr., 120.

The judgment cannot be rendered against an infant without providing that he be allowed a day in court after he comes of age, to show cause against the judgment. He should be allowed six months after coming of age. He will not be allowed to open the accounts, nor to redeem, unless judgment was obtained by fraud or he claims title paramount to the mortgage; he may show error in the judgment.

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Mills v. Dennis, 3 Johns. Ch., 387; *Booth v. Rich*, 1 Vern., 236; *Godier v. Ashton*, 18 Ves., 83; *Williamson v. Gordon*, 19 Ves., 114; *Mallack v. Galton*, 3 P. Wms., 352; 1 Dan., 226, 243; *Lloyd v. Barnes*, 2 P. Wms., 73; *Anon.*, Mos., 66.

Title does not pass to the plaintiff on a strict foreclosure until a final order is obtained after the expiration of the time allowed to redeem. *Sheriff v. Sparks*, West, 130; *Thompson v. Grant*, 4 Mad., 232; *Faulkner v. Bolton*, 7 Sim., 319; *Hansard v. Hardy*, 18 Ves., 400; *Wood v. Surr*, 19 Beav., 551.

As to computation to be made with reference to redemption, see *Webber v. Hunt*, 1 Mad., 13; *Gould v. Tancred*, 2 Atk., 545; *Davis v. May*, 19 Ves., 384; *Sheppard v. Elliott*, 4 Mad., 254; *Brown v. Barkham*, 1 P. Wms., 632; *Knowles v. Chapman*, *Seaton's Decrees*, 149; *Bainbridge v. Owen*, 2 J. J. Marsh., 465; *Van Buren v. Olmstead*, 5 Paige, 2; *Marony v. O'Dea*, 1 Ball & B., 118; *Trimleston v. Hamill*, 1 Ball & B., 385; *Coleman v. St. Albans*, 3 Ves., 32; *Mead v. L'd Orrery*, 3 Atk., 244; *Thomas v. Brigstocke*, 4 Russ., 64; *Digby v. Craggs*, 2 Eden, 200; *Robertson v. Campbell*, 2 Call, 421; *Moore v. Cable*, 1 Johns. Ch., 335; *Faure v. Winans*, Hopk., 263, 421; *Saunders v. Frost*, 5 Pick., 269.

If the value of the land be equal to the debt, strict foreclosure extinguishes the debt; if not, the debt will be reduced by the value of the land. *Morgan v. Plumb*, 9 Wend., 287; *Spencer v. Harford*, 4 Wend., 381; *De Grant v. Graham*, 1 N. Y. Leg. Obs., 75.

Action to redeem is converse of action for strict foreclosure. If plaintiff fails to redeem in time appointed, dismissal of his complaint as a consequence of such failure operates as a strict foreclosure. *Perine v. Dunn*, 4 Johns. Ch., 140; *Beach v. Cooke*, 28 N. Y., 535; *Wood v. Surr*, 19 Beav., 551; *Hansard v. Hardy*, 18 Ves., 400; *Bolles v. Duff*, 43 N. Y., 474.

record. No replication was filed by the complainant, and no testimony was taken upon either side. The bill was taken *pro confesso* as to Clark and wife, and the case stood upon the bill and answer as to Few.

The court decreed that all the defendants should be forever barred and foreclosed of their right of redemption in the mortgaged premises. The decree does not find either the fact or the amount of the alleged indebtedness. It is silent upon the subject. The record shows no proceeding in relation to it. No time was given either to Mrs. Clark or her trustees within which to pay and redeem. The foreclosure was unconditional, and was made absolute at once. The appeal is prosecuted to reverse the decree.

In our view of the case it will be sufficient to consider one of the numerous objections insisted upon by the counsel for the appellants.

The sale and conveyance by the Marshal transferred the entire interest of Jeremiah Clark in the mortgaged premises to Reyburn, but it did not in any wise affect the equity of redemption which had been vested in Few by the trust deed of Clark and wife to him. *Childs v. Childs*, 10 Ohio St., 389. The equity of redemption would have been barred and extinguished by the decree which ordered the premises to be sold if the proper parties had been before the court when it was made. The bill in that case having been dismissed as to Mrs. Clark and Few, the proceedings left their rights in full force. They were before the court in the case now under consideration, and the trust estate was then for the first time liable to be affected by its action. If there was a balance of the debt secured by the mortgage still unpaid, they were properly proceeded against, and the complainant was entitled to relief. The question to be considered relates to the character of the decree.

Can a decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained?

The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable and alienable like other interests in real property. 1 Pow., Mort., 252; 2 Greenleaf's Cruise, 128. As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim "once a mortgage always a mortgage," but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the Chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. 2 Greenleaf's Cruise, 77, 78; Spence's Eq. Jur., 601-608. After the practice grew up of applying to the Chancellor to foreclose the right to redeem

upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the Chancellor, according to circumstances of the case. It was only in the event of final default that the foreclosure was made absolute.

In this country the proceeding in most of the States, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties, in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law "impairing the obligation of the contract" within the meaning of the provision of the Constitution upon the subject. *Bronson v. Kinzie*, 1 How., 311; *Williamson v. Doe*, 7 Blackf., 18.

At the date of the execution of this mortgage the Act of the Territorial Legislature of Kansas of 1855, "concerning mortgages," was in force. It directed that in suits upon mortgages the mortgagee should recover a judgment for the amount of his debt, "to be levied of the mortgaged property," and that the premises should be sold under a special *fi rei facias*. But it also provided that nothing contained in the Act should be so construed as to "prevent a mortgagee, or his assignee or the representative of either, from proceeding in a court of chancery to foreclose a mortgage according to the course of proceeding in chancery in such cases." Statutes of Kan. of 1855, p. 509. This gave to the complainant in the case before us the option to proceed either way. He elected to file a bill in equity. No rule of practice bearing upon the subject, established by the court below, has been brought to our attention.

The 90th rule of equity practice adopted by the Supreme Court, directs that where no rule prescribed by this court, or by the circuit court, is applicable, the practice of the circuit court shall be regulated by the practice of the High Court of Chancery in England, so far as it can be applied consistently with the local circumstances and convenience of the district where the court is held.

The equity spoken of in the Process Act of 1792, is the equity of the English chancery system. *Robinson v. Campbell*, 8 Wheat., 212; *Boyle v. Zacharie*, 6 Pet., 648.

Spence says: "At length, in the reign of Charles I., it was established that in all cases of mortgages, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day, to be named." Eq. Jur., 608.

The settled English practice is for the decree to order the amount due to be ascertained, and the costs to be taxed; and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant; but in default of payment within the time limited, "that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of and in said mortgaged premises."

2 Dan. Ch. Pr., 1016; 1 Seton, Decrees, 846. We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by *Chancellor Kent*, with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the *Chancellor*, and to be regulated by the circumstances of the particular case; but he nowhere intimates that such an allowance could be entirely withheld. *Perine v. Dunn*, 4 Johns. Ch., 140. The practice in Illinois is in conformity to these views. *Johnson v. Donnell*, 15 Ill., 97. In the light of these authorities we are constrained to hold the decree in the case before us fatally defective.

There is another point upon which we deem it proper to remark before closing this opinion. It was urged by the counsel for the appellants, as a further ground of reversal, that the children of Clark and wife, who are alleged to be beneficiaries under the trust deed, were not before the court. It does not appear by anything in the case that there were such children in case. If the facts were as alleged, it is clear that they should have been made parties. Otherwise their right to redeem could not be taken away by the decree. A decree against the trustee alone does not, in such a case as this, bind the *cestuis que trust*. *Collins v. Lofftus*, 10 Leigh, 5; Calvert, Parties, 121.

The decree is reversed, and the cause will be remanded to the court below for further proceedings in conformity to this opinion.

Cited—96 U. S., 638; 106 U. S., 71; 20 Kan., 254.

SAMUEL B. PAUL, *Plff. in Err.*,

v.

COMMONWEALTH OF VIRGINIA.

(See S. C., 8 Wall., 168-185.)

Corporation, not a citizen—special privileges not secured by Constitution—law requiring insurance companies of other States to file security, is constitutional.

A corporation is not a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Special privileges enjoyed by citizens in their own States are not secured in other States by this provision, such as grants of corporate existence and powers.

States may exclude a foreign corporation entirely or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest.

A law of a State requiring insurance companies of other States to file security before they can issue policies in the State, is constitutional.

Such law does not conflict with the provision of the Constitution, that Congress shall have power to regulate commerce among the several States.

[No. 189.]

Argued Oct. 12, 1869. Decided Nov. 1, 1869.

NOTE.—State licenses and power of State to tax commerce. See note to *Gibbons v. Ogden*, 22 U. S. (9 Wheat.), 1; and note to *Brown v. Maryland*, 25 U. S. (12 Wheat.), 419.

Citizenship of corporations and their stockholders. See note to *Hope Ins. Co. v. Boardman*, 9 U. S. (5 Cranch), 67.

Foreigners in statute includes corporations; when deemed citizens. See note to *U. S. v. Amedy*, 24 U. S. (11 Wheat.), 392.

See 8 WALL.

U. S., BOOK 19.

IN ERROR to the Supreme Court of Appeals for the State of Virginia.

This case arose in the Circuit Court for the City of Petersburg, in the State of Virginia, upon a presentment made by a grand jury against the plaintiff in error, for issuing an insurance policy without a license required by the statutes of the State. Judgment having been given against the defendant, he filed a petition in the Supreme Court of Appeals of Virginia, for a writ of *supersedeas*.

The said writ of *supersedeas* was denied. Whereupon the defendant sued out this writ of error.

A full statement of the case appears in the opinion of the court.

Messrs. J. M. Carlisle, J. D. McPherson, and B. R. Curtis, for plaintiff in error:

Such legislation was expressly forbidden by the Articles of Confederation, by which (Art. 4, sec. 1), it is provided, that "The better to secure and perpetuate mutual friendship and intercourse among the people of the States in this Union, the free inhabitants, etc., shall be entitled to all the privileges and immunities of free citizens in the several States, * * * and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." 1 Stat. at L., 4.

2. It cannot be supposed that the Constitution was intended to be less efficient in these respects than the Articles of Confederation had been. One of the great objects was to secure a more perfect Union. The defect in Article 4 of the Confederation was, not that it imposed too great restrictions upon the powers of the States, but that it was wholly without the protection and support of a supreme Federal power. The want of a power to regulate commerce, not only with foreign nations, but among the several States, is stated by Story to have been "One of the leading defects of the Confederation, and probably as much as any one cause conduced to the establishment of the Constitution."

Story, Com. Const., sec. 1053; Federalist, Nos. 4, 7, 11, 22.

Accordingly, we find the whole subject covered by the two clauses above referred to.

Art. 4 guaranties to the citizens of each State all the privileges and immunities of citizens in the several States, omitting to specify such privileges as applying to trade and commerce, such specification being unnecessary, because the whole subject of commerce among the several States was expressly and exclusively granted to Congress by Art. 1, sec. 8.

Indeed the words "privileges and immunities" in article 4 of the Constitution, have been held to include the right of exemption from any higher impositions than other citizens are liable to.

Corfield v. Coryell, 4 Wash. (C. C.), 871; 3 Kent, Com., 72.

3. That these provisions of the Virginia Statute are essentially and distinctly a regulation of commerce between Virginia and other States, can only be denied upon the idea that the business of insurance is not comprehended by the term "commerce."

But the term "commerce," as used in the Constitution, has been authoritatively construed to have a signification wide enough to induce all these subjects. In *Gibbons v. Ogden*, 9 Wheat., 189, Chief Justice Marshall said: "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches."

Indeed, the right to sell merchandise and the right to insure it would seem, in the nature of things, to be inseparable.

In *Almy v. Cal.*, 24 How., 169, 174 (65 U. S., XVI., 644, 646), Chief Justice Taney, speaking of a tax on a bill of lading, uses this language:

"A tax or duty on a bill of lading, though differing in form from a tax on the article shipped, is in substance the same thing." See that opinion *passim*.

In *Bk. of Augusta v. Earle*, 13 Pet., 590, agencies for corporations engaged in the business of insurance, are referred to as "usages of trade and commerce."

And if a New York merchant has a right to establish an agency to sell his goods in Virginia, it would seem difficult to deny to that agent the right to effect an insurance there with a New York company, through its agent, upon equally favorable terms as with a Virginia company.

The power to levy a tax or impose a burden or restriction, however inconsiderable, necessarily involves the power absolutely to prohibit the thing so taxed or restricted. "The power to tax involves the power to destroy."

McCulloch v. Maryland, 4 Wheat., 316, quoted by Mr. Justice Miller, in *Crandall v. Nevada*, 6 Wall., 46 (78 U. S., XVIII., 785).

The power here claimed by the State of Virginia, therefore, is the power to exclude all companies, not incorporated by the State of Virginia, from trade and commerce within the State. The language of the statute is not "corporations," but "companies."

5. But if the statute can be construed to apply only to an incorporated company, it comes to the same thing; for a corporation created by the laws of one of the States and composed of citizens of that State is a citizen of that State within the meaning of the Constitution. *R. R. Co. v. Letson*, 2 How., 497.

And such is the rule of international law.

6. In no view of this statute can it be regarded as a police regulation. It concerns only the exercise of a business not only lawful and permitted, but encouraged. It does not at all concern the manner of that business, but only the persons who shall exercise it in respect of their being citizens of the State of Virginia.

7. The statute in question is a regulation of commerce between Virginia and the other States in the Union, upon a subject which must in its nature be exclusively federal.

Messrs. C. Robinson and Thos. R. Bowden, for defendant in error:

This is a personal tax imposed upon the person who acts as the agent of a foreign insurance company within the State, and is not a tax imposed upon such foreign insurance company.

No question was made by the pleadings, as appears in the record, which give this court jurisdiction, in this case, and without which it

has been frequently decided this court has no jurisdiction.

Miller v. Nicholls, 4 Wheat., 311; *Crowell v. Randall*, 10 Pet., 868; *Bank v. Sharp*, 6 How., 301; and *Baldwin v. Payne*, 6 How., 332; and *R. R. Bkg. Co. v. Marshall*, 12 How., 165.

If this is to be regarded as a civil case, it could not have been stayed or reversed after verdict for any defect, imperfection or omission in the pleadings, which could not be regarded on demurrer, or for any other defect, imperfection or omission which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of.

See, Code, Va., 1860, ch. 181, sec. 3, p. 743. If it be considered a criminal case, the Act of the Legislature of Virginia is equally clear that "Judgment in any criminal case after a verdict, shall not be arrested nor reversed upon any exception to the indictment of other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case." Code, Va., 1860, ch. 207, sec. 12, 832.

Samuel B. Paul could not act as the agent of these companies in Virginia until they had complied with the laws of the State of Virginia. They had no existence in that State. This court has frequently decided that a corporation is a mere legal entity, and can have no legal existence outside of the dominion of the State by which it is created.

Bk. of Augusta v. Earle, 13 Pet., 519; *Cov. Drabridge v. Shepherd*, 20 How., 227 (61 U. S., XV., 896); *R. R. Co. v. Wheeler*, 1 Black, 286 (66 U. S., XVII., 130).

Judge Samuels delivered the unanimous opinion of the Court of Appeals of Virginia, in the case of *Slaughter v. Commonwealth*, 13 Gratt., 767. We think the cases referred to by him fully sustain the decision of the Court of Appeals in affirming the judgments of the courts below, and rely upon it in this case as a full and complete answer to the argument of the appellant in this case.

Mr. Justice Field delivered the opinion of the court:

An Act of the Legislature of Virginia, passed on the 3d of February, 1866, provides that no insurance company not incorporated under the laws of that State, shall carry on its business within the State without previously obtaining a license for that purpose; and that it shall not receive such license until it has deposited with the Treasurer of the State, bonds of a specified character to an amount varying from \$30,000 to \$50,000, according to the extent of the capital employed.

A subsequent Act, passed during the same month, declares that no person shall, without a license authorized by law, act as agent for any foreign insurance company, under a penalty of not less than \$50, nor exceeding \$500, for each offense; and that every person offering to issue or making any contract or policy of insurance for any company created or incorporated elsewhere than in the State, shall be regarded as an agent of a foreign company.

In May, 1866, the defendant, a resident of the State of Virginia, was appointed agent of several insurance companies incorporated in

the State of New York, to carry on the general business of insurance against fire; and in pursuance of the law of Virginia, he fled with the auditor of public accounts of the State his authority from the companies to act as their agent. He then applied to the proper officer of the district for a license as such agent within the State, offering at the time to comply with all the requirements of the statute respecting foreign insurance companies, including a tender of the license tax, excepting the provisions requiring a deposit of bonds with the Treasurer of the State, and the production to the officer of the Treasurer's receipt. With these provisions neither he nor the companies represented by him complied, and on that ground alone, the license was refused. Notwithstanding this refusal, the defendant undertook to act in the State as agent for the New York companies without any license, and offered to issue policies of insurance in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted and convicted in the Circuit Court of the City of Petersburg, and was sentenced to pay a fine of \$50. On error to the Supreme Court of Appeals of the State, this judgment was affirmed, and the case is brought to this court under the 25th section of the Judiciary Act.

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the States of the Union other than Virginia. And the business of insurance was then, and still is, a lawful business in Virginia, and might then and still may be carried on by all resident citizens of the State, and by insurance companies incorporated by the State, without a deposit of bonds, or a deposit of any kind, with any officer of the Commonwealth.

On the trial in the court below, the validity of the discriminating provisions of the Statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States." The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term "citizens" as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the Legislature, and possessing only the attributes which the Legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judi-

cial power of the United States to controversies between citizens of different States. In the early cases when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Thus, in the case of *Hope Ins. Co. v. Boardman*, 5 Cranch, 57, where the company was described in the declaration as "a company legally incorporated by the Legislature of the State of Rhode Island and Providence Plantations, and Established at Providence," the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation as such was not a citizen within the meaning of the Constitution.

In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the State in which the corporation was created, and and where alone it had any legal existence, without any special averment of such citizenship, the averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court. *Louisville R. R. Co. v. Letson*, 2 How., 497; *Marshall v. Balt.* and *O. R. R. Co.*, 16 How., 314; *Covington Drawbridge Co. v. Shepherd*, 20 How., 283 [61 U. S., XV., 898]; *Ohio and Miss. R. R. Co. v. Wheeler*, 1 Black, 297 [66 U. S., XVII., 133].

But in no case which has come under our observation, either in the state or Federal Courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. In *Bank of Augusta v. Earle*, 18 Pet., 586, the question arose whether a bank, incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the State of Alabama; and it was contended, as in the case at bar, that a corporation, composed of citizens of other States, was entitled to the benefit of that provision, and that the court should look beyond the Act of Incorporation and see who were its members, for the purpose of affording them its protection, if found to be citizens of other States, reference being made to an early decision upon the right of corporations to litigate in the Federal Courts in support of the position. But the court, after expressing approval of the decision referred to (*Bank of U. S. v. Deveaux*, 5 Cranch, 61), observed that the decision was confined in express terms to a question of jurisdiction; that the principle had never been carried further, and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its creation: that if the principle were held to embrace contracts, and the members of a corporation were to be regarded as individuals carrying on business in the corporate name and, therefore, entitled to the privileges of citizens they must at the same time take upon themselves the liabilities of citizens, and be bound

by their contracts in like manner; that the result would be to make the corporation a mere partnership in business with the individual liability of each stockholder for all the debts of the corporation; that the clause of the Constitution could never have intended to give citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities attendant upon the exercise of such privileges in those States; that this would be to give the citizens of other States higher and greater privileges than are enjoyed by citizens of the State itself, and would deprive each State of all control over the extent of corporate franchises proper to be granted therein. "It is impossible," continued the court, "upon any sound principle, to give such a construction to the article in question. Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State."

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N. Y., 607.

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting

them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict ac-

countability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in *Bk. of Augusta v. Earle*, 13 Pet., 586, "upon any sound principle, to give such a construction to the article in question"—a construction which would lead to results like these.

We proceed to the second objection urged to the validity of the Virginia Statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company and the Virginia Company may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations.

There is, therefore, nothing in the fact—that the insurance companies of New York are corporations—to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

In *Nathan v. La.*, 8 How., 73, this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange was not in conflict with the constitutional power of Congress to regulate com-

merce. The individual thus using his money and credit, said the court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are the subjects of state regulation and, inferentially, that they may be subjects of direct state taxation.

"In determining," said the court, "on the nature and effect of a contract, we look to the *lex loci* where it was made, or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant; others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different States. These laws, in various forms and in numerous cases, have been sanctioned by this court." And again: "For the purposes of revenue, the Federal Government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the Federal Government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal Government; and domestic bills or promissory notes are as necessary to the commerce of a State as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the States, much more would a tax upon state paper, by Congress, be a tax on the commerce of a State."

If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire.

We perceive nothing in the Statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be affirmed.

Ordered accordingly.

Cited—10 Wall., 415, 573; 12 Wall., 430; 13 Wall., 283; 16 Wall., 76, 98; 20 Wall., 455, 468; 24 U. S., 539; 26 U. S., 12, 19, 21, 183; 28 U. S., 407; 100 U. S., 95; 104 U. S., 11; 106 U. S., 121, 356, 643; 109 U. S., 47, 537; 8 Biss., 482; 6 Biss., 423; 8 Biss., 34; 1 Wood, 37; 11 Bank. Reg., 172; 13 Bank. Reg., 20; 9 Blatchf., 264; 11 Blatchf., 204; 1 McCrary, 129; 3 Hughes, 13, 19; 1 Hughes, 600; 4 Cliff., 604; 4 Dill., 289; 3 Sawy., 220; 47 Ind., 517; 15 Kan., 636; 87 Pa. St., 182, 183; 3 Am. Rep., 223 (20 Gratt., 614); 4 Am. Rep., 506 (21 Mich., 580); 8 Am. Rep., 623 (55 Ill., 90); 8 Am. Rep., 706 (7 Nev., 140) 9 Am. Rep., 121 (24 Mich., 165); 11 Am. Rep., 585 (30 Wis., 503); 16 Am. Rep., 634 (67 Ill., 571); 22 Am. Rep., 701 (40 Wis., 175); 36 Am. Rep., 349 (71 Me., 514); 44 Am. Rep., 388 (92 N. Y., 325); 28 O. St., 218.

JACK THORINGTON, *Appt.*,

v.

WILLIAM B. SMITH AND JOHN H. HARTLEY.

(See S. C., 8 Wall., 1-14.)

Contract for payment of confederate notes, enforceable—de facto government—confederate notes as a currency—evidence to show con-

tract was to be paid in—effect of evidence—amount of recovery.

A contract for the payment of Confederate notes, made during the late rebellion between parties residing within the so called Confederate States, can be enforced in the courts of the United States.

De facto government is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country.

Under certain limitations, obligations assumed by it in behalf of the country or otherwise will, in general, be respected by the government *de jure* when restored.

The rights and obligations of a belligerent were conceded to the Confederate Government very soon after the war began.

Confederate notes must be regarded as a currency, imposed on the community by irresistible force.

This currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States.

Evidence can be received to prove that a promise, made in one of the Insurgent States, and expressed to be for the payment of dollars, was in fact made for the payment of Confederate notes.

Such evidence does not modify nor alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence.

The party entitled to be paid in Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

[No. 112.]

Argued Mar. 18 and Oct. 6, 1868. Decided Nov. 1, 1869.

APPEAL from the District Court of the United States for the Middle District of Alabama.

The bill in this case was filed in the court below, by the appellant, to enforce a vendor's lien. Judgment having been given for the defendants, the plaintiff took an appeal to this court.

A full statement of the case appears in the opinion of the court.

Messrs. W. P. Chilton and P. Phillips, for appellant:

Parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted to vary, qualify, contradict, add to or subtract from the absolute terms of a written contract.

2 Pars., N. & B., 501; *Baugh v. Ramsey*, 4 T. B. Mon., 155; *Pack v. Thomas*, 18 Sm. & M., 11; *William v. Beasley*, 8 J. J. Marsh., 577; *Morton v. Wells*, 1 Tyler, 383; *Roane v. Green*, 24 Ark., 212; *Galena Ins. Co. v. Kupfer*, 28

Ill., 834; *Mar. Ins. Co. v. Tincher*, 80 Ill., 402; *Morris v. Edwards*, 1 Ohio, 189; *Smith v. Jeffryes*, 15 Mees. & W., 561; *Thompson v. Sloan*, 23 Wend., 71.

The contract was neither immoral nor illegal. *Hodgson v. Temple*, 5 Taunt., 181; *Daler v. Earl*, 3 Gray, 482; *Holman v. Johnson*, Cowp., 841; *Orchard v. Hughes*, 1 Wall., 75 (68 U. S., XVII., 561).

(No counsel appeared for appellee.)

Mr. Chief Justice Chase delivered the opinion of the court:

This is a bill in equity for the enforcement of a vendor's lien.

It is not denied that Smith and Hartley purchased Thorington's land, nor that they executed to him their promissory note for part of the purchase money, as set forth in his bill; nor that if there were nothing more in the case, he would be entitled to a decree for the amount of the note and interest, and for the sale of the land to satisfy the debt.

But it is insisted, by way of defense, that the negotiation for the purchase of the land took place, and that the note in controversy, payable one day after date, was made at Montgomery in the State of Alabama, where all the parties resided, in November, 1864, at which time the authority of the United States was excluded from that portion of the State, and the only currency in use consisted of Confederate treasury notes, issued and put in circulation by the persons exercising the ruling power of the States in rebellion, known as the Confederate Government.

It was also insisted that the land purchased was worth no more than \$3,000 in lawful money; that the contract price was \$45,000; that this price, by the agreement of the parties, was to be paid in Confederate notes; \$35,000 was actually paid in those notes; and that the note given for the remaining \$10,000 was to be discharged in the same manner; and it is claimed, on this state of facts, that the vendor is entitled to no relief in a court of the United States.

And this claim was sustained in the court below, and the bill was dismissed.

The questions before us upon this appeal are these:

(1) Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so called

NOTE.—Contracts payable in Confederate notes; tender of.

Contracts made within Confederate States, during the war, stipulating for payment in Confederate notes, are valid if not made in aid of the war, and payment in the agreed currency is a good discharge of the contract. *Hanauer v. Woodruff*, 82 U. S. (15 Wall.), 439; *Pettis v. Campbell*, 47 Ga., 596; *Rodgers v. Bass*, 46 Tex., 505; *Wilcoxon v. Reynolds*, 46 Ala., 529; *Hale v. Wilkinson*, 21 Gratt., 75; *Coleman v. Wingfield*, 4 Heisk., 133; *Bond v. Perkins*, 4 Heisk., 364; *Ritchie v. Sweet*, 32 Tex., 338; *S. C.*, 5 Am. Rep., 245; *Berry v. Bellows*, 30 Ark., 198; *Merced v. Wiggins*, 74 N. C., 48; *McPherson v. Lynah*, 14 Rich. Eq., 121.

Tender of Confederate money of no avail in payment, though such money was the circulating currency in the community at the time. *Graves v. Hardisty*, 19 La. Ann., 186; *Parker v. Bros.*, 20 La. Ann., 167.

It was held in North Carolina that a tender, in 1863, of Confederate money at its nominal value in payment of a note due in 1867, was not a legal ten-

der for any purpose. *Love v. Johnston*, 72 N. C., 415; *Tate v. Smith*, 70 N. Car., 65.

Held in Alabama that "dollars" is *prima facie* to be construed lawful money of the U. S. *Wilcoxon v. Reynolds*, 46 Ala., 529; *Taunton v. McInnis*, 46 Ala., 619; but see *Mezels v. McGraw*, 44 Miss., 100.

Contracts made during the war in one of the Confederate States payable in Confederate currency, not designed in their origin to aid that government are not, because thus payable, invalid between the parties. *Wilmington, &c., R. R. Co. v. King*, 81 U. S., 596.

Receipt by agent of a London Ins. Co. of Confederate money in payment of premiums, held a good payment and binding upon the company. *Robinson v. International Life Ass. Co.*, 42 N. Y., 64; *S. C.*, 1 Am. Rep., 490.

After the commencement of the war, debtors in the Confederate States had no right to pay the agents or trustees of their creditors in the United States debts due these last in any other currency than legal currency of the U. S. *Fretz v. Stover*, 89 U. S. (22 Wall.), 198; *Taylor v. Thomas*, 89 U. S. (23 Wall.), 479.

Confederate States, be enforced at all in the courts of the United States?

(2) Can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, made for the payment of any other than lawful dollars of the United States?

(3) Does the evidence in the record establish the fact that the note for \$10,000 was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the Government of the United States, by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months, four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the Government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National Government.

What was the precise character of this government in contemplation of law?

It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government.

Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

See 8 WALL.

Examples of this description of government *de facto* are found in English history. The Statute 11 Henry VII., ch. 1, British Stat. at L., 82, relieves from penalties for treason all persons who, in defense of the King, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch. 4 Bl., Com., 77.

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as King *de facto*.

Another example may be found in the Government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the Restoration. The better opinion doubtless is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the King *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the Statute of Henry VII. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (6 St. Tr., 119), in the year following the Restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized State. No obligations of a national character were created by it, binding after its dissolution, on the States which it represented, or on the National Government. From a very early period of the Civil War to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power within the Territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the Treaty of Peace in 1815, according to the judgment of this court in *U. S. v. Rice*,

4 Wheat., 253, "The British Government exercised all civil and military authority over the place." "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be right-fully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose." It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming v. Page*, 9 How., 614, that, although Tampico did not become a part of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible.

It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business

transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer.

The second question, whether evidence can be received to prove that a promise, made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States, is next to be considered.

It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the National Government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended, and if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence.

We have already seen that the people of the insurgent States, under the Confederate Government were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligent power actually established as the government of the country, and contracts made with them must

be interpreted and enforced with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word dollar had the same meaning as under the Government of the United States; that the Confederate notes were never made a legal tender, and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract. But, it must be remembered that the whole condition of things in the insurgent States was matter of fact rather than matter of law and, as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects; and it seems to us that no rule of evidence properly understood requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar is used in the contract before us. Our answer to the second question is, therefore, also in the affirmative. We are clearly of opinion that such evidence must be received in respect to such contracts, in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for \$10,000, to enforce payment of which suit was brought in the circuit court, was to be paid, by agreement of the parties, in Confederate notes.

It follows that the decree of the Circuit Court must be reversed and the cause remanded, for further hearing and decree, in conformity with this opinion.

Cited—14 Wall., 665; 15 Wall., 443, 444, 449; 16 Wall., 409; 19 Wall., 548, 554, 555, 557; 20 Wall., 472; 91 U. S., 3, 506; 94 U. S., 435; 95 U. S., 31; 96 U. S., 184, 192, 557; 97 U. S., 516, 517; 102 U. S., 65; 103 U. S., 793; 104 U. S., 602; 105 U. S., 140; 1 Abb. U. S., 267, note; 4 Bank. Reg., 41, 42; Chase, Dec., 315; 1 Am. Rep., 497 (42 N. Y., 54); 4 Am. Rep., 128, 149 (44 Ala., 134); 12 Am. Rep., 556 (22 Gratt., 628); 22 Am. Rep., 355 (27 Ohio, 623); 25 Am. Rep., 725 (54 Ala., 510); 43 Am. Rep., 444 (28 Ohio, 597); 109 Mass., 382.

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LECIL W. DEAN, *Appt.*,

v.

ROBERT D. HARVEY, Administrator of W.
H. YOUNELL, Deceased.

(See S. C., 8 Wall., 14, 15, note.)

Bill to set aside deed for fraud—insufficient allegations—Confederate notes.

A bill to set aside a deed of land for fraud and inadequate consideration, which sets up a lien in favor of the vendor of the complainant, but in which such vendor is not made a party, nor is there any allegation of notice to the grantor of complainant of the alleged lien for purchase money, shows no ground for relief.

Allegations of fraud, founded wholly upon the circumstance that the land was sold for Confederate notes, without any averment that the complainant was induced to take these notes by fraudulent misrepresentations, affords no ground of relief in equity.

[No. 171.]

Argued Oct. 21, 1869. Decided Nov. 1, 1869.

APPEAL from the Circuit Court of the United States for the Northern District of Georgia.

The bill in this case was filed in the court below, for the cancellation of a deed.

The case is sufficiently stated in the opinion of the court.

Mr. James Hughes, for appellant.

Messrs. J. B. Baldwin and Louis Janin, for appellee.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a bill to set aside a deed of land for fraud and inadequate consideration. It sets up a lien in favor of the vendor of the complainant. A demurrer was interposed in the court below and was sustained, and the bill was dismissed.

The vendor, whose lien is set up, is not made a party, nor is there any allegation of notice to the grantor of complainant, of the alleged lien for purchase money. No ground of relief, therefore, is shown by the allegations of the bill as to this lien.

The allegations of fraud are founded wholly upon the circumstance that the land was sold for Confederate notes, without any averment that the complainant was induced to take these notes by fraudulent misrepresentations of the decedent.

Upon the principles of the decision just read in the case of *Thorington v. Smith* (*ante*, 361) this circumstance, in the absence of such averment, affords no ground for the interposition of a court of equity.

The decision of the Circuit Court must, therefore, be affirmed.

THE TUG JAS. E. EAGLE, MICHAEL B.
KEAN, Claimant and *Appt.*,

v.

WILLIAM T. FRASER, Owner of the Brig
GENERAL WORTH.

(See S. C., "The Eagle," 8 Wall., 15-26.)

NOTE.—To what places the jurisdiction of admiralty is confined. See note to *Allen v. Newberry*, 62 U. S., XVI., 110.

Admiralty jurisdiction — collision — exception — Law of 1845.

District Courts, under the Judiciary Act of 1789, can take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays and rivers navigable from the seas.

The circumstance that a portion of them lie within the limits of another sovereignty, constitutes no objection to the exercise of this power.

Cases of collision should be tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law.

Exception not taken in the trial below is untenable.

The Enabling Act of 1845 is obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury.

The general jurisdiction in admiralty exists without regard to it.

[No. 152.]

Submitted Apr. 8 and Oct. 14, 1869. Decided Nov. 1, 1869.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The libel in this case was filed by the appellee in the District Court of the United States for the Eastern District of Michigan, to enforce an alleged lien on the tug *Jas. E. Eagle*, for damages sustained in a certain collision.

A decree was entered in favor of the claimant, and thereupon the defendant took an appeal to the court below, which confirmed the said decree. Whereupon the said defendant took a further appeal to this court.

A full statement of the case appears in the opinion of the court.

Mr. John S. Newberry, for appellant:

On the argument below, counsel insisted that this action was on a contract.

We insist that the action was for a tort.

In *Ware*, 427, it is held that a case of tort and contract cannot be joined.

If they cannot be joined *a fortiori*, an action cannot be changed—I will not say amended—from one to the other.

Houseman v. Cargo, etc., 15 Pet., 40; 3 Conk. Adm., 264.

A lien is the creature of law.

Harmer v. Bell, 22 Eng. L. & E., 62, cited in 15 Law Rep., 555, Feb., 1853; *The Young America*, 2 Curt., 404; *Vandewater v. Miles*, 19 How., 91 (60 U. S., XV., 557); *The Gen. Smith*, 4 Wheat., 438.

The law in force in Canada, where this damage was done, where this alleged cause of action arose, gives no lien or any action against the wrong-doing vessel, or any right or lien *in rem*.

The laws of the United States can have no extraterritorial operation.

De Lovio v. Boit, 2 Gall., 398; *The Ohio v. Stunt*, 10 Ohio St., 582; *Young Mechanic*, 2 Curt., 410.

The rights of the parties in all cases, especially in actions for a tort, must depend upon the law of the place where the alleged rights accrued.

Story, Conf. L., sec. 323, n. b; *Whiston v. Stodder*, 8 Mart., 95; *The Ohio v. Stunt*, *supra*; *People v. Tyler*, 7 Mich., 161.

Neither the brig, *Gen. Worth*, nor the tug, *Eagle*, nor barge, *F. Moore*, has the proper characteristics to bring it within the Act of 1845, nor to give the Admiralty Court jurisdiction in regard to matters of contract occurring on it.

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1. It must be of "twenty tons burden and upward."

2. "Enrolled and licensed for the coasting trade."

3. "At the time (*i. e.*, the time the cause of action arose) employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes," etc., etc.

It has been held by this court, that the Act limits the jurisdiction to vessels having these three characteristics.

The Genesee Chief v. Fitzhugh, 12 How., 458; *Allen v. Newberry*, 21 How., 245 (63 U. S., XVI., 111); *Maguire v. Card*, 21 How., 248 (63 U. S., XVI., 118); *The Hine v. Trevor*, 4 Wall., 555 (71 U. S., XVIII., 451).

There is no lien in admiralty against the vessel towed in favor of the towing vessel. Neither is there any lien in favor of the vessel towed, for damages suffered for negligent towing.

It will be noticed that the rules of the Supreme Court in admiralty provide for no such cases.

If the question of towage and reciprocal lien growing out of towing were settled when those rules were adopted, it would not have escaped the research of *Judge Story*, who is supposed to have drafted the rules.

Tow-boats are not common carriers. See 1 Pars. Mar. L., 176, n., where the cases are collected.

4. Towing, as a salvage or *quasi* salvage service, may be sustained and the lien given for salvage, but not otherwise. See *The H. B. Foster*, Abb. Adm., 232.

But the case at bar is not such a case.

Until authority is shown holding the lien to exist, I simply refer to the case of *The Gen. Smith*, 4 Wheat., 438, where it is held that on a proceeding *in rem* to enforce a specific lien, it is incumbent on the party to establish the lien in the first instance. *The H. B. Foster*, Abb. Adm., 232.

In this case numerous cases of salvage by tow boats, or towing in the nature of salvage, are referred to. But in every one of them, where the lien was sustained, it was a case against a vessel in distress.

The barge *F. Moore* had no lookout, master nor other officer on deck attending to the navigation of the barge, and the whole damage was caused solely by that negligence.

The following cases have been decided in this court, holding vessels of all classes to blame for not having a lookout: *St. John v. Paine*, 10 How., 585; *The Genesee Chief*, 12 How., 463; *The New York v. Rae*, 18 How., 225 (59 U. S., XV., 361); *Chamberlain v. Ward*, 21 How., 570 (63 U. S., XVI., 219); *N. Y. & B. Tr. Co.*, 22 How., 470 (68 U. S., XVI., 399); 23 How., 291 (64 U. S., XVI., 562); *Whitridge v. Dill*, 23 How., 448 (64 U. S., XVI., 581).

Messrs. William A. Moore and Geo. B. Hibbard, for appellee:

1. Admiralty Courts are courts of the Law of Nations, and a large part of their power, and in some cases their entire power is derivable from such law.

The Huntress, Davies, 100; *Thompson v. The Catharina*, 1 Pet. Adm. Dec., 104; *The Neptune*, 8 Hagg., 129, 140.

2. As such courts, they have jurisdiction

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generally in all cases of maritime collision, for such cases are cases *juris gentium*.

The Johann Frederick, 1 W. Rob., 85; *The Jupiter*, 1 Ben., 536; *The Ticonderoga*, Swab., 215, 217; *The Two Friends*, 1 C. Rob., 271; *The Jerusalem*, 2 Gall., 191; *The Volant*, 1 W. Rob., 383; *The Griefswald*, Swab., 430.

The District Courts of the United States are Courts of Admiralty, each with the same jurisdiction, and all have all "admiralty and maritime jurisdiction." Const. U. S., art. III., sec. 2.

The Act of 1789 gives to all the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." 1 Stat. at L., 76; *Glass v. The Betsey*, 3 Dall., 16.

The navigation of these waters is not inland. They, therefore, are not inland waters. They are, consequently, in every legal aspect, seas.

Moore v. The A. T. Co., 24 How., 1 (65 U. S. XVI., 674).

The courts will take judicial notice of the geographical situation of these waters, that they are navigable from the ocean by vessels of large size.

The Apollon, 9 Wheat., 362; *N. J. Nav. Co. v. Merch. Bk.*, 6 How., 344; *Waring v. Clarke*, 5 How., 441; *The Genesee Chief*, 12 How., 443; *U. S. v. Grush*, 5 Mas., 290; *De Port Maria*, Ch., 4.

They are without the bounds of any county; and within the ideas of Lord Coke himself, are within the admiralty jurisdiction.

4 Inst., 140; 2 East (P. C.), 17, sec. 10; Com. Dig., Admiralty, F., I.; *De Lovio v. Boit*, 2 Gall., 398.

The limits of the jurisdiction are substantially to be sought for in the general maritime law of nations. *Waring v. Clarke*, 5 How., 441; *Jackson v. The Magnolia*, 20 How., 296 (61 U. S., XV., 909); *The Genesee Chief*, 12 How., 443; *P. W. & B. R. R. Co. v. Tow-Boat Co.* 23 How., 209 (64 U. S., XVI., 433); *The Commerce*, 1 Black, 574 (66 U. S., XVII., 107).

The jurisdiction of the district courts exists beneath the Constitution and the Act of 1789, and irrespective of the Act of 1845, which should be considered a piece of legislation founded in a mistake in which, at the time of its enactment, this court partook.

Const. U. S., art. III., sec. 2; 1 Stat. at L., 76; *The Betsey*, 3 Dall., 6.

Upon closer view than any heretofore taken, the Act of 1845 is not restrictive, and if not restrictive, of course the Act of 1789, as it applies to all district courts, must apply and give jurisdiction, in the full meaning of its terms, to the District Court of the Eastern District of Michigan.

1. It is not restrictive by its very language, for it is an Act "extending the jurisdiction," etc.

5 Stat. at L., 726; *Waring v. Clarke*, 5 How., 441; *The Genesee Chief*, 12 How., 443; *The Commerce*, 1 Black, 574 (66 U. S., XVII., 107); *The Sarah*, 1 Lush., 549.

The jurisdiction of the District Courts as to cases arising upon the lakes, has been held in many well reasoned opinions to depend upon the Act of 1789, and not upon the Act of 1845, and that therefore that Act is not restrictive.

Franconet v. The Backus, 1 Newb., 1; *Scott v. The Young America*, 1 Newb., 101; *Parmlee*
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v. The Mears, 1 Newb., 197; *The Great Western*, 4 West, L. Mo., 281; *Wolberton v. Lacey*, 8 Law Rep. N. S., 672; *The Belfast* [ante, 266].

"The true test of admiralty jurisdiction," says Justice Story in an early case, "is whether the vessel be engaged substantially in maritime navigation, or in interior navigation and trade, not on tide-waters."

The Orleans, 11 Pet., 175, 183; *Peyroux v. Howard*, 7 Pet., 324.

"Since the case of *The Genesee Chief*" says Mr. Justice Nelson, "navigable waters may be substituted for tide-waters."

The Plymouth, 3 Wall., 20 (70 U. S., XVIII., 125); *The Magnolia*, 20 How., 296 (61 U. S., XV., 909); 1 Curt. Com. U. S. Courts, sec. 46.

The lien exists from the very nature of the case, and exists in precisely such a case.

The Nightwatch, 1 Lush., 542; *The John Fraser*, 21 How., 184 (62 U. S., XVI., 106); *Sturges v. Boyer*, 24 How., 110 (65 U. S., XVII., 591); *The Express*, 1 Blatchf., 365; *The Hector*, 4 Blatchf., 199.

2. The lien may be said to be inchoate at the time of the collision; existent at the place where the tort takes place; enforceable when the offending *res* comes within the jurisdiction of a court exercising the powers of a Court of Admiralty.

Fland. Ship, sec. 152; *The Bold Buccleugh*, 7 Moore, P. C., 284; *The Rock Island Bridge*, 6 Wall., 213 (73 U. S., XVIII., 758).

But it is abundantly held that the lien exists and can be enforced, wherever the property is found within the jurisdiction of an Admiralty Court.

The Bee, 1 Ware, 332; *The Commerce*, 1 Black, 574 (66 U. S., XVII., 107); *The Slavers*, 2 Wall., 383 (69 U. S., XVII., 911); *U. S. v. The Betsey*, 4 Cranch, 443; *The Marino*, 9 Wheat., 391.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The libel was filed in this case by Fraser against the tug and barge, Franklin Moore, for a collision with the brig General Worth, at the head of the Detroit River, about two o'clock on the morning of the 2d of September, 1864. The brig was a vessel of twenty tons burden and upwards, enrolled and licensed at the Port of Buffalo for the coasting trade, and was on her voyage with a cargo of lumber from the Port of Saginaw in the State of Michigan, to the Port of Buffalo, New York; and had proceeded on her way to the head of St. Clair River, when she was taken in tow by the tug, under an agreement to tow her to Lake Erie. The tug had with her two tows beside the brig—the schooner, Telegraph, and the barge. The schooner being the first in tow, the brig second, and the barge the third and last—all tailed to the tug. When the tow had reached the head of the Detroit River, the brig grounded upon Peach Island Reef; and while fast there the barge, being attached to her by a short hawser, came with her stern against the stern of the brig with great violence, doing very considerable damage.

The answer of M. B. Keen, the owner of the

tug, denies most of the allegations in the libel; and charges that the brig was run into by the barge, without any fault or want of skill on the part of the master or the hands of the tug. Denies also that the libellant had any lien or claim on or against the tug that could be enforced in a Court of Admiralty. The answer of A. H. Doty, the owner of the barge, charges that when the tow arrived at the head of the Detroit River, which was about two o'clock in the morning, it was very dark and cloudy, with a strong breeze; that from the negligence and ignorance of the master and hands, the tug was half a mile or a mile out of the usual course of navigation at that place, which caused the grounding of the brig; and that the barge being towed by direction of the master of the tug with a short hawser, and it being dark and with a strong breeze she was forced against the stern of the brig, doing whatever damage occurred.

A large amount of evidence was taken on both sides; and among other things, it appeared that the place where the collision occurred was on the Canada side of the line through the Detroit River, between that Province and the United States; and also that there was no law in Canada whereby a lien is given in a case of collision, against the offending vessel for damages. After the argument of counsel and consideration of the court, a decree was entered dismissing the libel as to the barge, and sustaining it against the tug. On appeal to the circuit, this decree was affirmed. The case is now before us on appeal from this decree. The question of merits upon the proofs is briefly urged by the counsel for the appellant; but we dismiss it, saying that we fully concur with the conclusion of the courts below.

We shall only examine the questions of law.

The summary of them, as stated by the learned counsel, is (1) There is no law in force in the Province of Canada, the place where the tort was committed, that gives a lien upon the vessel for the alleged damages; (2) The laws of the United States have no extraterritorial force in a foreign territory to create a lien; and (3) The admiralty lien is a right in the thing—*ius in re*, and not *ius ad rem*—and the lien must depend upon the law of the place where the alleged right occurred.

It is apparent from the grounds upon which the learned counsel has placed his claim to a reversal of the decree below, that he has entirely misapprehended the scope and effect of the decision of this court in the case of *The Genesee Chief*, 12 How., 443; and the several cases following it, *Jackson v. The Magnolia*, 20 How., 296 (61 U. S. XV., 909); and *The Hine v. Trevor*, 4 Wall., 555 (71 U. S. XVIII., 451).

The leading case obliterated the limit, that had been previously adopted and enforced in the jurisdiction in admiralty, to tide-waters; and held that, according to the true construction of the grant in the Constitution, it extended to all public navigable waters, whether influenced by the tide or not. The *Chief Justice*, in delivering the opinion, observes: "It is evident that a definition (of the grant in the Constitution) that would, at this day, limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable waters, including lakes and rivers, in which there is no tide; and, certainly, there

can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public waters used for commercial purposes and foreign trade. The lakes, and the waters connecting them," he observes, "are undoubtedly public waters, and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

It follows, as a necessary consequence of this interpretation of the grant in that instrument, the District Courts, upon whom the admiralty jurisdiction was exclusively conferred by the Judiciary Act of 1789, can take cognizance of all civil causes of admiralty jurisdiction upon the lakes, and waters connecting them, the same as upon the high seas, bays and rivers navigable from the sea. These waters fall within the same category, and are subject to the same jurisdiction, and hence the circumstance that a portion of them lie within the limits of another sovereignty constitutes no objection to the exercise of this power. Before the limit of tide-water was removed by the judgment in the case of *The Genesee Chief*, this jurisdiction was constantly exercised in cases of marine torts upon the high seas, bays and rivers in which the tide ebbed and flowed, occurring in any part of the world, and in respect to which an American ship was concerned; and, since that judgment, occurring upon any bay or public river as far as navigable, irrespective of the tide.

Since the recent Acts of Parliament, in England, removing the ancient restriction by the common law courts upon the admiralty jurisdiction, it seems to be exercised as freely and broadly as in this country. The case of *The Diana* arose out of a collision on the Great Holland Canal in 1862. An exception was taken to that jurisdiction founded upon the old objection, but was overruled by Dr. Lushington. 1 Lush. R. P., 539. So, in the case of *The Courier*, 1 Lush., 541, which was for a collision on the Rio Grande, in foreign waters. And *The Griefswald*, the same. Swab. R., 480. It is insisted, however, that, if the court will take jurisdiction for a collision occurring on foreign waters, and within foreign territory, the local law of the place of collision should govern; and hence the law of Canada in the present case; and *Smith v. Conary*, in this court, is cited as an authority for the doctrine. 1 How., 28. The collision in that case occurred in the Port of Liverpool, while the vessel of the defendant was coming out. The defendant set up in defense, that by the statute law of England he was compulsorily obliged to take on board of his ship a Liverpool pilot, which he did; that she was exclusively in his charge when the accident occurred; and that this law, as construed by the courts of England, excused the owner and master of the vessel; and this was agreed to by the court, and applied to the case, the *Chief Justice* giving the opinion. All vessels entering into or departing from a domestic or foreign port, are bound to obey the laws and well known laws and usages of the port, and are subject to seizure and penalties for disobedience; and when submitting to them, they are entitled to all the protection which they afford. The same question was recently before Dr. Lushington in the case of a collision between the American

ship Annapolis and a Prussian bark, at the same port, and the American ship was discharged on the ground as in the case above cited. 1 Lush., 293. These are exceptional cases, and furnished no rule to the court below for the trial of the collision in question. It was tried there, as it should have been tried, according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law.

An objection is also taken, that the case was not brought within the requirements of the Act of 1845, so as to give the district court jurisdiction—that is, it was not shown that the vessels were of the burden of twenty tons and upwards or enrolled or licensed for the coasting trade, or employed at the time, in the business of commerce and navigation between ports and places in different States.

These facts were substantially set forth in the libel, and the answers did not set up any specific exception on this ground, nor does it seem to have been taken by the respondents at all in the progress of the trial below. The objection we think untenable.

This Act of 1845 (5 Stat. at L., 726), as is apparent from several of the cases before the District Courts whose districts lie contiguous to the lakes, has occasioned a good deal of embarrassment in administering their admiralty jurisdiction since the decision in the case of *The Genesee Chief*. It is quite clear, under this decision, in the absence of that Act, the District Courts would possess general jurisdiction in admiralty over the lakes and the waters connecting them; and hence, there would be no more difficulty in the administration of the law than in cases upon the high seas or bays or rivers navigable from the sea.

At the time it was passed, tide-water was the limit of admiralty jurisdiction, and the Act was intended to remove this restriction upon the court, as it respected these lakes, and to extend the jurisdiction to them, thereby making these waters an exception as to the tide-water limit. The power conferred by the Act, however, was not that of general admiralty jurisdiction, but was limited to cases of "contract and tort, arising in, upon or concerning steamboats, and other vessels, of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between ports and places of different States." The better opinion, we think, is, that the Act does not embrace, but necessarily excludes, cases of prize. These are neither cases of contract or tort, and the vessels engaged in making the seizure, as prize of war, which are ships of the navy or privateers, are not employed at the time, in the business of commerce and navigation. We think it also a matter of grave doubt if the Act confers jurisdiction in cases of salvage, jettison or general average. These are not matters of contract, according to the most eminent commentators on the subject (1 Story, Eq. Jur., sec. 490; 3 Kent, Com., 246), and they certainly are not cases of tort.

One question, and a very important one, is, whether, since the decision of *The Genesee Chief*, which opens the lakes and waters connecting them to the general jurisdiction of the District Courts in admiralty, they can entertain

this jurisdiction in cases outside of that conferred by this Act. If the affirmative of this question should be sustained, although the system would be disjointed and incongruous, yet it would, in its result, remedy most of the difficulties and inconveniences now existing. But the opinions of the judges of this court, as expressed in several cases, though the question has never been directly before the court for decision, are, that the Act should be regarded as restrictive of the general jurisdiction of these courts. This was the opinion expressed by the Chief Justice in the case of *The Genesee Chief* and has been followed by other justices in this court, who have had occasion to express any opinion in the subject. The history and operation of this Act of 1845 are peculiar.

It is "An Act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same." At the time it was enacted it had the effect expressed and intended, and so continued for some seven years, when the case of *The Genesee Chief* was decided. From that time, its effect ceased as an enabling Act; and has been no longer regarded as such. It is no longer considered by this court as conferring any jurisdiction in admiralty upon the District Courts over the lakes, or the waters connecting them. That is regarded as having been conferred by the grant of general admiralty jurisdiction by the 9th section of the Act of 1789 to these courts. The original purpose of the Act, therefore, has ceased, and is of no effect; and, in order to give it any, instead of construing it as extending the jurisdiction in admiralty, it must be construed as limiting it—the very reverse of its object and intent, as expressed on its face.

In the case of *The Hine v. Trevor* [*supra*], it is said by the learned justice, in delivering the opinion of the court, that the jurisdiction in admiralty on the Western rivers did not depend on the Act of 1845, but was given by the original Act of 1789; and he intimated further, that the jurisdiction on the lakes was also founded on this Act, though governed in its exercise by the Act of 1845. The case then before the court did not arise on the lakes, but on the Mississippi River; and the remarks made in respect to the jurisdiction upon the lakes, was in answer to an impression very general, as is said, among the profession in that section of the country, and even of the learned judge whose judgment the court was reviewing, that the jurisdiction upon the rivers depended on this Act of 1845. That case, not at all involving the question of jurisdiction upon the lakes, but simply upon the interior rivers, did not receive that full deliberation in respect to this question, which, in the present case, is called for. We have now examined it with care, and given to it our best consideration, and are satisfied, that since the decision of the case of *The Genesee Chief*, the court must regard District Courts as having conferred upon them a general jurisdiction in admiralty upon the lakes and waters connecting them, by the 9th section of the original Act of 1789; and the enabling Act of 1845, therefore, has become inoperative and ineffectual as a grant of jurisdiction; and, as it was an Act, on the face of it, and as intended, in its purpose and effect, to

extend the admiralty jurisdiction to these waters, we cannot, without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this Act, as to the concurrent remedy at common law, is, in effect, the same as in the Act of 1789, and is, therefore, of necessity, useless and of no effect. *The Belfast* [ante, 266].

The 9th section of the Judiciary Act of 1789 confers exclusive original cognizance of all civil causes of admiralty jurisdiction upon the district courts, "including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."

When this clause first came under the consideration of the courts, there was a good deal of difficulty in determining whether the words, including all seizures, etc., were intended as being comprehended within the grant of general admiralty jurisdiction, or as simply within the cognizance of the District Courts, as the words were ambiguous, and might be construed as either within the cognizance of the District Courts or within the class of cases of general admiralty jurisdiction. The difference was material; as if not within the general admiralty jurisdiction, the parties were entitled to a trial by jury; otherwise not. This question was first decided in the case of *U. S. v. La Vengeance*, 3 Dall., 297, the court holding that the cases were included within the general admiralty jurisdiction. The point was contested in several subsequent cases, but the court adhered firmly to its first decision. *The Sally*, 2 Cranch, 406; *The Betsey*, 4 Cranch, 443; *The Samuel*, 1 Wheat., 9; *Id.*, 20; *The Sarah*, 8 Wheat., 391. The Act, notwithstanding these decisions was still effectual and necessary to sustain the general jurisdiction, as the limit of tide waters then prevailed in the admiralty courts, and the jurisdiction given by the Act extended to waters which were navigable from the sea, irrespective of the tide. The seizures, also, in many instances, would be made within the body of a county—*infra corpus comitatus*—within which the admiralty jurisdiction was not yet admitted. *Waring v. Clarke*, 5 How., 441.

But since the decision in the case of *The Genesee Chief*, this clause, above recited, is no longer of any force. The general jurisdiction in admiralty exists without regard to it; and if any effect should be given, instead of extending, as was intended, it would restrict it; and, for the reason given in respect to the Act of 1845, it has become useless and of no effect.

The decree of the court below affirmed, with costs and interest.

Cited—21 Wall., 588; 109 U. S., 632; 2 Hughes, 17; 5 Hughes, 382; 1 Bro., 178, 180, 184, 335, 340, 497, 532, 533, 555, 556; 3 Bank. Reg., 182; 1 Abb. U. S., 340; 5 Ben., 77; 8 Ben., 155; 7 Am. Rep., 94 (26 Wis., 497); 11 Am. Rep., 283 (9 R. I., 419); 14 Am. Rep., 92 (62 Ill., 227); 35 Wis., 107.

FURMAN, GREEN ET AL., *Plfs. in Err.*,

v.

P. L. NICHOL, CLERK OF DAVIDSON COUNTY COURT, COLLECTOR OF TAXES, ETC.

(See S. C., 8 Wall., 44-64.)

Jurisdiction over state judgments—practice in—when attaches—judicial notice—contract with bank to receive its notes for taxes—attaches to the notes—law repealing.

A cause can be removed from a state court into this court, under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right which he claimed it gave him was denied to him by the state court.

The particular provision of the Constitution which the plaintiffs in error say has been violated in its application to their case, need not be contained in the pleading.

If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached its conclusion and judgment without applying it to the case in hand, then the jurisdiction of this court attaches.

It need not appear that the state court erred in its judgment.

It is sufficient to confer jurisdiction, that the question in the case was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

All courts take notice, without pleading, of the Constitution of the United States, and the public laws of the State where they are exercising their functions.

A State may, in the charter creating a bank, agree to receive the paper of the bank for all taxes due the State.

Such a contract is binding on the State, and within the protection of the Constitution of the United States.

Courts do not favor repeals by implication, and never sanction them if the two acts can stand together.

The State had the right at any time to withdraw its guaranty, but it must be done in such a manner as not to impair the obligation of its contract with the note holders of the bank.

The guaranty attached to the paper itself, and could not be withdrawn from it; and notes in circulation at the time of the repeal of the Act are not affected by it, and carry with them the pledge of the State to be received in payment of taxes by every *bona fide* holder.

Section 28 of the charter of the Bank of Tennessee, constituted a contract with the holders of the notes of the Bank, and it was not in the constitutional power of the Legislature to repeal the section so as to affect the notes which, at the time, were in circulation.

[No. 106.]

Argued Mar. 11, 1869. Decided Nov. 1, 1869.

IN ERROR to the Supreme Court of Tennessee.

This case comes by writ of error to the Supreme Court of Tennessee, under the 25th section of the Judiciary Act of 1789.

It involves the question of the constitutionality of an Act of the Legislature of that State, passed June 10, 1865, repealing the 13th section of the Act of Jan. 19, 1833, establishing the Bank of Tennessee, by which the State was

NOTE.—What laws are void as impairing the obligation of contracts. Vested rights defined. See note to *Fletcher v. Peck*, 10 U. S. (6 Cranch), 57.

bound to receive the issues of such bank for taxes.

The plaintiffs in error, Francis Furman and Francis W. Green, in August, 1866, filed their petition in the Circuit Court of Davidson County, in the State of Tennessee, against the defendant in error, Phillip L. Nichol, who was clerk of the County Court of said County, and one of the collectors of state taxes, for a *mandamus* to compel the latter to receive from the former \$3,535.58, in the notes and issues of the Bank of Tennessee, issued prior to May 6, 1861, in full payment of that amount tendered by plaintiff as due from him to the State of Tennessee, for taxes as a merchant, for the year ending Aug. 28, 1866, and to compel the defendant in error to issue to plaintiffs in error a license as merchants, the said Green having entered into partnership with Furman, Aug. 1, 1866.

The petition alleges the application for the license, the tender of the bond required by the laws of Tennessee, and a sworn statement of invoice cost of all the goods purchased by Furman, upon which statement there was due to the County of Davidson the sum of \$883.65, which sum was tendered to the defendant in error in legal currency of the United States, which he refused to accept, unless said Furman would also pay him the state taxes in like currency. That upon said statement, there was also found to be due to the State of Tennessee the sum of \$3,584.58, and that said Furman tendered to the defendant in error, and offered to pay him said sum in the notes and issues of the Bank of Tennessee, issued prior to May 6, 1861. That the defendant in error refused the same, because said notes and issues of the said bank were not at par, and refused to accept the bond tendered, and to issue to plaintiffs in error a license, because Furman had not paid said state tax in par funds, and had only tendered and offered to pay the same in said issues of the Bank of Tennessee, in which issues he insists he had a right to pay said state tax.

In said petition, the charter of the Bank of Tennessee is set forth, and particularly the 12th section of the said charter, to wit: the Act of the General Assembly of the State of Tennessee, passed Jan. 19, 1838, entitled "An Act to Establish a State Bank to Raise a Fund for Internal Improvements, and to Aid in the Establishment of a System of Education," the said 12th section being in the following words, viz.:

Section 12. "Be it enacted, that the bills or notes of said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the Treasury of the State, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the State."

Said petition further states, that the bank notes tendered were issued by the Bank of Tennessee, as provided for in said 12th section of said charter, and payable to bearer; that the corporation is still in existence and the charter un-repealed; that said bank was organized and issued its bills or notes under the provisions of said charter, which circulated as money and legal currency.

That said charter was a contract made with the people of the State, and every person into
See 8 WALL.

whose possession the said notes and issues of said bank might come, that the same should be received by all collectors of taxes, for dues to the State of Tennessee, and it is not in the power of the Legislature of the State of Tennessee to impair or annul the validity and binding force of said contract.

A writ of *mandamus nisi* issued, by order of Hon. M. M. Brien, Judge of the 9th Judicial Circuit of the State of Tennessee.

To the petition the defendant filed a demurrer.

At the September Term, 1866, of said Circuit Court of Davidson County, on argument, the demurrer was overruled and a peremptory *mandamus* was awarded. "Commanding the defendant in error to receive of the plaintiffs in error, in payment of plaintiffs' state tax, as merchants, the notes or issues of the Bank of Tennessee, issued prior to the 6th day of May, 1861, and to issue to the plaintiffs a license."

The Supreme Court of the State of Tennessee, on appeal, reversed said judgment, sustained the demurrer, and dismissed the petition. Whereupon the petitioners sued out this writ of error.

Some additional facts in the case appear in the opinion of the court.

The question as to the jurisdiction of this court was raised by counsel for the defendant in error, by motion. The case was very fully argued by counsel, both as to the question of jurisdiction and upon the merits.

Messrs. Geo. Hoadley, Robert L. Caruther, and B. R. Curtis, for plaintiffs in error:

1. After the recent elaborate examination of the question in *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116 (68 U. S., XVII., 571), in which *Mr. Justice Catron*, although dissenting, concurred as to the question now under consideration, we need not multiply the authorities to the proposition, that jurisdiction is conferred upon this court under the 25th section of the Judiciary Act of 1789, where it appears that the constitutional question was presented to and passed upon by the court below, either by express averment or necessary intendment in the pleadings in the case, or where it appears from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which it passed, without deciding it. These are the fifth and sixth of the classes of cases in which jurisdiction is said by *Mr. Justice Catron*, in pronouncing the opinion of the court in *Armstrong v. Treas. Athens Co.*, to have been conferred on this court by writ of error under the 25th section of the Act of 1789. As *Mr. Justice Miller* well says, on page 143 of 1 Wall. (68 U. S., XVII., 576), after citing the case last referred to, "Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular Act of Congress or part of the Constitution supposed to be infringed by the state law ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on, by the party who brings the writ of error, and that the right thus claimed by him was denied."

Crowell v. Randell, 10 Pet., 368; *Ocean Ins.*

Co. v. Polleys, 13 Pet., 157; *Lessee of Coons v. Gallaher*, 15 Pet., 18; *Neilsen v. Lagow*, 12 How., 98; *Medberry v. Ohio*, 24 How., 413 (65 U. S., XVII., 739); *R. R. Co. v. Rock*, 4 Wall., 177 (71 U. S., XVIII., 381).

2. The 12th section of the Act of Incorporation of the Bank of Tennessee was not repealed by section 603 of the Tennessee Code, which went into effect in May, 1853.

It is claimed that section 603 repealed by implication the 12th section of the Act of Incorporation. But it must be a necessary implication. Mr. Dwaris, in his work on Statutes, p. 533, says that there is no repeal by implication unless made quite plain.

Dr. Foster's case, 11 Coke, 63; *Bowen v. Lease*, 5 Hill, 221; *Ches. & O. Can. Co. v. Balt. & O. R. Co.*, 4 Gill & J., 1; *Street v. Com.*, 6 Watts & S., 209; *Com. v. Herrick*, 6 Cush., 465; *State v. Minton*, 3 Zab., 529.

3. The 12th section of the Act of Incorporation of the Bank of Tennessee was, until repealed, a contract between the State and every bill holder of the bank, obliging the former to receive the bills for taxes.

4. This contract as to bank-bills, issued before the repeal of the 12th section, is wholly unaffected thereby; the obligation to receive the circulation when paid for taxes, is not discharged by the circumstance that the holder purchased it after repeal.

With the first holder it is admitted that a contract is complete on the part of the State, when he has received the note from the bank. This contract, it cannot be denied, imparts value to the note in his hands. The nature of the contract is an assurance by the State that the note may be used in payment of taxes. Is this a personal contract with the holder? Surely not; for contracts are unassignable, because personal, only when the relations between the parties are such as to show that the performance was intended to be undertaken to or by the particular person, and none other.

The purpose of the statute is not merely to assure the first holder that he may use the bills in the payment of taxes, but to create confidence on his part in their value; indeed, to add a value to them in his hands, by assuring him that his transferee may also so use them. The assurance or guaranty that each holder may pay them out for taxes, is not a new agreement with such holder first made at the time he becomes holder. When the first holder took the bills from the bank, the State promised him that if he should assign them, his assignee and his assignee's assignee might also use them for payment of taxes. To deprive his assignee of this right is, therefore, to violate a contract made originally with him. Such is the natural import of the language of the section, and is the just result of the fact that the paper has an increased value in the first holder's hands, by reason of such right of the assignee. It makes it more current. And so, being always able to pass the bills readily, he confides in them as he would money, and does not hurry with them, for coin, to the counter of the state bank, or seek to get rid of them as of doubtful credit. The Legislature says to the first holder of the bill, when he takes it from the bank: "We promise you and your assigns, that if you will take this bill, you and they, whoever may

be its holder, may always use it in payment of taxes." Such promise is a continuing guaranty, necessarily negotiable. This right so to use is thus paid for by the first holder to the bank; in his hands it is property, acquired for a consideration, which he in turn sells and is paid for when he sells the note. Otherwise, if the note has this increased value in his hands, because of its power in his assignee's hands, it is a value for which he has given no consideration whatever.

Judge McLean says, in *Woodruff v. Trapnall*, 10 How., 206: "The guaranty included all the notes of the bank in circulation, as clearly as if on the face of every note the words had been engraved—'This note shall be received by the State in payment of debts;' and that the Legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument. Anyone had a right to receive them and to test the constitutionality of the repeal."

That case was *mandamus*, to compel the receipt of notes of the State Bank of Arkansas, in payment of a judgment recovered by the State against Woodruff, the State Treasurer. In creating the bank, the State had agreed that "the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas." It was the sole stockholder of the bank, and appointed its directors. It repealed the clause of the charter permitting this use of the notes. It did not appear whether Woodruff was possessed of these notes before the repeal or not. In all these particulars, that case is like this. And there are no other important features of either case. Judge McLean, in expressing the views of the majority of the court (*Woodruff v. Trapnall*, 10 How., 205), says: "The notes are made payable to bearer; consequently, every *bona fide* holder has a right under the 28th section, to pay to the State any debt he may owe it, in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a State."

That the State had the right to repeal the above section, may be admitted. And the emissions of the bank subsequently are without the guaranty. But the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may owe to the State, in the notes thus issued. It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in his possession at the time the 28th section was repealed. It is admitted that he had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section; and nothing more than this could be required. On page 208, he adds:

"The right to make payment to the State in this paper arises out of a continuing contract, which is limited in time by the circulation of the notes to be received. They may be offered in payment of debts due to the State in its own right, before or after judgment, and without regard to the cause of indebtedment. Whatever

may be the demerits of the plaintiff in error, they do not affect the nature and extent of the obligation of the State, and that obligation cannot be withdrawn from this paper. Into whosoever hands it shall come, it carries with it the pledge of the State to receive it in payment of its debts."

It is true that *Woodruff v. Trapnall*, 10 How., 205, was decided by five judges against four, but it is also true that it has never been overruled, but has often been affirmed. It is now too late to question it. Eighteen years have since elapsed. It furnished the standard of duty and legal obligation, during the larger part of the life of the Bank of Tennessee, and was undoubtedly the basis of the confidence the holders of the notes of that bank felt.

Paup v. Drew, 10 How., 218; *Trigg v. Drew*, 10 How., 224; *Curran v. Arkansas*, 15 How., 304; *Hawthorne v. Caley*, 2 Wall., 10 (69 U. S., XVII., 776); *McGee v. Mathis*, 4 Wall., 143 (71 U. S., XVIII., 314); *VonHoffman v. Quincy*, 4 Wall., 535 (71 U. S., XVIII., 408).

Messrs. Horace H. Harrison, John Trimble, and Horace Maynard, for defendant in error:

1. The writ of error in this cause being to a state court, the jurisdiction of this court to review the cause depends upon whether or not there was drawn in question the validity of the Act of 1838, chartering the Bank of Tennessee, or the validity of the Act of 1865, repealing the 12th section of said Act, upon the ground of said Acts or either of them being repugnant to the provisions of the Constitution of the United States, and whether the decision of the state court was in favor of its or their validity.

If the validity of neither of these Acts, upon the ground of such repugnance, was drawn in question in the Supreme Court of Tennessee, or if the validity of neither was drawn in question and neither of these Acts decided by that court to be valid, in either case the writ of error ought to be dismissed.

It is not sufficient that one of the questions in the 25th section of the Judiciary Act might have arisen and been actually decided.

Williams v. Oliver, 12 How., 111; *The Victory*, 6 Wall., 382 (73 U. S., XVIII., 848); *Hamilton Co. v. Mass.*, 6 Wall., 632 (73 U. S., XVIII., 904).

Nor does error lie to a state court on the ground of an alleged violation of the Constitution, unless it appear by the record that the point was raised in the state court; that the party called attention to the particular clause of the Constitution relied upon, and to the right claimed under it, and that the point thus distinctly raised was ruled against him.

Furney v. Toule, 1 Black, 350 (66 U. S., XVII., 216); *Hoyt v. Sheldon*, 1 Black, 518 (66 U. S., XVII., 65).

Even if this strict and very correct ruling is at all modified in the case of *Bridge v. Hoboken Co.*, 1 Wall., 116 (68 U. S., XVII., 571), still, as it is laid down in that last named case, the pleadings must make a case which necessarily comes within the provisions of the Constitution.

The intention of the parties to raise a constitutional question is not enough; it must be actually raised and decided.

Matheson v. Br. Bank of Mobile, 7 How., 260.

There is no allegation or statement in the

record by plaintiffs in error, that there was a contract between the State or that its Legislature had impaired, or that by any act it had impaired or attempted to impair the obligation of such contract.

There was no question made as to the validity of the Act of 1838. Plaintiffs in error themselves must have claimed that that Act was valid, for the very contract, if there was any such contract, was made by, or grew out of that Act.

The decision of the state court was a decision upon the construction of the effect of the Statute of 1838, section 12, and not upon the validity of any statute.

Where a state law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court has no jurisdiction.

Bk. of Cincinnati v. Buckingham, 5 How., 317; *G. G. R. R. & Banking Co. v. Marshall*, 12 How., 185; *Lawler v. Walker*, 14 How., 149; *Robertson v. Coulter*, 16 How., 106; *Congdon v. Goodman*, 2 Black, 574 (67 U. S., XVII., 257).

The cases in 1 Wall., 116 (68 U. S., XVII., 571), and in 3 Wall., 51 (70 U. S., XVIII., 137), do not reach the principle in the matter of objection to the jurisdiction of the Supreme Court in this cause.

We call the attention of the court (if deemed necessary to refer to authorities upon a question which must be so familiar to the court), to the following cases:

Crowell v. Randell, 10 Pet., 368; *Chouteau v. Marguerite*, 12 Pet., 507; *Ocean Ins. Co. v. Polleys*, 13 Pet., 157; *Bank of Ky. v. Griffith*, 14 Pet., 56; *Coons v. Gallaher*, 15 Pet., 18; *Bk. of Cincinnati v. Buckingham*, 5 How., 317; *Maxwell v. Newbold*, 18 How., 511 (59 U. S., XV., 506); *R. R. Co. v. Rock*, 4 Wall., 177 (71 U. S., XVIII., 381).

From which are extracted the following points:

To give jurisdiction to the Supreme Court to review the judgment of a state court, it must appear:

1. That some one of the questions stated in the Judiciary Act did arise.

2. That the question was decided by the state court as required by that section.

3. It is sufficient, if it appear by clear and necessary intendment from the record, that such question must have been raised and decided.

4. It is not enough that such question might have arisen, or been applicable; it must appear that it did arise and was applied.

There was no contract between the State of Tennessee and anyone, at the passage of the Act, under the 12th section, but said section was simply a proposition made by the State, which, if accepted by anyone taking the issues of the bank upon the faith of the provisions of that section, was binding upon the State so long as that section remained unrepealed and the proposition outstanding or unwithdrawn, and no longer.

Even if this 12th section is treated as a guaranty on the part of the State, the contract of guaranty, like every other contract, implies at least two parties, and requires the agreement of both parties to make it valid.

The provisions of the 12th section of the Act of 1838 cannot be said to be a guaranty. It was not an agreement or undertaking to assume

or pay the notes of the Bank of Tennessee, but to receive these notes in payment of taxes and dues to the State. It cannot be said that there was the essential feature or element of mutuality in the transaction, until the notes of the bank were taken, under and upon the faith of the undertaking on the part of the State, contained in the 12th section. The obvious import of the provision and the intention of the State was, to make the notes current. The State was incorporating a bank, in which it was interested at least to the extent of fostering and building up its educational and internal improvement interests.

The State did not, by the 12th section, say:

I will guaranty the payment or redemption of the notes of the bank, and the faith and credit of the State is pledged to do that; but I desire to make the notes of the Bank of Tennessee, when issued, circulate currently at par as the representative of money. If any person will take these notes, I will receive them in payment of taxes; and if thus taken, it will operate as a contract with the holder to that effect; when he takes them he accepts the offer I make. He assents to the terms contained in the proposition I make.

We have, then, the parties, viz.: the State and the party who accepts the proposition by taking the notes; the consideration, viz.: the cause moving in making the proposition; the assent of the parties, without which, as it is said, there can be no legal contract, and the notes, the subject of the contract.

This taking of the notes was the act which made the particular person who took them, a party. His rights, under a contract, it is clear, for the first time then accrued. The notes issued by the bank, payable to bearer, were negotiable on delivery; and the bank was bound for all its lawful issues and to redeem them from the holder upon presentation. The emission of the notes to parties receiving them, or the delivery by the holder to others, who thus became the holder of the notes, made the contract complete between the bank and the holder. And as long as the 12th section of the charter of the Bank of Tennessee was in force, it is to be presumed that the issues of the bank were taken upon the faith of the promise of the State contained in that section.

But can it be said that, after the 12th section was repealed, and the proposition in that section withdrawn, that a person taking the notes of the bank took them upon the faith of that promise? It cannot be doubted that the Legislature had the right to repeal the 12th section, but it is said that the repeal of this section did not and could not affect the liability of the State to take any and all of the notes of the bank issued prior to the repeal of the 12th section.

It is true that in *Woodruff v. Trapnall*, 10 How., 205, it was held by a majority of the court, that the 28th section of the charter of the State Bank of Arkansas (very similar to the 12th section of the charter of the Bank of Tennessee), was a continuing guaranty on the part of the State that the notes should be received; that the notes were made payable to bearer and, consequently, every *bona fide* holder had a right, under that section, to pay to the State any debt he might owe it; that the State had a right to repeal said section, and the emissions

of the bank subsequently were without the guaranty; that the notes in circulation at the time of the repeal were not affected by it; and that it was sufficient, if Woodruff had the notes in his possession at the time he made the tender, and they were issued by the bank before the repeal of the section; and that into whosoever hands the notes of the bank might come, they carried with them the pledge of the State to receive them in payment of its debts.

But, admitting all that can be claimed as having been decided in *Woodruff v. Trapnall*, it does not follow that the State of Tennessee is bound to receive from the plaintiffs in error the issues of the Bank of Tennessee, tendered by them in payment of the amount due from them for exercising the privilege of selling goods in that State, at wholesale, and that the State, through its officers, should be compelled to issue to them a license to exercise such privilege.

The entire stock of the Bank of Tennessee did not belong to the State of Tennessee, nor did the State furnish the capital and receive the profits, as it was held was the case with the Bank of the State of Arkansas, the State of Tennessee being a mere trustee of a large portion of the \$5,000,000 invested in the Bank of Tennessee as its capital.

It seems to be clear that, as plaintiffs in error in this case did not act upon the proposition made by the State in the 12th section of the charter of the Bank of Tennessee until after that proposition was withdrawn—did not accept it, nor have any rights vested under it, until the repeal of the section, which amounted to a withdrawal of the proposition, that they cannot be heard to set up a contract with the State.

3. The plaintiffs in error fail to show that the notes held and tendered by them to the defendant were the lawful issues of the Bank of Tennessee. They show that the notes were issued by the bank, as provided for in the said 12th section of said charter; but it will be noticed that the section referred to does not authorize the issue of the notes of the bank and it cannot, therefore, be said that the notes tendered by plaintiffs in error were issued by the bank as provided for in said 12th section, for the 12th section made no provision for the issue of notes by the bank. That section simply refers to certain kinds of issues of the bank, and does not authorize the issue of that kind of notes, but provides that the bills or notes of said corporation, originally made payable, or which shall have become payable, in gold or silver coin, shall be receivable, etc.

We submit whether this court will compel the State of Tennessee to take the notes tendered by plaintiffs in error, unless they showed that such notes were the lawful issues of the Bank of Tennessee.

It may be that the same strictness is not required in this proceeding in describing these notes as would be required in an action at law brought on them, but certainly the State would not be compelled to receive notes purporting to be the issues of the bank unless they were the lawful issues of the bank; that is to say, issued in accordance with the provisions of the charter of the bank.

4. The plaintiffs in error are not entitled to set up and enforce any contract with the State under the circumstances, because the State,

under its general police power, had a right, by repealing the 12th section of the bank charter, to say that it would no longer be liable to take the notes of the Bank of Tennessee in payment of its revenue or the debts due it.

The subject of the police power of the States has often been considered in its bearings upon the clause of the Constitution of the United States, which forbids the passage of laws by the States violating the obligation of contracts, and it has been invariably held that this clause does not so far remove from state control the rights which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is held, are subject to this power, and regulations which affect them may not only be established by the States, but must also be subject to change from time to time with reference to the general well being of the community, as circumstances change, or as experience demonstrates the necessity.

Cooley, Const. Law, 574; *Thorpe v. R. & B. R. R. Co.*, 27 Vt., 140.

The Chief Justice, in *Dartmouth College v. Woodward*, 4 Wheat., 629, uses the following language, which is cited as pertinent to the general question of what laws are prohibited upon the ground of impairing the obligation of contracts: "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed."

Will the court hold that the 12th section of the charter of the Bank of Tennessee was a guaranty, a continuing guaranty on the part of the State to take all the notes of the Bank of Tennessee in payment for taxes to the full extent of the whole amount of the issues of the bank, and with that guaranty unaffected by a repeal of the charter and unaffected by the action on the part of the officers of the bank, which swelled its volume of circulation, issued for illegal purposes, to an amount that would cripple the State to the extent of stopping the operations of the State Government, or make it powerless to regulate its civil institutions or to provide for the good government of the State?

Will the court hold that the State had no power to pass the Act of Feb. 16, 1866, and under the circumstances, even in the case of a *bona fide* holder of the legal issues of the bank, issued in pursuance of the charter and prior to repeal of the 12th section of the bank charter, to change the remedy of the note holder (so that it does not destroy the right of the note holder), and compel him to present the note to the special Board of Directors appointed under that Act, for payment, or to the trustee, or the court under that Act, and show what kind of notes he held, before compelling the State to take these notes? We need not quote authorities to show that it is competent for the State to change the remedy under a contract. These authorities or decisions are numerous and are familiar to the court.

How much stronger is the reason, under the general police power of the State, why the State should be held to have a right to direct

the winding up of the bank, the presentation of the notes of the corporation issuing them, to the bank or its officers or trustee designated by the State for that purpose, before presenting them to the guarantor, especially after the repeal of the 12th section and the notice, which the holders had, of the fact that many of the notes of the bank were re-issues and illegal, and especially when the officers of the bank charged with winding up the institution and acquainted with the business transactions of the bank, the amount and character of its issues are presumed to be best able to detect the illegal issues and distinguish them from its legal issues.

Mr. Justice Davis delivered the opinion of the court:

The main question involved in this suit is of more importance than difficulty; but before we proceed to discuss it, it is necessary to consider the point of jurisdiction which is raised by the defendant in error. The circumstances under which this court is authorized to review the decisions of state tribunals has been so often considered and decided, that there is hardly anything left to do, but to apply the already well settled legal principles which govern this class of cases, to a particular record, in order to decide, whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through with the various adjudications of this court on this subject. It is enough for the purposes of this suit to say, that a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him, was denied to him by the state court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach, without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits.

By the laws of Tennessee, the privilege of merchandising is taxable. Any one who wishes to engage in that calling, must obtain a license from the Clerk of the County Court where he proposes to carry on the business, and give bonds that he will pay a certain percentage on the invoice cost of all goods brought into his mercantile establishment for sale during the year. In compliance with these laws, Francis Furman, of Nashville, obtained, on the 28th day of August, 1865, from the County Clerk, a license as a wholesale merchant for the ensuing year. Being desirous of forming a copartner-

ship before the expiration of his license, it became necessary for him to discharge his obligations to the State for the business of the store up to that time. Accordingly, on the 8d day of August, 1866, he appeared before the Clerk with Green, his proposed partner, and tendered the amount due the State for taxes, in the notes and issues of the Bank of Tennessee, issued prior to the 6th of May, 1861, and tendered also the bond as required by law, and demanded that a license be issued to them as wholesale merchants. But the Clerk declined to comply with this request because these notes were depreciated, and informed the parties that he would not issue the license unless the taxes were paid in par funds.

Furman and Green, conceiving themselves aggrieved by this conduct, applied to the local circuit court for a *mandamus* to compel the County Clerk to accept payment of the Tennessee Bank notes in discharge of Furman's obligation, and to issue to them a license as wholesale merchants. The application for the writ proceeded on the theory that the State had, in the passage of the Act creating the Bank of Tennessee, in 1838, made a contract with its people to receive these notes in payment of state taxes, and that it was not in the power of a subsequent Legislature to impair the binding force of this contract.

The proceeding was an effort on the part of the plaintiffs in error to test the question of the validity of the authority of a public officer of the State, exercising authority under the State, on the ground that such authority was repugnant to that provision of the Federal Constitution which forbids a State to pass any law impairing the obligation of a contract. The purpose of the petition, the issue which it presented and sought to have determined, were as plainly to be seen, as if the words of the particular constitutional provision relied on had been inserted in it, and the obnoxious legislation spread out at length. All courts take notice, without pleading, of the Constitution of the United States, and the public laws of the State where they are exercising their functions.

It is insisted that the petition should have averred that the State had impaired, or by some act attempted to impair, the obligation of a contract, but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes, by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the Legislature to impair the validity of this contract.

The *mandamus* was asked for to enforce a contract—to act directly on Nichol, the clerk and collector, who was exercising an authority under the State. What is plainer than that this proceeding impeached this authority, in its application to their case, because the legislation construed by this officer as depriving Furman of his right to pay his state taxes in notes of the Bank of Tennessee. If so, then the petitioners, insisting on the protection of the Constitution, drew in question both the validity of state legislation and the authority of the state officer, and unless the record discloses that the Supreme Court of Tennessee denied relief, on other than Federal grounds, it is perfectly

manifest that we are compelled to take jurisdiction of this cause.

But to proceed a step further. The cause was heard on the petition and a demurrer, admitting its truth, but denying its sufficiency.

There were three principal defenses to the relief asked, specified in the demurrer, as was required by the Tennessee Code of Practice.

These were, first, that the 12th section of the Act incorporating the Bank of Tennessee did not constitute a contract. Second, that there was no contract, because the said 12th section was repealed by implication by section 603 of the Code of 1858, and there was no averment that the notes were issued before that time. The third and last defense was, that the petition did not show that the plaintiffs became the owners of the notes before the direct repeal of the 12th section by the Legislature, in 1865. What possible difference can it make, in deciding the question of jurisdiction, on which of these three grounds the Supreme Court of Tennessee based their judgment? The right and duty of this court to hear and determine this case does not depend on our ability to prove that the Supreme Court of Tennessee was wrong in its judgment. Whether that judgment was right or wrong, it is reviewable here, if it necessarily drew in question the validity of a state statute, or of an authority exercised under it, on the ground of the repugnancy of the statute to the Constitution of the United States. That it did do this there would seem to be no doubt.

The defense really amounts to this, either that the alleged contract did not exist, or if it did, that there has been no legislation that impairs it.

Whether it be true or false, depends on the construction to be given the laws of the State, which are claimed as proving the making of the contract and its violation.

If so, this court decides for itself, whether the construction which the court below gave to these different statutes was correct or incorrect; and we are required to reverse, under the 25th section of the Judiciary Act, if we find that under an error of construction, that court has adjudged that no contract has been impaired. To do otherwise, would be to surrender to the state courts an important trust confided to this court by the Constitution.

Without pursuing the subject any further, it is clear from the record that the Supreme Court of Tennessee, in dismissing the petition for *mandamus*, necessarily adjudged that there was not at the time such a contract as the plaintiff, Furman, claimed authorized him to make the tender to the clerk, of the notes of the Bank of Tennessee. The jurisdiction of this court is, therefore, complete, and the case must be decided on its merits.

The State of Tennessee, through its Legislature, in 1838, thought proper to create a bank "in its name and for its benefit." It was essentially a state institution. The State owned the capital and received the profits; appointed the directors, and pledged its faith and credit for its support. This would seem to have been enough to establish the credit of the institution on a firm basis, and to inspire confidence in the value of its notes, so that they would obtain a free circulation among the people as money. But the Legislature, in its anxiety to insure for these notes a still greater con-

fidence of the community, went further, and provided that they should be receivable at the treasury of the State, and by all tax collectors and other public officers, in all payments for taxes and other money due the State.

It will be readily seen, that nothing could have been better calculated to accomplish the purpose the Legislature had in view than the incorporation of this guaranty into the charter of the bank. It assured the free circulation of their notes, gave them a credit over the issues of other banks, and furnished a security to those who held them against any serious loss, if, in the vicissitudes of trade, the bank itself should become embarrassed; for, annually, they would be enabled to use the notes at their par value in the payment of their taxes.

That this guaranty was, until withdrawn by the State, a contract between the State and every note holder of the bank, obliging the State to receive the notes for taxes, cannot admit of serious question.

The State was engaged in banking, and like other corporations engaged in the same business, desirous of using all legitimate means to increase the profits of the enterprise. The profits of a bank of issue depend in a great measure on the ability of the bank to keep its currency afloat. The longer the bills are withheld from redemption the greater the remuneration to the corporation. Every additional guaranty thrown around the bills, affecting their security and increasing the uses to which they can be put, affords necessarily additional inducements for the people in whose hands they fall to keep them, and not return them to the counter of the bank for redemption in specie. What so natural as that the intelligent legislators of 1838, knowing all this, should say to every person discounting a note, or taking it in the ordinary transactions of life, "If you will not return this note for redemption, we will take it from you for taxes? It is true you can demand specie for the bills, and so can the State demand specie for taxes, but if you will forego your right the State will do the same, and consent to receive from you, in lieu of specie, for the taxes due her, the notes of the bank." In such a transaction the benefit is mutual between the parties. The bank gets the interest on the notes as long as they are unredeemed, and the holder of the bills has a ready and convenient mode of paying taxes. The State did, therefore, in the charter creating the Bank of Tennessee, on good consideration, contract with the bill-holders to receive from them the paper of the bank for all taxes they owed the State. Until the Legislature, in some proper way, notifies the public that the guaranty thus furnished has been withdrawn, such a contract is binding on the State, and within the protection of the Constitution of the United States.

An attempt is made to restrict the operation of this guaranty to the person who, in the course of dealing with the bank, receives the note, and not to extend it further. Such an interpretation would render the guaranty of comparatively little value, and defeat the object which we have attempted to show the Legislature designed to accomplish by it. The guaranty is in no sense a personal one. It attaches to the note—is part of it, as much so as if written on the back of it; goes with the note every-

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where, and invites everyone who has taxes to pay to take it.

The quality of negotiability is annexed to the notes in words that cannot be misunderstood, and which indicate the purpose of the Legislature that they should be used by everyone who is indebted to the State.

It is contended that the promise of the State was withdrawn in 1858, by section 603 of the Code of that year—not in express terms, but by necessary implication. Courts do not favor repeals by implication, and never sanction them if the two Acts can stand together. The provision of the Code, which is deemed inconsistent with the continuance of the promise of the State, directs the kind of funds which collectors shall, after that time, receive for taxes. The Legislature thought fit to confer upon the people the privilege of paying their taxes in the issues of other banks that were at par. As these issues were in circulation at the time, it was doubtless thought a wise policy to allow the people to pay their taxes in them, and as long as they were at par the State could not be the loser. This policy was adopted for the convenience of the people. There are in the statute no words of negation, saying that no funds other than those specified in the section shall be received. But we are to construe the different sections of the Code together in order to arrive at the meaning of the Legislature. In doing this, we find that where Acts of Incorporation are not expressly repealed, they are, in terms, saved from repeal by section 42 of the Code. As there was no attempt in the Code to interfere with the charter of the Bank of Tennessee, it follows that it was saved from repeal, and of course, that the guaranty contained in the 12th section of the Act of its Incorporation was still continued. That the Legislature so understood it, receives additional confirmation from the consideration, that this guaranty was expressly withdrawn in 1865. Why withdraw it then if it was withdrawn in 1858?

The effect of the repealing Act of 1865 remains to be considered. It is true the State had the right at any time to withdraw its guaranty, but it is equally true that it must be done in such manner as not to impair the obligation of its contract with the note holders of the bank. That this repealing Act operated on all the issues of the bank after its date cannot be doubted, but the question with which we have to deal is: what effect did it have on the notes of the bank issued prior to its passage? It is conceded that these plaintiffs are entitled to the relief they ask, if the defendant was obliged to receive the notes which were tendered. The tender was made in the notes of the bank, issued prior to the 6th day of May, 1861, which were in conformity to its charter, and were payable to bearer. It does not appear when the notes came to the hands of the plaintiffs—whether before or after the repealing Act—but it is a fair presumption, in the absence of any averment to the contrary, that it was after the date of that Act.

It is insisted, as the bank during the rebellion was under the control of the usurping government, and was used by it for unlawful purposes, that it should have been stated that the notes tendered were the lawful issues of the bank. But it would seem the pleader had this

state of things in his mind, and wished to avoid the issue it involved, for he avers that the notes were issued prior to the 6th day of May, 1861, the time when the State endeavored to sever its relations with the Union. The presumption is that the bank, before that time, issued its notes properly; and, in addition, it is stated, as we have seen, that they were issued in conformity with the 12th section of its charter. It follows from this statement, necessarily, that they were the lawful issues of the bank. If the defendant wished to contest this point he should have answered, and not by his pleading, admitted the truth of the petition and all legal inferences that could be drawn from it.

The case is, therefore, not embarrassed by the changed relation of the State after 1861; and the discussion of the principles which settles this case are not intended by the court to apply to the issues of this bank while under the control of the insurgents, because such a case is not before us, and it will be time enough to decide the important questions which it would present when it arises, if it ever should arise.

It is contended that the repealing Act took from those persons who did not at the time hold the paper of the bank, the right to acquire it afterwards, and use it to discharge their debts to the State.

This construction of the contract would limit the obligation to the person, and withdraw it from the paper. If, as we have endeavored to show, the guaranty attached to the paper itself, and could not be withdrawn from it, then it follows that the notes in circulation at the time of the repeal are not affected by it, and carry with them the pledge of the State to be received in payment of taxes by every *bona fide* holder.

It would seem to be unnecessary to discuss any further the principles which lie at the foundation of this case, as they were settled in *Woodruff v. Trapnall*, 10 How., 190, heretofore decided by this court. The mere statement of that case will show its similarity to this. In 1836, the State of Arkansas, in the charter of a bank (owned and controlled by the State), declared that the notes of the institution should be received in payment of all debts due the State. Some years afterwards this provision of the charter was repealed. After its repeal, Trapnall, acting in behalf of the State, sued out an execution upon a judgment which the State had obtained against Woodruff, a defaulting treasurer. Woodruff met the demand of the writ by a tender (which was refused) of the notes of the bank, but whether he got these notes before or after the Repealing Act was passed, did not appear. On this state of things, Woodruff, to test his right to pay his debt in the paper of the bank, applied for a writ of *mandamus* against Trapnall, which was denied him by the state court. The case was brought here, as this is, under the 25th section of the Judiciary Act, and this court held that the undertaking of the State to receive the notes of the bank, constituted a contract between the State and the holders of the notes, which the State was not at liberty to break; and that the tender of notes issued prior to the Repealing Act was good. It was also held, that it made no difference whether the debtor had the notes in his possession when the Repealing Act was passed or not.

It will thus be seen that *Woodruff v. Trapnall*, and this case, in all important features, are alike.

An attempt has been made to distinguish the cases, because in the Tennessee Bank trust funds were embarked in the enterprise; but if the State thought proper to use them in this manner, it took care to pledge its faith to supply any deficiency that should arise through the mismanagement of the bank. It is difficult to see how the employment of these funds made the bank any less a state institution, for it was created expressly for the benefit of the State, who had the exclusive management of it, and agreed to support it. But if we concede that the State did wrong in using these funds in banking, can that tend even to justify it in breaking its promise to the note holders of the bank?

Enough has been said to show, as the result of our views, that section 28 of the charter of the Bank of Tennessee constituted a contract with the holders of the notes of the bank, and that it was not in the constitutional power of the Legislature to repeal the section so as to affect the notes which, at the time, were in circulation.

It is ordered that the judgment of the Supreme Court of Tennessee be reversed, and this cause remanded to that court, with directions to enter a judgment awarding the writ of mandamus.

Cited—12 Wall., 380; 14 Wall., 21; 20 Wall., 628; 21 Wall., 549; 96 U. S., 442; 97 U. S., 455, 457, 479, 480; 100 U. S., 532; 102 U. S., 680; 2 Wood, 112; 3 Dill., 74.

THE AMERICAN WOOD PAPER COMPANY, Appt.,

v.

JACOB D. HEFT ET AL.

Motion to dismiss—rule to show cause.

Upon a motion to intervene and to dismiss the appeal on the ground that the suit is fictitious, there having been a settlement of the matter in litigation between the parties, and that the suit is now prosecuted to affect the moving party, where the affidavits leave it doubtful whether or not the suit is fictitious, the court will grant a rule to show cause why the suit should not be dismissed, with leave to both parties to take and file depositions in support of and against the motion.

[No. 154.]

Motion argued Feb. 26, 1869. Rule granted Mar. 1, 1869.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is sufficiently stated by the court. See, also, the report of the decision of this court dismissing this appeal (*post*, 379).

Mr. B. F. Butler, for intervenor.

Mr. T. A. Jenckes, for appellant.

Mr. Justice Chase delivered the opinion of the court:

This is a motion for leave to intervene and to move to dismiss the appeal upon two grounds, namely:

(1) That the suit of the appellant is merely fictitious, there having been a settlement of the matter in litigation between the parties.

(2) That the suit is now prosecuted, not to

determine any real controversy between the parties to the record, but to obtain a decree on which to found an application for an injunction against persons really interested, adversely to the appellants, but not parties to the record and among them against the person in whose behalf the motion is made.

The affidavits in support of the motion do not show that there was no real controversy in the circuit court, but are introduced for the purpose of satisfying us that since the decree in that court the matters there litigated have been settled in such a manner that the appellees have no further interest in the cause.

An affidavit against the motion has been filed by the appellants, in which affiant describes himself as yet of the company, and denies that the matters in litigation upon the appeal have been settled; but avers, on the contrary, that the appeal is prosecuted in good faith and for the determination of a real controversy.

Taking all the affidavits together, in connection with the circumstances that no appearance has been entered in this court for the appellees, we are of the opinion that enough is shown to warrant a rule against the appellant, to show cause why the appeal should not be dismissed.

In the case of *Lord v. Veazie*, 8 How., 254, in this court, an appeal was dismissed upon motion, the court being satisfied, by the affidavit produced, that the suit was fictitious and collusive; and the same course was pursued upon similar showings in *Cleveland v. Chamberlain*, 1 Black, 425 (66 U. S., XVII., 93); *Fletcher v. Peck*, 6 Cranch, 147, per Johnson, J., dissenting.

In these cases no doubt was left in the judgment of the court, that the suits were in fact what the affidavits in support of the motion to dismiss alleged them to be.

In this case, we do not think it proper to go at present to the extent of dismissal.

We think, indeed, that it would be the better practice in cases similar to this, to move in the first instance upon affidavits for a rule to show cause why the suit should not be dismissed.

That rule will now be awarded, returnable the 9th day of April next, and leave is given to both parties to take depositions on sufficient notice before any Commissioner of the United States, in support of the rule and against it.

THE AMERICAN WOOD PAPER COMPANY, Appt.,

v.

JACOB D. HEFT ET AL.

(See S. C., 8 Wall., 338-337.)

Sham litigation.

Where the complainants own both sides of the litigation and control them, the case should not be heard by this court. The litigation is no longer a real one.

[No. 154.]

Argued Feb. 26, 1869. Decided Nov. 8, 1869.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On motion to dismiss.

See 8 WALL.

The history of the case and a full statement of the facts appear in the opinion of the court.

Mr. B. F. Butler, for intervenor.

Mr. T. A. Jenckes, for appellants, *contra*.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania. The bill was filed by the complainants in the court below, the appellants here, to enjoin the defendants against the infringement of several patents owned by the former for improvements in the manufacture of paper, two of which need only be mentioned—one to Watt & Burgess, granted on the 2d July, 1854, in the manufacture of paper pulp from wood and other vegetable substances; the other to M. A. Ch. Miller, on the 26th May, 1857, in the manufacture of paper by using a peculiar process in the treatment of straw and other fibrous materials.

The answer of the defendant set up several defenses, but the most material were: 1. The want of novelty; and 2. That they manufactured paper in their establishment under inventions and patents of John W. Dixon, one of the defendants. A mass of proofs were taken on both sides, and after the hearing of counsel on the 22d of November, 1867, the bill was dismissed, the two judges differing in opinion. It is now before us on appeal.

Pending this appeal, Harrison D. Meach has been allowed to intervene by counsel, upon an allegation that, since the decree below, the case has been settled and that it is now carried on without the appellees having any further interest in the defense; and for the purpose of obtaining the decree of this court in favor of the complainants to influence suits pending in the circuit in their favor and against strangers to this suit, and in which the same questions are involved, and that the intervenor is a defendant in one of these suits. A commission has been heretofore issued to take proofs in the matter, and which are now before us. The original bill was filed on the 29th August, 1865. It appears from the proofs under the commission, that at this time the Dixon patents which were set up as one of the defenses to this suit, were owned, two thirds by W. W. Harding, and one third by Dixon, the inventor; the two thirds having been conveyed in December, 1864, the co-defendants of Dixon having no interest therein, except working under them in the manufacture of paper. It further appears that in the fall of 1868, about one year after the decree dismissing the bill, Harding and Dixon sold and transferred all their interest in the Dixon patents to the complainant, and received for the same eighteen hundred shares of the stock of their company at par value, which was \$100 per share, nominally \$180,000, and this for one half the interest in the patents; for the other half the complainants confirmed the licenses that had been granted under the Dixon patent.

This is the account of the sale given by Dixon, who was examined as a witness under the commission.

Hay, the General Agent of the complainants, says the purchase was made with Harding, and that stock to the amount of two thousand shares was given, and that two certificates with

blank vouchers of attorney were made out and delivered to Harding, one for eighteen hundred and the other for two hundred shares. Dixon states that Harding transacted the business with the complainants for him, and with his concurrence.

The case, therefore, as it now stands, is: the complainants having purchased in the patents under which the suit was defended, own both sides of the subject-matter of this litigation; and, further, the owners of the Dixon patents having taken, in consideration for the sale, stock in the complainants' company, their interest has been transferred to the side of the complainants.

It is said, notwithstanding all these negotiations, exchanges, and transfers, the damages for the alleged infringement in the bill have not been compromised. But, before that question can be reached, as the bill was dismissed below, this court must hear and determine the question on the merits, whether or not the defenses set up in the answer are sustained upon the proofs. If the court should determine they were not, then the question of damages would arise; if otherwise, not. Now, upon this question of merits; the complainants own both sides of the litigation and control them; and, in the language of the *Chief Justice*, in the case of *Lord v. Veassie*, 8 How., 355, "the plaintiff and defendant have the same interest, and that interest adverse, and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both parties to this suit desire it to be." And, for this reason, the case should not be heard by this court.

If anything further was necessary to show that the litigation is no longer a real one, even if the suit should proceed, and the question of damages be reached, there would be the same interest on both sides, Dixon, one of the defendants, since the sale of his patents, having a large interest on the side of the complainants, and, as defendant, would be subject to his payment of part, or the whole amount, of the damages recovered. Indeed, the weight of the proofs is, that he has bound himself to keep his co-defendants harmless.

The motion to dismiss the case, for the reasons above given, must be granted.

GEORGE MATTINGLY, Compt. and Appt.,
v.

J. W. NYE, JOHN C. HARKNESS ET AL.

(See S. C., 8 Wall., 370-376).

Family settlement, when not fraudulent—judgment not impeachable collaterally.

The Statute of 13 Eliz., ch. 5, does not affect a settlement by a husband for his family as to subsequent creditors, unless fraud was intended when it was made.

Such settlements, though voluntary, are founded upon a meritorious consideration, and will be upheld and enforced in equity against the husband. A judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally nor be questioned upon a creditor's bill.

NOTE.—Settlement or conveyance for benefit of wife and child, when good, or void, as to creditors. See note to *Sexton v. Wheaton*, 21 U. S. (8 Wheat.), 229.

Argued Oct. 19, 1869. Decided Nov. 8, 1869.

APPEAL from the Supreme Court of the District of Columbia.

A creditor's bill was filed in the court below by the appellant, for a decree to declare fraudulent and void a certain deed of trust. The court dismissed the bill. Whereupon the complainant took an appeal to this court.

A full statement of the case appears in the opinion of the court.

Messrs. W. S. Cox and S. L. Phillips, for appellant:

The complaint and defendant Nye, as appears from bill and answers, had had many transactions for the loan of money to the defendant, and, to secure the payment of which, the defendant made several assignments of various claims he had against Congress for services performed for them; the defendant contending that these assignments were made in payment and satisfaction of the indebtedness between them, and the complainant denying it. There is conflicting testimony on this point.

A further defense of usury to the original indebtedness is set up in the answer, and for the sake of this argument, may be considered as admitted.

To all this it is answered by the complainant that he is a judgment creditor who has exhausted his remedy at law, and if these defenses are true, they were legal, and might and should have been made in the suit at law in which judgment was obtained.

Hungerford v. Sigerson, 20 How., 156 (61 U. S., XV., 869).

This estoppel of judgment recovered, applies with equal force to the defense of usury made in the answer, nor can the other defendants avail themselves of it. *Austin v. Chittenden*, 33 Vt., 553.

The defense of usury is purely personal, and is not available to persons occupying the position of *bona fide* purchasers for value; *Stephens v. Muir*, 8 Ind., 352; 4 Dana, 177;

Nor to heirs, sureties, devisees and representatives. *Mech. Bk. v. Edwards*, 1 Barb., 371.

It is admitted by the answers, that the deed for the benefit of the wife and children was voluntary; that defendant was possessed of no other property and that this debt was due long before the conveyance.

Mr. Jos. H. Bradley, for appellee:

1. The contracts between the complainant and defendant Nye, are all tainted with the vice of usury in their inception and continuation, and are void.

2. Inasmuch as Nye is not seeking any relief in equity against a judgment at law, but complainant is asking the aid of a court of equity to reach the equitable interest of Nye in real estate, and to subject it to execution on a judgment obtained against Nye on this usurious contract (a judgment obtained by a default when the defendant was prevented by a dangerous illness from defending the case), he may now, in this court, set up that defense.

3. But if there were no usury in their various transactions, the whole of the indebtedness of Nye to Mattingly, prior to the purchase of the property sought to be reached by this bill, had been satisfied by a sale and transfer of an

interest in the other claims mentioned in those assignments, and Nye was not indebted to Mattingly.

4. Nye's last assignment to Mattingly could not override the trust created in Harkness, so as to subject that property to his debts, inasmuch as that trust was created for a valuable consideration when he was not indebted, and it was irrevocable.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in chancery from the decree of the Supreme Court of the District of Columbia. The case as disclosed in the record is as follows: On the 10th of June, 1868, the complainant recovered a judgment at law against the defendant, J. W. Nye, for \$2,450, with interest from the 21st of July, 1860, until paid, and costs; a *fi. fa.* was issued and returned *nulla bona*. The defendant has no property liable to execution. On the 25th of June, 1857, Nye bought and paid for the property described in the bill. It was conveyed by deed of that date to the defendant, Harkness, in trust for Mary Nye, the wife of J. W. Nye, and her children. The legal title is still in Harkness upon that trust. The bill is a creditor's bill, filed to reach this property. It alleges, in addition to the facts already stated—which are not controverted—that a large part of the indebtedness for which the recovery at law was had, subsisted at the time the property was bought and conveyed, and that hence it is liable in equity to be applied, in satisfaction of the judgment.

Nye and Harkness only answered. Harkness denies that there was any indebtedness by Nye to the complainant at the time of the purchase and conveyance of the trust property. Nye alleges usury in the transactions between him and the complainant to a very large extent; that they had settled everything before the trust property was conveyed to Harkness, and that he then owed the complainant nothing; that the judgment was rendered by default; that he intended to defend, and could have done so successfully, but that he was prevented by extreme illness.

Testimony was taken upon both sides. The court below dismissed the bill.

The case involves several legal propositions which it is proper here to state.

I. The Statute of 13 Eliz., ch. 5, is in force in the County of Washington, but it does not affect a conveyance like as to subsequent creditors, unless fraud was intended when it was made. *Seaton v. Wheaton*, 8 Wheat., 239; S. C., 1 Am. L. Cas., 1. The whole learning of the law upon this subject is so fully developed in the note to the case in the work last mentioned, that it would be a waste of time to more than refer to it.

II. Such settlements, though voluntary, are founded upon a meritorious consideration, and will be upheld and enforced in equity against the husband. *Ellison v. Ellison*, 1 Lead. Cas. in Eq., 199.

III. The judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditor's bill.

If in this case there is any ground of equity—
See 8 WALL.

table relief, it should have been presented by a cross-bill or other proper proceeding had directly to affect the judgment. *Bank of Wooster v. Stevens*, 1 Ohio St., 233; *Marine Insurance Co. v. Hodgson*, 7 Cranch, 337; *Peck v. Woodbridge*, 3 Day, 30; *Davol v. Davol*, 13 Mass., 265; Story, Eq. Pl., sec. 782.

Here the question is not as to the conclusiveness of the judgment, but as to the indebtedness of Nye to the complainant when the property was conveyed to Harkness. The trust deed bears date on the 23d of June, 1857. The judgment was recovered on the 10th of June, 1868, nearly six years later. The judgment was founded upon an assignment by Nye to the complainant of \$2,450 of a claim in favor of Bary and Stewart against the United States. Nye was the assignee of those parties, and his assignment to the complainant is dated July 21st, 1860. This was about three years before the date of the judgment.

But it is alleged by the complainant that the consideration of this assignment included two debts due to him from Nye, evidenced by instruments bearing date on the 2d of November, 1858, and amounting together to \$1,650. One is an order by Nye on General McCalla to pay the complainant the sum of \$1,450 out of the claim of Bary and Stewart before mentioned. The other is a like order for the payment of \$200 out the same claim, or out of another claim which is mentioned, payment to be made out of the first money which should be received on either, after reserving \$500 to meet a previous order which Nye had given. The complainant insists that these two orders represented debts which subsisted more than two years before the execution of the trust deed, and which still subsist. Nye insists that they were given and received in discharge of all of his liabilities to the complainant down to their date, and that the complainant took them at his own risk. Here lies the stress of the controversy between the parties.

Nye and the complainant were both examined as witnesses. A considerable mass of other testimony is found in the record. It is to some extent conflicting, but we have had no difficulty in coming to a satisfactory conclusion as to the facts. We think they are as follows:

The complainant made advances of money to Nye from time to time and charged him high rates of usury. Nye evinced a strange fatuity in submitting to whatever terms the complainant thought proper to impose. The order for \$1,450 was given to the complainant for a much larger sum than he claimed to be due; Nye testifies that it was for double the amount. It was not doubted then that the claim to which the order refers would be speedily sanctioned by Congress, and paid by the government. A committee of the House of Representatives had unanimously reported a bill to pay it. This has occurred more than once since. There has been at no time any adverse action; but the claim has not yet been finally acted upon and is still pending before Congress. According to the testimony of Nye, at the same time that he gave this order to the complainant he gave a like order to Wm. G. White for double the amount of a debt due to him. The condition upon which both orders were given was the same. It was that the creditors should take

them in discharge of their debts, and that Nye was to be under no further personal liability touching either the debts or the orders. He avers that they were received by the complainant and White respectively with this agreement.

White was examined as a witness. Speaking of these orders, he says: "That order in my favor was taken by me in full satisfaction of my claim on Mr. Nye; I understood from Mr. Mattingly that he received the order from Mr. Nye in satisfaction of his claim." The complainant in his testimony admits that he advanced but \$100 for the order for \$200, but says, the balance was "in consideration of advantages, benefits and favors I had done him." This order was taken like the other, with the understanding that there was to be no personal liability on the part of the drawer. The creditor was to look alone to the fund upon which it was drawn for payment.

These conclusions receive strong support from the fact that on the 5th of January, 1857, the complainant addressed a letter to S. W. McKnew, in which he stated that he had settled with Nye, and, in effect, that Nye owed him nothing. He complains that this letter was obtained from him by unfair means. The testimony of McKnew shows that in this he is mistaken.

In regard to the assignment of \$2,450 of the Barge and Stewart claim, upon which the judgment was recovered, Nye testifies that the only consideration for it, in addition to the pre-existing orders of \$1,450 and \$200, was a further advance by the complainant of \$200—\$100 in money and the same amount in groceries.

The complainant says: "We had in 1860 such a settlement as we always had. He obtained further advances—one of \$400, one of \$200, and some smaller amounts at different times which I do not recollect." Even this would leave a large margin of difference between the amount assigned and the amount of the consideration. There are several features in the complainant's testimony which impress us unfavorably, but it is not necessary to dwell upon them. Nor is it material to consider the facts relating to the last assignment. We are entirely satisfied that the orders of November 2d, 1853, were taken by the complainant upon the terms stated by Nye and White. There was, therefore, no indebtedness by Nye to the complainant when the trust deed was executed to Harkness, nor subsequently, until the assignment of July 21st, 1860, was given, if there were before the rendition of the judgment. This is decisive of the case before us. Harkness and Mrs. Nye were neither parties nor privies to the judgment. Their rights, legal and equitable, were vested and fixed by the deed. Neither Nye nor the complainant could do anything subsequently to impair them. The settlement of 1860 between those parties, and the judgment recovered upon the instrument then given, could have no retroactive effect, so far as the rights of trustee and *cestui que trust* were concerned.

The court below, we think, properly dismissed the bill, and the decree is affirmed.

Cited—102 U. S., 153; 7 Bank Reg., 104; 2 Dill., 59.

L. P. WOODRUFF AND G. M. PARKER,
Partners under the Name and Style of WOOD-
RUFF & PARKER, *Pliffs. in Err.*,

v.

JOHN PARHAM, Tax Collector of the City
OF MOBILE.

(See S. C., 8 Wall., 123-147.)

Taxing imports—tax on sales at auction.

The constitutional provision against taxing imports by the States, does not extend to articles brought from another State.

An ordinance, under a charter of a city authorizing the collection of a tax on sales at auction, is valid as applicable to goods which are products of other States, sold in original packages.

[No. 129.]

Argued Oct. 13, 1869. Decided Nov. 8, 1869.

IN ERROR to the Supreme Court of Alabama. This action was brought in the Circuit Court of Mobile County, Alabama, to recover for an alleged wrongful taking of goods upon the collection of a certain tax. Upon an agreed statement of facts, judgment was rendered for defendants. The Supreme Court of Alabama, upon appeal, affirmed the judgment. Whereupon the plaintiff sued out this writ of error.

A full statement of the case appears in the opinion of the court.

Messrs. John A. Campbell, Geo. N. Stewart, and P. Hamilton, for plaintiffs in error: Can a State tax imports into it from other States of the Union?

This question, in its simple form, has been answered by *Chief Justice Marshall*, in the opinion he delivered for the Court in *Brown v. Md.*, 12 Wheat., 449. The question there for decision was upon the propriety of a license tax imposed by the State upon the merchant, as a prerequisite or condition of the right or liberty to sell the imported article. After discussing the general principles involved in the constitutional prohibition upon the State to levy imposts or duties on imports or exports, and deciding that this tax, though indirect in form, was in fact a duty on imports, and therefore illegal, remarks: "It may be proper to add that we suppose the principles laid down in this case apply equally to importations from a sister State."

That opinion, so announced, has more recently and since the conflicting views of the *Passenger* and *License* cases, been emphatically declared the judgment of this court.

The State of California for purposes of revenue, by an Act directed the stamp tax to be imposed on bills of lading for the transportation from any point or place in that State, to any point or place without the State, of gold or silver in any form.

The question there was: is this stamp tax, so required to be paid by state authority, an impost or duty on an export within the meaning of the constitutional prohibition upon the State? It was held by a unanimous Bench, that the tax fell within the terms of the prohibition.

As in this case so in that, the transportation was between States; it was from the State of California to the State of New York.

NOTE.—State licenses and power of State to tax commerce. See note to *Gibbons v. Ogden*, 22 U. S. (9 Wheat.), 1; and note to *Brown v. Maryland*, 25 U. S. (12 Wheat.), 419.

The transaction was an export from one State to another State. It was, nevertheless, held to be a case of export and, therefore, protected against any interference or regulation by mere state authority.

Upon the authority of these two cases—*Brown v. Md.*, 12 Wheat., 419, and *Almy v. Cal.*, 24 How., 169 (85 U. S., XVI., 644)—it would seem that the argument is exhausted. They establish the rule that no matter in what form (whether by license or by stamp duty or by any other device) a tax may be sought to be imposed by the authority of the State upon commerce not wholly internal, the attempt is illegal; and that this rule applies, whether the portion external to the State which seeks to tax is connected with, or internal to a sister State, or concerns the business of a purely foreign nation. In either event, the power to tax that commerce does not exist; it belongs alone to the General Government.

And this would seem to result from the language used in the Constitution in the grant of power to regulate commerce. The grant to Congress is universal: "To regulate commerce with foreign nations, among the States, and with Indian tribes." 9 Wheat., 198.

The prohibition upon the States is correlative. They may not coin money, nor make anything but gold and silver coin a tender; they may not make any law to impair the obligation of a contract; they may not lay imposts nor duties on imports nor exports; they may not lay any duty of tonnage; and may not make any agreement with themselves nor with foreign powers.

These grants to the one and prohibition on the other, seem clearly to indicate where the whole power of regulation over matters purely external to a State, or common to all, was intended to be placed.

After some uncertainty, this court has lately announced conclusions which appear to be definite and plain, and to cover the whole point now in discussion. *Steamship Co. v. Port Wardens*, 6 Wall., 81 (73 U. S., XVIII., 749); *Orandall v. Nevada*, 6 Wall., 85 (73 U. S., XVIII., 745).

On the part of the State, it is an attempt to tax an article brought into it from another State, for purpose of sale.

This legislation falls within the definitions and limitations announced in *Orandall v. Nevada*; See, also, *Cooley v. Board of Wardens*, 12 How., 290.

The case, too, falls within the scope of the dissenting opinions in the former case, and within the letter of the decision in *Steamship Co. v. Port Wardens*.

The case, too, falls within the influence of the opinion of the court in *Hays v. Steamship Co.*, 17 How., 598 (58 U. S., XV., 254).

See, also, *Gibbons v. Ogden*, 9 Wheat., 198, 209; *Sinnott v. Davenport*, 22 How., 229, 238 (63 U. S., XVI., 243, 246).

The power existing in Congress to regulate, and its abstaining from legislation on the subject, is as expressive an enactment as the most positive declaration could be. It is a declaration that the commerce between the States shall be free. *Gibbons v. Ogden*; *Passenger cases*, 7 How., 464.

Mr. P. Phillips, for defendant in error:

Citizens of another State can never claim

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greater immunity than is accorded by a State to its own citizens.

A tax which does not discriminate against goods brought from another State, which does not operate upon goods in transit to other States, but is only imposed on all sold in the State, in no wise countervails that harmony and equality intended to be secured by the Federal Constitution.

In the case of *Pierce v. N. H.*, 5 How., 554 (*License cases*), the appellant was indicted and convicted of selling a barrel of gin purchased in Massachusetts, and brought coastwise to his store in Dover.

This case was heard and decided in connection with the case of *Thurlow v. Mass.*, and *Fletcher v. R. I.*, and differed only in the fact that in the last two cases the conviction was for selling foreign imported liquors. Taney, *Ch. J.*, after deciding the cases of *Mass.* and *R. I.*, says: "I come now to the New Hampshire case, in which a different principle is involved, the question, however, arising under the same clause of the Constitution."

"The present case differs from *Brown v. Maryland*, 12 Wheat., 449, in this, that the former was one arising out of commerce with foreign nations, which Congress had regulated by law; whereas the present in a case of commerce between two States, in relation to which Congress has not exercised its power."

"The law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is, therefore, a regulation of commerce."

After a full consideration of the question, the *Chief Justice* concludes:

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one; for although the gin sold was an import from another State, and Congress had clearly the power to regulate such importation, yet, as it has made no such regulation, the traffic in the article may lawfully be regulated by the State, as soon as it is landed in its territory."

Judge McLean, commenting upon the dictum in *Brown v. Maryland*, says:

"Neither the facts nor the reasons of that case apply to a person who transports an article from one State to another. In some cases the transportation is only made a few feet or rods, and generally is attended with little risk, and no duty is paid to the Federal or State Governments, and why should property when conveyed over a State line be exempt from taxation which is common to all other property in the States?"

Woodbury, J., in delivering his separate opinion, says: "It had been contended that the sum required to be paid for a license is in the nature of a duty on imports, and thus in conflict with the Constitution as settled in *Brown v. Maryland*. It is conceded that a State is forbidden to lay any duties on imports. But the statutes in question do not purport to tax imports from abroad or imports from another State. The last is not believed to be referred to in the Constitution.

I ask attention to the fact, that while there was contrariety of argument in the separate opinions, there was no difference of opinion as to the constitutionality of the state law.

It necessarily follows that if the gin brought into New Hampshire from Massachusetts was

an import within the meaning of the Constitution, then the license tax required by the State was a tax on imports, and void under the decision in *Brown v. Maryland*.

The decision maintaining the validity of the Act is, therefore, conclusive of the position that the gin was not an "import."

The same doctrine has been held by the state courts.

State v. Pinckney, 10 S. C. (Rich.), 474; *Cumming v. Savannah*, R. M., Charl., 26; *Harrison v. Vicksburg*, 8 Sm. & M., 581; *Beall v. State*, 4 Blackf., 107; *Padelford v. Savannah*, 14 Geo., 488.

In the case of *Nathan v. La.*, 8 How., 80, the Act of the State provided that "Every exchange broker shall pay an annual tax of \$250." It was contended that, as the appellant dealt solely in foreign bills of exchange, the Act operated is a tax on commerce; but this court held:

1. That this was not a tax on bills of exchange, but on the business of a broker.

2. That the right of a State to tax its own citizens for the prosecution of any business or profession, has not been doubted. *Nathan v. La.*

It need not be denied that, under the grant of the commercial power, Congress might provide for exemption from state taxation, incidental as well as direct, of all property carried from one State to another; but this grant does not operate, *proprio vigore*, to divest the States of all right to act upon the subject. In the absence of any Act of Congress with which the state law conflicts, that law will be maintained. *U. S. v. R. R. Bridge Co.*, 6 McLean, 517.

In the late case of *Crandall v. Nevada*, this court held that under the power to regulate commerce among the States, Congress had authority to pass laws, the operation of which would be inconsistent with the tax imposed by the State. But it passed no such laws. It was, therefore, held that inasmuch as the tax did not, of itself, institute any regulation of commerce of a national character, or which had a uniform operation over the whole country, it was not repugnant to that clause of the Constitution.

Crandall v. Nevada, 6 Wall., 43 (73 U. S., XVIII., 747); see, also, *Gibbons v. Ogden*, 9 Wheat., 201.

"Merchandise in original packages (says the court in a late case), once sold by the importer, is taxable as other property." *Pervear v. Com.*, 5 Wall., 479 (72 U. S., XVIII., 609).

Mr. Justice Miller delivered the opinion of the court:

The charter of Mobile authorizes that City to impose a tax for municipal purposes on real and personal estate, auction sales and sales of merchandise, capital employed in business and income within the City. The plaintiff in error having sold as auctioneer and commission merchant, a large amount of goods for others, and also on his own account, claims that as to such goods as were brought into the State of Alabama from other States of the Union, and sold by him at wholesale in the original and unbroken packages, he is not liable to the tax which the ordinances of the City imposed upon all sales of merchandise.

The case was heard in the courts of the State of Alabama upon an agreed statement of facts,

and that statement fully raises the question whether merchandise brought from other States and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution, that no State shall, without the consent of Congress, levy any imposts or duties on imports or exports. And it is claimed that it also brings the case within the principles laid down by this court in *Brown v. Md.*, 12 Wheat., 419.

That decision has been recognized for over forty years as governing the action of this court in the same class of cases, and its reasoning has been often cited and received with approbation in others to which it was applicable. We do not now propose to question its authority or to depart from its principles.

The tax of the State of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another.

The subject of the relative rights and powers of the Federal and State Governments in regard to taxation, always delicate, has acquired an importance by reason of the increased public burdens growing out of the recent war, which demands of all who may be called in the discharge of public duty to decide upon any of its various phases, that it shall be done with great care and deliberation. Happily for us much the larger share of these responsibilities rests with the legislative departments of the State and Federal Governments. But when, under the pressure of a taxation necessarily heavy, and in many cases new in its character, the parties affected by it resort to the courts to ascertain whether their individual rights have been infringed by legislation, and assert rights supposed to be guaranteed by the Federal Constitution, they, in every such case properly brought before us, devolve upon this court an obligation to decide the question raised from which there is no escape.

The words "impost," "imports" and "exports" are frequently used in the Constitution. They have a necessary correlation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument.

In the case of *Brown v. Maryland*, the word "imports" as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown v. Maryland* was decided—namely: in 1827—it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word "country" as a synonym for United States.

But the word is susceptible of being applied to articles introduced from one State into another, and we must inquire if it was so used by the framers of the Constitution.

Leaving, then, for a moment, the clause of the Constitution under consideration, we find the first use of any of these correlative terms in that clause of the 8th section of the 1st article, which begins the enumeration of the powers confided to Congress.

"The Congress shall have power to levy and collect taxes, duties, imposts and excises, * * * but all duties, imposts and excises shall be uniform throughout the United States."

Is the word "impost," here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the 9th section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former. But if we give to the word "imposts," as used in the first mentioned clause, the definition of *Chief Justice Marshall*, and to the word "export" the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts.

It is also to be remembered that the Convention was here giving the right to lay taxes by national authority in connection with paying the debts and providing for the common defense and the general welfare, and it is a reasonable inference that the had in view, in the use of the word "imports," those articles which, being introduced from other nations and diffused generally over the country for consumption, would contribute, in a common and general way, to the support of the National Government. If internal taxation should become necessary, it was provided for by the terms "taxes" and "excises."

There are two provisions of the clause under which exemption from state taxation is claimed in this case, which are not without influence on that prohibition, namely: that any State may, with the assent of Congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the Treasury of the United States. The framers of the Constitution, claiming for the General Government, as they did, all the duties on foreign goods imported into the country, might well permit a State that wished to tax more heavily than Congress did, foreign liquors, tobacco, or other articles injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of Congress, and was paid into the Federal Treasury. But that it was intended to permit such a tax to be imposed by such authority on the products of neighboring States for the use of the Federal Government, and that Congress, under this temptation, was to arbitrate between the State which proposed to levy the tax and those which opposed it, seems altogether improbable.

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Yet this must be the construction of the clause in question if it has any reference to goods imported from one State into another.

If we turn for a moment from the consideration of the language of the Constitution to the history of its formation and adoption, we shall find additional reason to conclude that the words imports and imposts were used with exclusive reference to articles imported from foreign countries.

Section 3, article 6, of the Confederation provided that no State should lay imposts or duties which might interfere with any stipulation in treaties entered into by the United States; and section 1, article 9, that no treaty of commerce should be made whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. In these two articles of the Confederation, the words imports, exports and imposts are used with exclusive reference to foreign trade, because they have regard only to the treaty making power of the federation.

As soon as peace was restored by the success of the Revolution, and commerce began to revive, it became obvious that the most eligible mode of raising revenue for the support of the General Government and the payment of its debts was by duties on foreign merchandise imported into the country. The Congress accordingly recommended the States to levy a duty of five per cent. on all such imports, for the use of the Confederation. To this, Rhode Island, which, at that time, was one of the largest importing States, objected, and we have a full report of the remonstrance addressed by a committee of Congress to that State on that subject. 1 Elliot, Debates, 131-133. And the discussions of the Congress of that day, as imperfectly as they have been preserved, are full of the subject of the injustice done by the States who had good seaports, by duties levied in those ports on foreign goods designed for States who had no such ports.

In this state of public feeling in this matter, the Constitutional Convention assembled.

Its very first grant of power to the new government about to be established, was to lay and collect imposts or duties on foreign goods imported into the country, and among its restraints upon the States was the corresponding one that they should lay no duties on imports or exports. It seems, however, from Mr. Madison's account of the debates, that while the necessity of vesting in Congress the power to levy duties on foreign goods was generally conceded, the right of the States to do so likewise was not given up without discussion, and was finally yielded with the qualification to which we have already referred, that the States might lay such duties with the assent of Congress. Mr. Madison moved that the words "nor lay imposts or duties on imports" be placed in that class of prohibitions which were absolute, instead of those which were dependent on the consent of Congress. His reason was that the States interested in this power (meaning those who had good seaports) by which they could tax the imports of their neighbors passing through their markets, were a majority, and could gain the consent of Con-

gress to the injury of New Jersey, North Carolina, and other non-importing States. But his motion failed. 5 Madison Papers, 486. In the Convention of Virginia, called to adopt the Constitution, that distinguished expounder and defender of the instrument, so largely the work of his own hand, argued, in support of the authority to lay direct taxes, that without this power, a disproportion of burden would be imposed on the Southern States, because, having fewer manufactures, they would consume more imports and pay more of the imposts. 3 Elliot, Debates, 248. So, in defending the clause of the Constitution now under our consideration, he says: "Some States export the produce of other States. Virginia exports the produce of North Carolina; Pennsylvania those of New Jersey and Delaware; and Rhode Island those of Connecticut and Massachusetts. The exporting States wished to retain the power of laying duties on exports to enable them to pay expenses incurred. The States whose produce was exported by other States, were extremely jealous lest a contribution should be raised of them by the exporting States, by laying heavy duties on their own commodities. If this clause be fully considered it will be found to be more consistent with justice and equity than any other practicable mode; for, if the States had the exclusive imposition of duties on exports, they might raise a heavy contribution of the other States for their own exclusive emoluments." 2 Elliot, Debates, 443, 444. Similar observations, from the same source, are found in the 42d number of the Federalist, but with more direct reference to the power to regulate commerce.

Gov. Ellsworth, in opening the debate of the Connecticut Convention on the adoption of the Constitution, says: "Our being tributary to our sister States, is in consequence of the want of a Federal system. The State of New York raises £80,000 or £80,000 in a year by impost. Connecticut consumes about one third of the goods upon which this impost is laid and, consequently, pays one third of this sum to New York. If we import by the medium of Massachusetts, she has an impost, and to her we pay tribute." 2 Elliot, Debates, 192. A few days later he says: "I find, on calculation, that a general impost of five per cent. would raise a sum of £245,000," and adds: "It is a strong argument in favor of an impost, that the collection of it will interfere less with the internal police of the States than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea coast, and is chiefly a water operation. * * * If we do not give it to Congress, the individual States will have it." 2 Elliot, Debates, 196.

It is not too much to say that, so far as our research has extended, neither the word "export," "import" or "impost" is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. The only allusion to imposts in the Article of Confederation is clearly limited to duties on goods imported from foreign States. Wherever we find the grievance to be remedied by this provision of the Constitution alluded to, the duty levied by the States on foreign importations is alone mentioned, and

the advantages to accrue to Congress from the power confided to it, and withheld from the States, is always mentioned with exclusive reference to foreign trade.

Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one State to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all the citizens.

These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

It is said, however, that, as a court, we are bound, by our former decisions, to a contrary doctrine, and we are referred to the cases of *Almy v. Cal.*, 24 How., 169 (65 U. S., XVI., 644); and *Brown v. Md.*, 12 Wheat., 419, in support of the assertion.

The case first mentioned arose under a statute of California, which imposed a stamp tax on bills of lading for the transportation of gold and silver from any point within the State to any point without the State.

The master of the ship *Rattler* was fined for violating this law, by refusing to affix a stamp to a bill of lading for gold shipped on board his vessel from San Francisco to New York. It seems to have escaped the attention of counsel on both sides, and of the *Chief Justice* who delivered the opinion, that the case was one of inter-state commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. In the language of the court, citing *Brown v. Md.* as governing the case, the Statute of Maryland is described as a tax on foreign articles and commodities. The only question discussed by the court is, whether the bill of lading was so intimately connected with the articles of export described in it that a tax on it was a tax on the articles exported. And, in arguing this proposition, the *Chief Justice* says that "A bill of lading, or some equivalent instrument of writing, is in.

variably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported." It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought. We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made. *The Victory*, 6 Wall., 382 (73 U. S., XVIII., 848).

The case, however, was well decided on the ground taken by Mr. Blair, counsel for defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall v. Nevada*, 6 Wall., 35 (73 U. S., XVIII., 745), and with the authority of Congress to regulate commerce among the States. We do not regard it, therefore, as opposing the views which we have announced in this case.

The case of *Brown v. Maryland*, as we have already said, arose out of a statute of that State, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods.

Chief Justice Marshall, in delivering the opinion of the court, distinctly bases the invalidity of the statute, (1) On the clause of the Constitution which forbids a State to levy imposts or duties on imports; and (2) That which confers on Congress the power to regulate commerce with foreign nations, among the States, with the Indian tribes.

The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the ground on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the Constitution which he supposed to be violated by the Maryland Statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

If the court then meant to say that a tax levied on goods from a sister State which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition.

It may not be inappropriate here to refer to the *Licenses Cases*, 5 How., 504.

The separate and diverse opinions delivered by the judges on that occasion leave it very doubtful if any material proposition was decided, though the precise point we have here

argued was before the court and seemed to require solution. But no one can read the opinions which were delivered without perceiving that none of them held that goods imported from one State into another are within the prohibition to the States to levy taxes on imports, and the language of the Chief Justice and Judge McLean leave no doubt that their views are adverse to the proposition.

We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.

But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void. There is also, in addition to the restraints which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the State from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another.

Judgment affirmed.

Cited—8 Wall., 150; 12 Wall., 420; 13 Wall., 34, 35; 15 Wall., 280, 297; 16 Wall., 482; 91 U. S., 282; 96 U. S., 446; 97 U. S., 573; 100 U. S., 437, 438, 677, 679; 2 Abb. U. S., 344; 6 Sawy., 297; 4 Hughes, 229; 38 Ind., 270; 70 Ill., 113; 8 Am. Rep., 708 (7 Nev., 140); 23 Am. Rep., 800, 802 (12 Nev., 285); 39 Am. Rep., 236 (33 La., 843); 55 Mo., 291.

JOHN W. HINSON, *Plff. in Err.*,

v.

ELISHA B. LOTT, Tax Collector of the
COUNTY OF MOBILE.

(See S. C., 8 Wall., 148-153).

Tax on spirituous liquors from other States, valid.

A state Act imposing a state tax of fifty cents per gallon on all spirituous liquors brought into a State, the same tax being imposed upon all spirituous liquors manufactured in the State, is not a violation of the Constitution.

The Act does not discriminate against the products of sister States, but is an appropriate and legitimate exercise of the taxing powers of the States.

[No. 180.]

Argued Oct. 13, 1869. Decided Nov. 8, 1869.

IN ERROR to the Supreme Court of the State
of Alabama.

The bill in this case was tried by the plaintiff in error, in the Southern Chancery Division

of the State of Alabama, to enjoin the collection of certain taxes. A decree having been entered dismissing the said bill, the complainant took an appeal to the Supreme Court of the State. That court decreed that the bill should be dismissed, "as to the tax upon liquor introduced from other States, and as to liquor imported from a foreign country, and not kept unbroken in the vessel in which it was imported"; but should be retained as to imported liquor "in the hands of the importer, and in the unbroken bulk in which it was imported."

Thereupon the complainant sued out this writ of error.

The case is further stated by the court.

This case was argued with *Woodruff v. Parham* next preceding (882).

Messrs. J. A. Campbell, Geo. N. Stewart, and P. Hamilton, for plaintiff in error.

Mr. P. Phillips, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in error, a merchant of Mobile, sets forth in his bill of complaint, that he has on hand five barrels of whisky consigned to him by — Dexter, of the State of Ohio, to be sold on account of the latter in the State of Alabama, and that he has five other barrels of whisky purchased by himself in the State of Louisiana, and that he has brandy and wine imported from abroad, all of which he holds and offers for sale in the said packages in which they were imported, and not otherwise. That the deputy tax collector for the County of Mobile and State of Alabama, is about to enforce the collection of state and county taxes on said liquors, for which he sets up the authority of the 18th, 14th and 15th sections of chapter one of an Act of the Alabama Legislature, approved Feb. 23, 1866. He insists that this Act is void, as being in conflict with the Constitution of the United States, and prays an injunction.

On final hearing, the relief prayed was granted as to all but the state tax, and relief as to that was granted as to goods imported from abroad, but the state tax of fifty cents per gallon on the whisky of Dexter, of Ohio, and that purchased by the plaintiff in Louisiana, was held to be valid.

Section 13 of the Statute referred to in the bill enacts that "Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this State, such dealer or dealers introducing any such liquor into the State shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof."

The two subsequent sections provide the mode of enforcing the collection of the tax thus imposed.

In the argument of this case no reference has been made to any other section than the 13th of the Statute in question.

If this section stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufact-

ured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exists at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.

We have decided, in the case of *Woodruff v. Parham*, 8 Wall., 123 [*ante*, 882], immediately preceding, that the constitutional provision against taxing imports by the States does not extend to articles brought from a sister State. But if this were otherwise, and we could hold that as to such articles the rule laid down in *Brown v. Maryland*, 12 Wheat., 445, concerning foreign imports, applied, it would prevent but a very little of the evil which we have described; for, under the decision in that case, it is only while the goods so imported were held in the original unbroken condition in which they came into the State, and in the hands of the first importer, that they would be protected from state taxation. As soon as they passed out of his hands into use, or were offered for sale among the community at large, they would be liable to a tax which might render their use or sale impossible.

But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the Supreme Court of Alabama delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the States, was supposed to present a serious objection to the validity of the Alabama Statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of commerce. And it is also true, as conceded in that opinion, that Congress had the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power, all conflicting state laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further.

That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the States until some regulation on the subject had been made by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever.

The question of the nature of the power to

regulate commerce and how far that power is exclusively vested in Congress, has always been a difficult one, and has seldom been construed in this court with unanimity. In the very latest case on this subject, *Orandall v. Nevada*, 6 Wall., 85 [78 U. S., XVIII., 745], the *Chief Justice* and *Mr. Justice Clifford* held that a tax on persons passing through the State by railroads or other public conveyances was forbidden to the States by that provision of the Constitution *proprio vigore*, and in the absence of any legislation by Congress on the subject; while a majority of the court, preferring to place the invalidity of the tax on other grounds, merely expressed their inability, on a review of the cases previously decided, to take that view of the question. But in that case the opinion of the court in *Cooley v. The Port Wardens*, 12 How., 299, was approved, which holds that there is a class of legislation of a general nature, affecting the commercial interests of all the States, which, from its essential character, is national, and which must, so far as it affects these interests, belong exclusively to the Federal Government.

The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.

But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed, by the previous sections of the same Act, of fifty cents per gallon on all whisky and all brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the Act, to examine the 13th, 14th and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As to the effect of the Act in such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States.

Decree affirmed.

Mr. Justice Nelson, dissenting:

I am unable to agree to the judgment of the court in this case. The naked question is, whether a State can tax the sale of an article, the product of a sister State, in the original package, when imported into the former for a market, under the Constitution of the United

States. If she can, then no security or protection exists in this government against obstructions and interruptions of commerce among the States; and one of the principal grievances that led to the Convention of 1787, and to the adoption of the Federal Constitution, has failed to be remedied by that instrument. And hereafter (for this is the first time since its adoption that the clause in question has received the interpretation now given to it), this inter-state commerce is necessarily left to the regulation of the Legislatures of the different States. We think we hazard nothing in saying, that heretofore the prevailing opinion of jurists and statesmen of this country has been that this commerce was protected by the clause—the subject of discussion—namely: “No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”

An attempt was made by the State of Maryland, in 1821, to lay a tax upon foreign imports, but which was pronounced unconstitutional by this court after an elaborate argument of counsel and a very full and carefully considered opinion of *Chief Justice Marshall*, concurred in by the whole court, and he closed it by saying: “It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State.” A tax was attempted by the State of California, in 1857, upon an export from that State to the State of New York, but was pronounced unconstitutional by this court, the opinion delivered by the late *Chief Justice*. He observed: “If the tax was laid on the gold or silver exported (it was in form a stamp tax on the bill of lading), everyone would see that it was repugnant to the Constitution of the United States, which, in express terms, declares that ‘no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.’” Again he observes: “In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be misunderstood.”

It is now said, however, that this clause relates only to foreign commerce, and is no prohibition against taxation upon commerce among the States; and, as we have already said, if this be so, it is left to the unrestricted imposition by a State of duties, or tax, upon all articles imported into the same from sister States. In looking at this clause, it will be seen that there is nothing in its terms or connection that affords the slightest indication that it was intended to be confined to the prohibition of a tax upon foreign imports. Surely, if this had been intended, it must have occurred to the distinguished members of the Convention, it would be quite important to say so, that the prohibition might not be misunderstood; especially when we take into consideration the eminent men who not only discussed and settled the terms and meaning of the clause, but to whom the whole instrument was committed for special and final revision. It would have been easy to have made the clause clear by affixing the word “foreign” before the word “imports.” Then the clause would read “foreign imports,” that now

is affixed, by construction, a pretty liberal one, of the fundamental charter of the government.

The same clause also provides: "No State shall, without the consent of Congress, lay any duty of tonnage," etc. Does this also relate to tonnage employed in foreign trade? If so, then it will be competent hereafter for the States to levy a tax upon the tonnage of vessels employed in carrying on commerce among the States, including the tonnage employed in the coasting trade. But, independently of the clause and the connection in which it is found, why should not the prohibition extend to imports and exports of commerce among the States? At the time of the Convention and formation of the Constitution the States were independent and foreign to each other, except as bound together by the feeble "league of friendship" in the Articles of Confederation in 1777, the 2d article of which provided that "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this Confederation expressly delegated to the United States in Congress assembled." And the only specified restraint then submitted to in respect to their commercial relations is found in the 8d section of the article, namely: "No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress to the courts of France and Spain." There is another provision relating to commerce among the States in the fourth article, to which we shall hereafter refer.

Now, as is seen, at the time the delegates assembled in 1787 to form the Constitution, they represented States that for all the substantial purposes of government were foreign and independent, and especially so in respect to all commercial relations among them, or with foreign countries. Looking at this condition of things, and to the delegates in the Convention representing such constituencies, is it reasonable or consistent with proper rules of construction to suppose, in the absence of any indication from the words of this clause prohibiting the tax on imports or exports, the members used the terms with exclusive reference to foreign countries—that is, countries foreign to the States—and not in reference to the States themselves? We again ask: if this distinction was intended, why was not the clause so framed as to indicate it on its face, and not left to mere conjecture and speculation?

Again; at the time the Convention was assembled, as it has been ever since and now is, the commerce among the States was many fold greater, and vastly more productive of wealth, independence, and happiness to the people, than all the foreign commerce of the country. Its magnitude and importance, therefore, invited protection and encouragement far beyond that of foreign commerce, and could not and did not escape the particular care and attention of the members of the Convention. Besides the clause in question, it is provided in the 9th section that "No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over

those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." And in the clause conferring upon the Federal Government the general power over commerce, it is given, in terms, "To regulate commerce with foreign nations and among the several States." The two are placed upon the same footing without any discrimination. The power is equally broad and absolute over the one as over the other. No distinction is made between foreign and inter-state commerce, and why should the specific prohibitions to be found in the Constitution in relation to this subject receive a different interpretation in the absence of any words indicating any such distinction? Take, as an example, the prohibition upon the Federal Government: "No tax or duty shall be laid on articles exported from any State." Is this clause, also, to receive the narrow and strained construction given to the one in question, and be applied only to exports to a foreign country? If so, then Congress may tax all exports from one State to another. If the terms in the clause before us do not embrace inter-state commerce, then the above clause does not. As was said by the *Chief Justice* in *Brown v. Maryland*, 1 Wheat., 445, "There is some diversity in the language, but none is perceivable in the act which is prohibited." Now, this is a prohibition or limitation upon the general commercial power conferred upon Congress, but if it only applies to foreign commerce, it loses more than half its efficiency as heretofore supposed to belong to it.

We will now recur to a provision in the Articles of Confederation to which we have heretofore alluded. It is the 4th section: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States shall be entitled to all the privileges and immunities of free citizens of the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same restrictions as the inhabitants thereof, respectively."

It will be seen the last clause of this article contains the doctrine of my brethren in the case before us.

The people of one State have the right of egress and regress to and from any other for the purposes of trade and commerce, and the articles may be taxed by the State into which they are carried; but there must be no discrimination. We have gone back to the Articles of Confederation, and have incorporated into the Constitution, by construction, a provision which the framers of that instrument had rejected as wholly inadequate for the protection of inter-state commerce. Instead, therefore, of adopting this article into that instrument, they adopted a more complete and thorough security to the enjoyment of the privileges of this commerce—"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports."

Why this change? If there had been no diversity of soil or climate in the States of the Confederacy, or in the mineral riches of the earth, any commercial regulation among them would have been of little importance. Foreign

trade and commerce would have been their only dependence for a market of their surplus productions. The products would, as a general rule, have been common among all the States. But the fact was otherwise. From the diversity of soil and climate the Middle and Eastern States were mostly grain growing States, and their surplus products were flour, pork, beef, butter and cheese, with a modicum of the manufacture of woollens.

The Southern States were cotton, tobacco and rice growing States. It was the exchange of these commodities that constituted the bulk of inter-state commerce.

Virginia and North Carolina looked to the Middle and Eastern States for their products in exchange for tobacco, tar, rosin and turpentine; South Carolina and Georgia for their cotton and rice. Now, the provision in the Articles of Confederation securing egress and regress for the purposes of trade and commerce furnished no protection to either State. New York and Pennsylvania could lay a tax upon all sales of cotton, tobacco or rice within these States, which would be a tax without any discrimination; and yet it would be, in fact, in its operation and effect, exclusively upon these Southern products. So in respect to the wheat, flour, pork, beef, butter and cheese, when shipped to these Southern States. Each State not producing the article sold, the general tax would not affect their people. We have no doubt the case before us falls within this category.

Alabama is a cotton growing State, and depends upon the Northern States bordering on the Mississippi and Ohio Rivers for most of her corn, wheat and flour. She cannot be, therefore, a State largely engaged in the manufacture of whisky. The tax, so far as regards her own people, is probably nearly nominal. We see from the above view why this non-discriminating article in the Confederation was not incorporated into the Constitution. It was entirely worthless as a protection against the taxation of the inter-state commerce.

The same results will follow, applying the principle to commerce among the States as it exists at the present time. The State of Pennsylvania supplies New York with the article of coal from her mines which is consumed in that State. The trade is very great, and is increasing every year as the facilities for the conveyance of the article, by railroads, into the interior of the State, are multiplied. According to the judgment of the court in the present case, the State of New York may tax these sales if she makes no discrimination. She may, therefore, pass a law imposing a tax on all sales of coal in the State, as the State of Alabama has done in respect to sales of whisky. Such a law may be passed and enforced without imposing any burden upon her own people, as there is no coal of any comparative value in the State but what is brought into it from abroad. So, in turn, Pennsylvania can tax the salt and plaster of New York, carried into that State, with like impunity to her people. Massachusetts may tax the grain and flour of the West, carried into the State, by a like law, as she does not raise a sufficient supply for home consumption, and a general tax upon all sales would not harm her people. In like manner she can tax the

See 8 WALL.

cotton and rice of the Southern States and sugar of Louisiana, and those in turn can tax her cotton, woollen manufactures and shoes carried into those States. The lumber of Wisconsin can be taxed at Chicago, its principal mart, by a general law of Illinois, without any serious prejudice to the interests of the people of that State. The gold-dust and gold and silver bars of California carried to New York can be taxed upon a like principle without prejudice to her people.

We have extended this discussion much further than we had intended, and will close it by referring to the views expressed by *Judge Story* on this clause of the Constitution. After stating the history of the clause in the Convention, he observes, in his valuable Commentaries on the Constitution (sec. 1016, Vol. I.): "So it seems that a struggle for state powers was constantly maintained, with zeal and pertinacity, throughout the whole discussion. If there is wisdom and sound policy in restraining the United States (referring to the prohibition upon it in respect to articles exported from the State) from exercising the power of taxation unequally in the State, there is, he observes, at least equal wisdom and policy in restraining the States themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is thus prevented which would rouse resentments and create dissensions to the ruin of the amity of the States. The power to enforce their inspection laws is still retained, subject to the revision and control of Congress. So that sufficient provision is made for the convenient arrangement of the domestic and internal trade whenever it is not injurious to the general interests."

Judge Story entertained no doubt but that this clause applied to the domestic and internal commerce of the States, as well as to the foreign. We have, therefore, the deliberate opinions of Marshall and Taney and Story concurring in this construction—great names in this and in every country where jurisprudence is cultivated as a science, and especially eminent at home as expounders of our constitutional law.

Cited—12 Wall., 429; 13 Wall., 34, 35; 97 U. S., 573; 100 U. S., 438, 678, 679; 6 Sawy., 298; 7 Ben., 23; 28 Am. Rep., 800 (12 Nev., 283); 55 Mo., 291.

UNITED STATES, *Appt.*,

v.

JOHN E. REESIDE;

AND

JOHN E. REESIDE, *Appt.*,

v.

UNITED STATES.

Judgment of Court of Claims affirmed by equal division of opinion.

The judges of this court, being equally divided, as to whether petitioner is entitled to any relief against the United States, the judgment of the Court of Claims, affirmed.

[Nos. 187, 188.]

Argued Nov. 3, 1869. Decided Nov. 8, 1869.

APPEALS from the Court of Claims.

This case arose upon a petition filed in the court below, by John E. Reeside, to recover commissions alleged to be due him as Inspector of horses upon a contract made with General John C. Frémont. The court found that, in July, 1861, Maj. Gen. John C. Frémont was appointed by the President to the command of the Department of the West, with headquarters at St. Louis, Missouri. So far as the President and Secretary of War could confer them, he was invested with all their authority and power in raising, equipping and supplying an army in the shortest time possible. The public exigency in the Department was immediate and pressing.

To obtain horses for the artillery, cavalry and transportation in the Department, General Frémont appointed John E. Reeside purchaser and inspector of horses at Cincinnati, Ohio, and at a designated compensation.

Upon the facts the court held:

1. That the appointment of Reeside by Maj. Gen. J. C. Frémont was unauthorized and, therefore, void.

2. That, the appointment being void for want of power to make it, the agreement for compensation for the same reason is a nullity.

3. But that, having rendered valuable service to the United States, the benefits of which were realized and accepted by them, he is entitled to be paid such sum as his services were reasonably worth.

Judgment below having been given accordingly in favor of Reeside for a part of his claim, each party took an appeal to this court.

Messrs. J. S. Black, T. J. D. Fuller, J. M. Carlisle and J. D. McPherson, for Reeside:

What were the agent's powers here as found by the record? They were unlimited. They were all that was in the power of the President and Secretary of War to confer upon him under the Constitution and laws of Congress, with ample appropriations of money in a time of war, to cover the expenditure.

The United States is estopped *in pais* from repudiating a part of the acts of a general agent without restrictions, after it has acknowledged the agency by confirming a portion of the agent's acts.

Elwell v. Chamberlain, 81 N. Y., 619; *Law v. Cross*, 1 Black, 533 (66 U. S., XVII., 185); *Gratiot v. U. S.*, 15 Pet., 336; *U. S. v. Jones*, 18 How., 92 (59 U. S., XV., 274).

The case of *The Venice*, 2 Wall., 259 (69 U. S., XVII., 866), as to the authority of a departmental commander to bind his government, and *a fortiori* where his government subsequently ratifies and adopts his acts.

See, also, *Buron v. Denman*, 2 Exch., 167; *Hodgson v. Dexter*, 1 Cranch, 345; *Mackbeth v. Haldimand*, 1 T. R., 172.

Messrs. E. R. Hoar, Atty Gen., T. L. Dick-ey, Asst. Atty Gen., E. P. Norton, and A. G. Riddle, for the United States:

It is respectfully submitted that this is not a mere finding of fact, but is a conclusion of the court involving questions of both law and fact. It may be that there are powers which were not conferred on General Frémont nor attempted to be conferred, either by the President or by the Secretary of War; which powers the Court of Claims may hold, could not be in any man-

ner conferred upon a commanding general, and yet which this court would hold might, in some manner, be lawfully conferred upon a commanding general. The Court of Claims having specified no special powers conferred on General Frémont, and having failed to state as naked or ultimate facts any acts done, either by the President or by the Secretary of War, in the way of conferring extra or special authority upon General Frémont, this general, sweeping statement must be treated as a nullity.

The commanding general of an army or of a department is nowhere clothed with power to make contracts, nor to appoint officers or agents to make contracts in behalf of the United States for supplies for the army; but other officers are especially provided by law for that purpose.

Reeside cannot recover on a *quantum meruit* for services rendered under the void orders of General Frémont.

He may deserve some compensation from his country in discharge of an obligation of gratitude, but for such compensation he must go to Congress and not to the Court of Claims.

Mr. Chief Justice Chase delivered the opinion of the court:

The judges of this court being equally divided in opinion on the question, whether the petitioner is entitled to any relief as against the United States, it is ordered that the judgment of the Court of Claims be affirmed.

THE STEAMBOAT CARROLL ET AL., Appts.,

v.

JOHN N. GREEN.

(See S. C., "*The Carroll*," 8 Wall., 302-306.)

Collision—duty of steamship—when liable.

Where a steamship and sailing vessel are approaching each other, from opposite directions or on intersecting lines, the steamship, from the moment the sailing vessel is seen, should watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact.

Porting the helm a point, when the light of the vessel was first observed, and then waiting until the collision was imminent before doing anything further, does not satisfy the requirements of the law.

If there was fault on the part of the schooner, and the steamer committed a greater fault in suffering the vessels to get in dangerous proximity, at the moment preceding the collision, and she furnishes no excuse for this misconduct, she is chargeable with all the damages resulting from the collision.

[No. 177.]

Argued Oct. 28, 1863. Decided Nov. 8, 1869.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed by the appellee in the District Court of the United States for the District of Maryland, to recover damages occasioned by a certain collision. A decree was entered in favor of the libellant, and the claimant thereupon appealed to the circuit court.

NOTE.—Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 61 U. S. (18 How.), 557.

which affirmed the decree. Whereupon said claimant took an appeal to this court.

The case is fully stated in the opinion of the court.

Mr. John H. B. Latrobe, for appellant.
Messrs. Wm. Schley and Wm. S. Waters, for appellee.

Mr. Justice Davis delivered the opinion of the court:

This is a case of collision between the schooner *Loon* and the steamer *Carroll*, which occurred on the waters of the Chesapeake Bay; and the question for decision is: which vessel was in fault?

The only difficulty in cases of the kind brought by this appeal before the court, arises out of the almost necessarily conflicting character of the evidence; but if the court is able to reconcile it, or if this cannot be done, can see, notwithstanding this conflict, how the matter really occurred, then a conclusion is easily reached; for the rules of navigation which are applicable, have not only been settled by repeated adjudication, but are now embodied in the statute law of the United States. 18 U. S. Stat. at L. 58.

If the two vessels in this case were approaching each other in opposite directions, so as to involve risk of collision, the duty of each was plainly marked out by law. The steamer was required to keep out of the way, slack her speed, or, if necessary, stop and reverse, while the schooner was required to maintain her course, and was not justified in changing it, unless obliged to do so to avoid a danger that immediately threatened her. As the steamer did not keep out of the way, and as the collision did occur, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner.

This collision happened about two o'clock at night. The night was bright, and the weight of the testimony is, that each vessel was provided with the necessary lookouts and lights. The schooner was in her proper course down the bay to James River in Virginia, while the steamer was on her way from New York to the Port of Baltimore, which the schooner had left the previous afternoon; and it is certain that the lookout of the steamer saw the schooner at least fifteen minutes before the accident happened. There is no dispute about the state of the wind, nor of the respective speed of the boats. It is manifest, therefore, that with proper precautions, they should not have collided, and that there was blame somewhere. The officers of the steamer charge the fault to the schooner, because at the moment before the collision she changed her course; while those in command of the schooner say that this change of course was taken to avoid a greater danger, and only made when a collision was inevitable, and that if the officers of the steamer had been attentive to their duty, the misfortune could have been averted.

The evidence in the case is limited in extent, and not as contradictory as the evidence generally is where vessels collide. As usual, the effort of each boat is to relieve itself and cast the blame on the other, but we see no reason

to think that any witness has intentionally sworn falsely.

Edmonson, captain of the schooner, says that when opposite "Point-no-Point," he saw the steamer coming up the bay, about a quarter of a mile distant. The schooner was steering south by east, her proper course, and the steamer's bearing from the schooner was about a point westward from the schooner's course. The schooner held her course until about the time of the collision, when, as it seemed inevitable, directions were given to starboard the helm in order to ease the blow; in consequence of which change, the blow of the steamer was received forward of the fore-rigging instead of in the middle of the vessel, which would have been the case if the schooner had continued on her course.

Travis and Henry, seamen on board the schooner, corroborated this testimony.

It is true they manifestly err when speaking of time and distance, but they were inexperienced seamen, and not very intelligent men, and there is no good reason for discrediting their testimony, which, in other respects, is reliable, because they do not testify with accuracy about distance on the water, and err in computations of time. It may well be doubted, whether Edmonson was not mistaken in the distance he said he was from the steamer when he first saw her; but in view of the testimony furnished from the steamer, the point is not material.

Ashcom, the mate of the steamer, in command at the time, and Jordan, the lookout, are the only witnesses on the part of the steamer who testify as to the state of the case prior to the collision, and they do not agree in their account of the transaction. Ashcom says, as soon as he made the schooner's light to be a port light, he gave the order to port the wheel, and it was done; while Jordan says he saw the schooner about fifteen minutes before the steamer struck her, and reported the fact to the mate, and that the course of the steamer was not changed until four or five minutes before the collision. At the speed the vessels were then running, they could not have been more than a mile apart, and Ashcom admits, when he first saw the schooner, she was four or five miles off.

It is highly probable that Jordan is right as to the point of time when the change was made; but be this as it may, the steamer cannot escape condemnation, unless she is able to show that there was no risk of collision, or that she adopted suitable measures to avoid it, and that the disaster was the result of misconduct on the part of the schooner. The fact that the vessel did collide, explodes the theory that there was no risk of collision, and besides, why did the mate port his helm if in his judgment there was no risk of it? He says this was done as soon as he saw the schooner. If so, he believed at the time the relations of the vessels to each other were such that they might collide, and the possibility of it is all that is required to charge the steamer, unless she can establish that she was without fault. There is no evidence to show that the schooner changed her course until the peril was imminent, but the natural inquiry arises: which boat was blamable for producing this peril? The schooner

was not, because she was obliged to keep her course. She could not choose, because the law had chosen for her. It is otherwise with the steamer. She could go to the right or left, and change as often as there was, in the apprehension of her officers, a necessity for change.

The steamer is, therefore, to blame, for suffering this peril to occur; for if it be conceded that the schooner was wrong in starboarding her helm, this cannot affect her right to recover, as she was in other respects without fault, because the steamer, having the right of way, put her in this predicament, and must answer for the consequences. *Steamship Co. v. Rumball*, 21 How., 888 [62 U. S., XVI., 148].

It is obvious that the officers of The Carroll were either unaware of the nature and extent of the nautical rules which govern vessels approaching each other in opposite directions, or were unmindful of them. These rules were established in the interest of commerce—for the protection of life and property, and must be observed. They require, where a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, that the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact. This The Carroll, on this occasion, failed to do. Porting the helm a point, when the light of the schooner was first observed, and then waiting until the collision was imminent before doing anything further, does not satisfy the requirements of the law. The safeguards against danger, in order to be effectual, must be seasonably employed, and in this case they were not used until the danger was threatening. If there was fault on the part of the schooner, the steamer committed a far greater fault in suffering the vessels to get in such dangerous proximity at the moment preceding the collision, and as she has furnished no excuse for this misconduct, is chargeable with all the damages resulting from this collision.

The decree of the Circuit Court is affirmed, with interest.

Cited—8 Wall., 562; 15 Wall., 679; 94 U. S., 604; 4 Cliff., 587; 1 Holmes, 19; 5 Bias., 303; 4 Ben., 219, 344; 8 Ben., 106; 1 Bro., 249; 61 N. Y., 316.

THE SCHOONER LUCY AND CARGO, WILLIAM AUSTIN, Claimant, *Appl.*,

UNITED STATES.

(See S. C., "*The Lucy*," 8 Wall., 307-310.)

Admiralty jurisdiction of circuit court—appeal in—practice—what confers jurisdiction.

The effect of the Act of July, 1862, was, to vest in the Circuit Court for the Southern District of Florida, the appellate jurisdiction exercised by other Circuit Courts in respect to decrees in admiralty; it left the original jurisdiction in admiralty of the District Court of that district untouched.

From a decree of such District Court pronounced in August, 1862, no appeal can be taken to this court

NOTE.—*Jurisdiction of Federal Courts not given by consent.* See note to Governor of Georgia v. Sundry African Slaves, 26 U. S. (1 Pet.), 110.

but only to the Circuit Court, and the allowance of such an appeal to this court was a nullity.

The fact that no transcript of the record was filed at the next term, is also fatal to the appeal.

No consent of counsel can give this court jurisdiction. Appellate jurisdiction depends on the Constitution and the Acts of Congress. When these do not confer it, Courts of the United States cannot exercise it.

[No. 224.]

Argued Nov. 5, 1869. Decided Nov. 8, 1869.

APPEAL from the District Court of the United States for the Southern District of Florida.

A libel in admiralty in this case was filed in the court below, against the schooner, Lucy, and a decree of condemnation passed against her as lawful prize of war. Aug. 15, 1862, an appeal was allowed to this court. The record of the case was filed Oct. 31, 1862, in the Circuit Court of the United States for the Southern District of Florida, but May 1, 1867, the case, by consent of all parties, was ordered to be transferred to this court.

A further statement of the case appear in the opinion of the court.

On motion to dismiss.

Mr. E. R. Hoar, Atty-Gen., for the United States.

Mr. J. Hubley Ashton and Nathaniel Wilson, for captors.

The case should be dismissed:

I. The Supreme Court acquires no jurisdiction of the case by the order of the Circuit Court. *The Alicia* (ante, 84).

II. The case was not in the Circuit Court. The 3d section of the Act of July 16, 1862, did not provide for its removal. 12 Stat. at L., 576.

III. The Supreme Court does not acquire jurisdiction by reason of the appeal from the decree of the District Court taken in August, 1862, to the Supreme Court of the United States.

By the Act of Mar. 3, 1845, 5 Stat. at L., 788, the District Court of the Southern District of Florida had the same jurisdiction as Circuit Courts and appeals were to the Supreme Court of the United States. The Act was not, however, in force at the time the appeal was taken. It was in August, 1862. The Act was repealed by the Act of July 15, 1863. 12 Stat. at L., 576.

The appeal seems to have been taken and allowed in August, in ignorance that the Act had been repealed in July. The Prize Act of June 30, 1864 (13 Stat. at L., 310), gave the Supreme Court jurisdiction of appeal from the District Court, but no appeal has been taken under this Act. It can hardly be argued that the Act of 1864 gave any vitality to the appeal taken in 1862. Even if it did, the case must be dismissed because the record was not filed before the end of the term succeeding the allowance of the appeal, nor before the end of the term succeeding the passage of the Act of June 30, 1864. The record was filed Dec. 24, 1867.

Edmonston v. Bloomshire (ante, 91).

Messrs. N. Chipman & Hoerner, D. P. Holland, and Thomas J. Durant, for appellant:

1. This appeal was returnable to the Supreme Court of the United States, as by the 1st section of the Act of Feb. 23, 1847, the District Court of Florida had the powers of a Circuit Court, and appeals from its decrees were re-

75 U. S.

turnable directly to the Supreme Court. 9 Stat. at L., 181.

2. This Act last quoted was not repealed by the Act of July 15, 1862, since the 8d section of that Act declared that only actions, suits, etc., which might have been brought and could originally have been brought in a Circuit Court, now pending in the District Court of Florida as a Circuit Court, on the first day of October, shall be transferred to the Circuit Court constituted by that Act. In the case at bar, the District Court of Florida was not acting as a Circuit Court and the case was not pending Oct. 1, 1862, having before that day been appealed to the Supreme Court of the United States. See 12 Stat. at L., 576.

3. The act of filing the transcript of the record in the Circuit Court of Florida was a mere error of the clerk. It can prejudice no one and gives that court no jurisdiction.

4. Things remained in this condition until Mar. 17, 1867 when, by an agreement between the parties, it was agreed that "The appeal taken and allowed in this case be taken to the Supreme Court of the United States."

5. This agreement operated as a waiver of the irregularity existing, from the fact that the appeal had not been filed in the Supreme Court of the United States during the December Term, 1862, and as a consent that it should be filed at the next term after the agreement, which was done.

6. This case is distinguishable from that of *The Alicia* (ante, 84). In that case, the decree of condemnation was rendered in January, 1863, when the Act organizing the Circuit Court in Florida was in full operation. See, Act, July 15, 12 Stat. at L., 576.

The appeal was then asked and allowed to the Circuit Court in the same month; and in February, 1867, by agreement of parties, and order of the Circuit Court thereon, the cause was transferred to this court, such transfer being authorized by the 13th section of the Act of June 30, 1864 (13 Stat. at L., 311); but in the opinion of the court, appellate jurisdiction of the cause could not be obtained in that way.

7. Irregularity in return of writs of error or appeal, may be cured by consent, whether implied from appearance or otherwise shown. *Wood v. Lide*, 4 Cranch, 180.

8. Nothing prevents a second appeal being taken, if the first has been dismissed. *The Virginia v. West*, 19 How., 182 (60 U. S., XV., 594); and the present case, although not strictly one of where an appeal was dismissed, comes within the analogy of such a case.

9. Good faith requires that the agreement made by the United States below should be kept here, since no law forbids its observance in the present instance.

10. If, notwithstanding the foregoing, the court should be of opinion that the case was properly in the Circuit Court of Florida, then it is submitted we ought to have an order similar to that given in the case of *The Alicia*, (*supra*).

Mr. Chief Justice Chase delivered the opinion of the court:

We think that the motion to dismiss, made in this case, must be allowed.

The decree of condemnation passed in the See 8 WALL.

District Court on the 4th of August, 1862, and on the 15th an appeal was allowed to this court.

By the Act of Feb. 23, 1847, 9 Stat. at L., 181, the District Court for the Northern District of Florida was established, with the jurisdiction and powers of a District and Circuit Court of the United States; and appeals were allowed from its decrees in the same manner and under the same regulations, as appeals from the circuit court.

At this time the Act of 1803, 2 Stat. at L., 244, governed appeals from the District to the Circuit Courts, and from the Circuit Courts to this court. No appeal in admiralty could be taken directly from the District Court to this court, except when, as in the case of the Southern District Court of Florida, the District Court exercised the jurisdiction of the Circuit Court as well as that of the District Court.

If this state of the law had undergone no change at the date of the decree of condemnation in this case, the allowance of an appeal to this court would have been quite regular.

But, on the 15th of July, 1862, Congress passed an Act establishing a Circuit Court for a circuit which included the Southern District of Florida, and repealing the former Act, which conferred upon the District Court, Circuit Court jurisdiction, the effect of this Act was to vest in the Circuit Court for that circuit the whole appellate jurisdiction exercised by other Circuit Courts in respect to decrees in admiralty. It left the original jurisdiction in admiralty of the District Court, untouched.

It was in virtue of this original jurisdiction that the District Court had cognizance of the case of *The Lucy*. The appellate jurisdiction of the case was vested by the Act in the Circuit Court.

It follows that, when the decree was pronounced in August, no appeal could be taken to this court, but only to the Circuit Court, and that the allowance of an appeal to this court was a nullity.

This objection to the jurisdiction is decisive; but, if it were otherwise, the fact that no transcript of the record was filed at the next term, would be fatal to the appeal. *Castro v. U. S.*, 8 Wall., 47 [70 U. S., XVIII., 163]; *Ins. Co. v. Mordecai*, 21 How., 195 [62 U. S., XVI., 94].

No consent of counsel can give jurisdiction. Appellate jurisdiction depends on the Constitution and the Acts of Congress. When these do not confer it, courts of the United States cannot exercise it.

We cannot take cognizance of a case not brought before us in conformity with the law.

The case at bar, therefore, must be dismissed.

Cited—20 Wall., 620.

MICHAEL LYNCH, LEOPOLDT GREGET,
ANDREW BERGEROTS ET AL., *Pliffs. in*
Err.,
v.

CARMEL S. DE BERNAL AND JOSE DE
JESUS BERNAL.

Motion to dismiss denied, but may be argued on
the final hearing.

Where the question of jurisdiction cannot be determined without opening the record and looking

into the merits, the motion to dismiss for want of jurisdiction will be denied, with permission to argue it upon the hearing of the cause.

[No. 805.]

Motion filed Apr. 9, 1869. Decided Nov. 8, 1869.

IN ERROR to the Supreme Court of the State of California.

An action was brought by the defendants in error in the District Court of the 4th Judicial District of the State of California, to recover possession of certain land. Judgment having been for the plaintiffs, the defendants took an appeal to the Supreme Court of the State, where the said judgment was affirmed. Whereupon the said defendants sued out this writ of error.

For a statement of the facts involved, see the report of the case upon the final disposition of it upon the merits, *post*.

On motion to dismiss for want of jurisdiction.

Messrs. E. L. Gould and F. Billings, for defendants in error.

Messrs. Geo. H. Williams and J. Hubley Ashton, for plaintiff in error.

Mr. Chief Justice Chase delivered the opinion of the court:

The question of jurisdiction in this case cannot be determined without opening the record and looking into the merits of the controversy.

The motion to dismiss for want of jurisdiction will, therefore, be denied; but may be argued upon the hearing of the cause.

UNITED STATES, *Appt.*,

v.

CHARLES D. GILMORE.

(See S. C., 8 Wall., 880-888.)

Constructive allowances to army officers.

Constructive allowances of pay to officers of the army are not entitled to favor.

The Act of June 20, 1864, did not have the effect of increasing the emoluments of officers.

The Act of March 3, 1865, as to "the measure of allowance for pay for an officer's servant," can have no retrospective operation.

[No. 138.]

Argued Apr. 5, 1869. Decided Nov. 8, 1869.

APPEAL from the Court of Claims.

The petition in this case was filed in the court below, by the appellee, an ex-colonel in the army, for money alleged to be due him as an allowance for servant's pay. The court having decreed the payment of said claim, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty. Gen., T. L. Dickey, Asst. Atty. Gen., A. G. Riddle, and E. P. Norton, for appellants.

Messrs. Chipman and Hosmer, for appellee:

The Act of July 17, 1862, was a particular intention, incompatible with the general intention, and was an exception applicable only to the law which it was passed to affect, viz.: the Act of Aug. 6, 1861.

Counsel clearly misapprehends the Act of March, 3, 1865. There is nothing in it which recognizes the existence of the Act of July 17, 1862, nor is there anything in it which bears the least semblance to a repealing Act.

It reads: "The measure of allowance for an officer's servant is the pay of a soldier, as fixed by law at the time."

The only law then in force was the law of June 20, 1864.

We come now to notice the Act of March 2, 1867. 13 Stat. at L., 485.

Suppose this Act repealed the Act of June 20, 1864, altogether; what then would be the effect?

We answer "Where a right, in the nature of a contract, has vested under the original statute, then the repeal does not disturb it."

Sedg., 138; *Fletcher v. Peck*, 6 Cranch, 87; *Gillmore v. Shooter*, 2 Mod., 810; *Couch v. Jeffries*, 4 Burr, 2480; *Churchill v. Orasee*, 2 Moo. & P., 415; S. C., 5 Bingh., 177; *Terrington v. Hargreaves*, 3 Moo. & P., 137; S. C., 5 Bingh., 489; *Butler v. Palmer*, 1 Hill, 324; 4 Serg. & R., 401; 3 Serg. & R., 590.

Mr. Chief Justice Chase delivered the opinion of the court:

This is an appeal from the Court of Claims. A suit was instituted in that court by the appellee, an ex-colonel of the army, for a sum alleged to be due him as an allowance for servants' pay, beyond the sum actually allowed him for that purpose by the Comptroller of the Treasury in settlement of his account. Judgment was given in his favor by the Court of Claims, and the United States appealed.

The sum in controversy in the particular case before us is insignificant, but the principle involved extends to numerous claims and large amounts.

It was for many years the practice in the army to detail enlisted men as personal servants of officers, and the practice had the sanction of law.

In 1812, with a view undoubtedly to the discouragement of this practice, it was provided by the Act of July 6 (2 Stat. at L., 785), that "Officers who shall not take waiters from the line of the army shall receive the pay, clothing and subsistence allowed to a private soldier, for as many waiters as they may actually keep, not exceeding the number allowed by existing regulations."

In 1816, the practice was absolutely prohibited except to company officers, and it was again provided, by the Act of April 24 (8 Stat. at L., 299), almost in the terms of the Act of 1812, that "All officers be allowed for each private servant actually kept in service, not exceeding the number authorized by existing regulations, the pay, rations and clothing of a private soldier, or money in lieu thereof, on a certificate setting forth the name and description of the servant in the pay account."

At the time of the passage of the last Act, the pay of a private was \$5 a month, with rations and clothing of certain money value in addition. The effect of the Act was precisely the same as if the money value of the whole had been ascertained, and the amount had been inserted as the allowance or emolument to be paid to the officer in addition to his own regular pay.

There is nothing in the Act which expresses any intention on the part of Congress that, whenever the pay of the private should be thereafter increased, the emolument of the officer should be proportionably augmented, with

further legislation. But this construction was given to the Act by the accounting officers, and the emolument of officers were thus indirectly increased from time to time until 1861. Whenever the pay, clothing, and rations of private soldiers were advanced in amount of value, the emoluments of officers were increased proportionably, not by legislation to that effect, but by departmental construction.

In 1854, by the Act of August 4 (10 Stat. at L., 575,) the pay of privates was increased to \$11 a month, and the allowance of officers for servants was also increased in like manner.

At length, when, in 1861, by the Act of August 8 (12 Stat. at L., 289, 326), the pay of privates was augmented to \$13 a month, and the army ration was increased, and the emoluments of the officers were also augmented by the construction referred to, the subject attracted the attention of Congress, and by the Act of July 17, 1862 (12 Stat. at L., 594), it was provided that "the 1st section of the Act, approved August 6th, 1861, entitled 'An Act to Increase the Pay of Privates in the Regular Army and of the Volunteers in the Service of the United States,' shall not be so construed, after the passage of this Act, as to increase the emoluments of the commissioned officers of the army."

This Act virtually gave the legislative sanction to the construction which had heretofore prevailed at the departments, in respect to the past Acts; but virtually, also, prohibited its future application. It expressly forbid its application to the increase of pay provided for by the Act of August, 1861; the departmental officers conformed their action to its directions, and thenceforth limited the emoluments of officers in respect to servants' pay to the allowances made under the Act of 1854.

In 1864, another Act was passed on the 20th of June (13 Stat. at L., 144), by which the pay of privates was still further increased to \$16 a month, without any mention of officers' emoluments; and it is under this Act that the claim under consideration is made. It is not denied that the action of the accounting officers, under the Act of 1862, is correct, but it is insisted that the Acts of 1864 must be construed as were the Acts of 1861 and the former Acts increasing pay, until the prohibitory Act of 1862.

But it by no means follows, from the silence of the Act of 1864, in respect to the emoluments of officers, that the old construction must be applied to it. The contrary inference, we think, is better warranted.

We have already said that the correctness of the original interpretation of the earlier Acts increasing pay was at least doubtful. Constructive allowances are not entitled to favor. And it is certain, though the allowances in question, so far as made prior to the Act of July, 1862, were confirmed by that Act, that its prohibition of that construction in future, as applied to the Act of 1861, must be taken, at least, as a legislative disapproval of the construction itself. It cannot, then, be assumed, that when the Act of 1864 was passed, Congress intended that this disapproved construction should be applied to it.

We conclude, on the contrary, that the indirect effect, claimed for the Act of 1864, of increasing the emoluments of officers, was not contemplated by the Legislature, and cannot properly be given to it.

See 8 WALL.

The construction contended for was not given to that Act by the accounting officers, and we cannot say that, in rejecting it, these officers committed any error.

We agree with the counsel for the appellee that no effect can be given in this case to the Act of March 3d, 1865 (18 Stat. at L., 487), which declares that "The measure of allowance for pay for an officer's servant is the pay of a private soldier, as fixed by law at the time." In prior Acts, this allowance had extended to the pay, clothing, and subsistence of a private. The intention of this Act seems to be that the allowance shall be limited to the pay. Winthrop's Dig. of Ops. Judge Advocate-General, 264. But whatever the intention, the Act can have no retrospective operation.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

Cited—23 Wall., 382; 28 Wis., 68.

THE MATERIALS OF THE CAMANCHE, P. DONOHUE ET AL. Claimants, Appt.,

v.

THE COAST WRECKING COMPANY OF NEW YORK.

(See S. C., "The Camanche," 8 Wall., 448-480.)

Corporation may maintain action for salvage—when owners of vessels may claim salvage—amount of—unnecessary allegations—agreement, when defense to salvage—reversal of decree.

A corporation can maintain a salvage suit for saving the salvaged property.

Owners of ships may claim salvage compensation when such services are rendered by their vessels, whether they are present or absent at the time the service is performed.

The owners of the ship are allowed one third of the amount awarded as salvage compensation, and sometimes much more in a case of peculiar danger.

Salvage suits may be instituted in the name of the ship or of the owners, without any allegation that the suit was prosecuted for the benefit of the master and crew.

An agreement for a fixed sum is no defense to a claim for salvage, unless it is set up in the answer with an averment of tender or payment.

Nothing short of a contract to pay a given sum at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage.

Court will not reverse decrees as to the amount of salvage, unless upon some clear mistake or gross over-allowance of the court below

[No. 158.]

Argued Oct. 27, 1869. Decided Nov. 15, 1869.

APPEAL from the Circuit Court of the United States for the District of California.

The libel in this case was filed in the District Court of the United States for the District of California, by the appellee, to recover salvage for services rendered in the harbor of San Francisco, in saving the cargo of The Aquila, consisting of materials, machinery, engines, construction tools, etc., for the construction of an ironclad monitor, The Camanche, and the armament of the same, which was to be constructed at San Francisco by the defendant, under a contract with the government.

The court entered a decree for \$28,428.44, with costs, in favor of the libellant. The court below having affirmed this decree, on appeal, the claimants took an appeal to this court.

The case is very fully stated by the court.

Mr. John E. Ward, for appellant:

1. The libellant in this case cannot be a salvor.

A salvor is one who renders personal service.

In the case of "*The Lively*," an agent at a seaport where a vessel had run ashore, being applied to by the master and having hired and employed persons to unload the vessel and get her adfioat, sued as a salvor. It was held that his claim could not be sustained. Doctor Lushington, giving judgment, said: "The whole records of this court show that a claim of this description cannot be allowed. * * * If I were to sanction a claim of this description, the inevitable consequence would be this: in every case where an accident occurred in the neighborhood of the various seaports of this country, and any agent was applied to, to hire a steamboat or hire sailors to go on board to render assistance, he would be entitled to come to this court and sue, as if he were a salvor himself, he personally doing nothing to effect the salvage. I believe that, over and over again, when such attempts have been made, and there have been two or three in my experience, every judge of this court has set his face decidedly against them." *The Lively*, 6 Notes of Cas., 206.

In the case of "*The Charlotte*," 6 Notes of Cas., 279, it was distinctly held that no claim for salvage remuneration, properly so called, can be maintained by parties not personally engaged in the service.

In the case of *Thos. Marshall v. The British Ship "Stratton Audley"*, 8 Ben., 241, Judge Blatchford says: "Nor can the corporation (meaning this very Coast Wrecking Company) itself be a salvor." It cannot hire persons on wages and claim salvage for services rendered by those persons."

In the case of "*Coast Wrecking Co.*" v. "*The Morning Star*," 6 Blatchf., 154, this principle is affirmed by *Mr. Justice Nelson*.

2. If this libellant can be a salvor, it is not the sole salvor; and payment to it would be no protection to the claimants against its employees.

In the "*Lustris*" case, 8 Hagg., 154, where, by express stipulation and agreement, the owners and underwriters were to be held answerable for the payment of the stores expended or damages, it was held that even this agreement did not bar the right of the officers and crew to salvage compensation.

In the case of "*The Centurion*," 1 Ware, 483, Judge Ware said: "In the present case, as the service in which their vessel was employed was not embraced in the contract with the crew, and was one which might have been attended with great peril, I am clear that the crew were entitled to a specific compensation beyond the rate of their wages for the time."

See, also, *The Britain*, 1 W. Rob., 40; *The Sarah Jane*, 2 W. Rob., 110.

Professor Parsons, in his recent elementary treatise, after examining all the authorities on this point, says: "The interest of co salvors is not joint but several, and payment or satisfaction to any one is not so to any other. If, there-

fore, payment is made to the master, although his receipt would bind himself and his owners, and an action would lie against him by the seamen for their shares, yet it is also true that the seamen may bring an action against the property saved, if the settlement was made with the master without their consent." 2 Pars. Ship. and Adm., 260.

3. This is not a case of salvage service. A contract was made for a sum certain, in consideration of which the service was to be performed.

Salvage means a compensation earned by persons who voluntarily assist in saving a ship or her cargo from peril.

In the case of "*The Calypso*," 2 Hagg. Adm., 217, Sir Christopher Robinson said: "All salvage is founded on the equity of remunerating spontaneous services."

And again, "Considering all salvage to be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle." 2 Hagg. Adm., 218.

In the case of "*The Neptune*," 1 Hagg., 336, Lord Stowell defines a salvor to be "A person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer, without any pre-existing covenant connecting him with the duty of employing himself for the preservation of that ship."

In the "*Mulgrave*" case, 2 Hagg., 77, Lord Stowell held that an agreement for a sum certain vitiates any claim for salvage; and would not consider the question, where a contract existed.

In the case of *The Helen & George*, 1 Swab., 869; *The Fire-Fly*, 1 Swab., 241; *The Jonge Andries*, 1 Swab., 236, Doctor Lushington, in rendering the decision of the court, said: "The principle on which the court acts, is, that if satisfied that any agreement has been made, it will carry it into effect, unless totally contrary to justice and the equity of the case;" and in conclusion tersely said: "I pronounce for the agreement."

In the case of "*The Versailles*," 1 Curt., 860, Judge Curtis said: "If there was such a contract fairly made, I do not think salvage could be claimed."

In the case of "*The Independence*," 2 Curt., 850, Judge Curtis said: "In my judgment, a contract to be paid at all events, either a sum certain or a reasonable sum for work, labor and the hire of a steamer or other vessel, in attempting to relieve a ship in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a Court of Admiralty, and any claim for salvage disallowed."

4. The amount allowed in this case, violates the established principles of law and justice regulating compensation for salvage.

The amount awarded violates the settled principles of law.

If the contract made between the parties does not totally destroy the claim for salvage, it certainly furnishes the rule by which the parties themselves should be governed.

What possible claim can the libellant make for a larger sum than the \$110,000, agreed to be

paid it for the saving of these materials and this machinery?

The testimony discloses the fact that it has been paid the sum of \$95,000, on account of these materials and this machinery; that it has been paid full salvage upon the ship and the rest of the cargo, upon which there is now no pretext for a claim, leaving still due it \$15,000, one half in legal tenders and one half in coin, which has not been paid in consequence of the bankruptcy of one of the insurance companies.

The judge in the court below has decreed that claimants should pay this amount, and in defiance of the agreement that they should also pay an additional salvage on the materials and machinery of *The Camanche*, to the extent of the value of \$60,000.

Agreements for salvage are not allowed to be made by the owners and masters of vessels, to the detriment of the owners of the cargo, and so *vice versa*. *The Westminster*, 1 W. Rob., 235.

5. The decree is vague and uncertain.

It purports to give to the libelant only \$24,062.25 principal, and \$4,366.19 interest, amounting in all to the sum of \$28,428.44 in currency; whereas, if enforced, it would actually give about \$25,228.44.

It awards \$28,428.44, principal and interest, in currency, as all the salvage to which the libelant is entitled; but it orders that \$17,000 (on account of the whole award) must be at once paid by the sureties of the claimants, in gold.

While courts do not encourage appeals from matters of discretion, in the case of *Post v. Jones*, 19 How., 160 (60 U. S., XV., 622), Mr. Justice Grier, delivering the opinion of this court, said, "Where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause. Hence, many cases are to be found where the appellate courts have either increased or diminished the allowance of salvage originally made, even where it did not violate any of the just principles which should regulate the subject."

It is respectfully submitted, that the rules of law and every principle which should regulate the awarding of salvage, have been violated in the decree rendered in this case.

Mr. E. Casserly, for appellee:

1. The service in this case was evidently a salvage service.

It was voluntary service rendered by the libelant in the saving of cargo in peril on board of a wrecked ship.

2. This case presents, in a very high degree, all the ingredients of a salvage service. These are—and are in the order of merit—as follows:

(a) The danger from which the property was rescued.

(b) The value of the property.

(c) The risk incurred in the salvage.

(d) The value of the property employed in the service and the risk to it.

(e) The skill and knowledge shown in rendering the services.

(f) The time and labor expended.

The Traveller, 3 Hagg., 871; *The London Merchant*, 3 Hagg., 395; *The Fusileer*, Brown. & Lush., 350.

See 8 WALL.

The risk deliberately assumed in this case, is a larger element in the compensation than even the toil and expense incurred.

The Westminster, 1 W. Rob., 234; *The Gilpin*, Olcott, 88; Conk. Adm., 290.

3. Under the circumstances of this case—the peculiar nature, situation and exposure of the property, remote from succor and demanding the most effective salvage services, thoroughly organized, promptly undertaken and kept up unremittingly for months; the enterprise, full of difficulty enhanced by danger from the outset, and constantly threatened with failure—the libelant, though a body corporate, is entitled to claim as salvor a full salvage compensation, on the merits of the service performed.

The objection because of the corporate capacity of the libelant, was first heard of on the trial of the cause in the district court below. It is not in the answer, and was not suggested during the protracted operations of the libelant, carried on under the eyes of two of the claimants.

Has this objection, hard, ungracious and purely technical, as it certainly is in the present case, any just foundation in the law of salvage, or in the public policy out of which it sprung in the beginning, and which at all times has given it form and development?

4. The law of salvage services to property in admiralty, as distinguished from a law for similar services on land, is founded on a great public policy established in the general interests of the commerce and navigation of the country.

This public policy requires for the protection of those interests, that such salvage services should be sedulously fostered; and hence, that they should receive compensation, not as mere pay for work and labor, nor even as limited to the precise *quantum* of benefit in the particular case; but on a scale so liberal as best to incur such services.

The Blaireau, 2 Cranch, 266; *The William Beckford*, 3 C. Rob., 355; Approved, 8 Hagg., 248; *The Sarah*, 3 C. Rob., 330, n. 1; *The Eobank*, 1 Sumn., 413; *The Rising Sun*, 1 Ware., 380; 2 Pars. Mar. L., 618; for *résumés* of the cases.

5. The same public policy demands, at least as strongly, that the means of salvage service should be the most efficient possible, and to that end should be always prepared, prompt, powerful and reliable. Hence, the Court of Admiralty has not hesitated to accept all beneficial modes and instruments of salvage service, which from time to time are developed by the progressive forces of society, even though it may depart from a settled rule of decision.

Thus the old rule, that none can claim salvage reward who did not directly take part in person in the salvage service, has been so often broken down in important classes of cases, that it is now the exception rather than the rule. As where a ship sends part of her crew on salvage service, those of the crew who remain on board are entitled to share in the salvage earned.

The same principle has been supposed to apply where the actual salvors belonged to a party, of which the others remained on shore.

A still stronger departure—made after considerable opposition—was when salvage was allowed to the owner of the ship engaged in

the salvage service, though he may have been absent and ignorant of the transaction.

The same equity is extended even to the owner of the cargo, where he has authorized the service; and probably also where he has not. 2 Pars. Ship. & Adm., 278, and *n.* 4, ed. 1869.

This departure in favor of the owner of the vessel was pushed still further in the case of steamers. The greatly increased power and efficiency of these vessels, then a new force in the maritime world, was cordially recognized and welcomed in admiralty, in the first case that arose there—and because it was the first. *The Raikees*, 1 Hagg., 246, 1824, per Lord Stowell.

The precedent has since been followed out and developed in numerous cases. *The Beulah*, 1 W. Rob., 477; *The William Penn*, 1 Am. L. Reg., 584; *The Kingaloch*, 26 Eng. L. & E., 599; 1 Curt. (C. C.), 363; 2 Curt. (C. C.), 362; *The Island City*, 1 Black, 180 (66 U. S., XVII., 78); 2 Pars. Ship. & Adm., 299, *n.* 5, citing many cases.

Less than fifty years ago, in admiralty the claim of the salvor vessel was but little worth, as compared with that of men salvors. Now, keeping pace with the times and their changed modes of salvage, the steamer is the real salvor and has the lion's share of the reward.

And the larger, stancher and more powerful the steamer, the more liberal the reward; though the danger to such a vessel is reduced by her superior qualities to a *minimum*.

The reason is, that society may be encouraged to give its best resources to the succor of life and property in distress at sea.

A leading consideration as to steamers is, that besides the value of the property which is generally at risk, they render salvage service with greater expedition, and often under circumstances where no other assistance could possibly avail. *The Kingaloch* (*supra*); Board of Trade Instructions to Receivers of Wreck, etc., on Salvage, art. 91, quoted in Maude & Poll., Ship., 494, *n.* 9.

All the reasons for encouraging steamers apply with equal force in favor of a powerful organization, such as the libellant's.

A pregnant instance of substituted service is when the first set of salvors, while prosecuting their operations, are tortiously ousted by another set who complete the service; but the law ascribes to the first set the whole merit of the services of the second set, and awards to them the entire compensation. *The Fleeca*, 3 W. Rob., 280.

These are all cases in which salvage awards are allowed, as of course, to those who have had no personal part in the salvage service. They are all cases of a substituted service, in which persons removed from the field of operations may claim as salvors, on the strength of the actual service rendered by some person or property which stands in their place, and is their substitute for the time being. Personal presence has not of late years been an essential. In the great and much contested case of *The Thetis*, 3 Hagg., 58, and 2 Knapp, 409, it was held that the responsibility borne by the admiral in furnishing men and stores, was more valuable than his personal presence would have been.

Should the powerful steamer of the libellant perform in the best manner a great salvage

service, for which she had been, at large cost, expressly built and equipped and at all times maintained in a state of the highest efficiency, could it be said that, because she was the property of a corporation, she must be denied a salvage compensation or cut down to one which is no better than pay for work and labor?

One ground assigned for giving a large salvage reward to powerful steamers is, that "They are owned by great and opulent companies and are fitted out by them at large cost." *The Perth*, 8 Hagg., 416.

If, in the case of a salvage service by their steamer, the libellant here stands as favorably before the court as if it was a natural person and not a corporation; why should it not stand equally well in the case of services performed by its agents and servants.

6. Either way, it is a case of substituted services, as sanctioned and rewarded in admiralty in numerous instances.

The well considered decision of the late *Chief Justice* in the case of *Virden v. The Caroline*, 6 Am. Law Reg., 222, asserts fully the doctrine of substituted service.

In the growing complexities and divisions of labor of an advancing civilization, men are less and less able to act directly for themselves and must act more and more through agents and servants. This important relation of agency, the most general in society, is not one which admiralty will disregard in respect to salvage services, which can be so much better performed by an organized body of drilled subordinates under one controlling head, than by ten times the number of undisciplined and unorganized wreckers.

Salvors are held responsible for the misconduct of those whom they make their agents, by employing them to aid them in the salvage service. 2 Pars. Ship. & Adm. (1869), 312.

It is difficult to see why they should not have the benefit of the good conduct of the same *employés*.

Had the agents and servants sent out by the Coast Wrecking Company to save the monitor, conducted that important service as badly as they conducted it admirably, and thereby ruined and lost the cargo, the Company would justly be made responsible before the law.

Since it may be charged in heavy liability for the demerits of its service, upon what principle is it denied credit for its meritorious services?

Associated service is no stranger in the law of admiralty, in the law of salvage. It has over and over a generous welcome there. *The Susan*, 1 Sprague, 504.

A great element of associated service is substituted service, by which each associate contributes his part of the service, labor, skill, money, advice, even responsibility, as the case may be, and has the benefit of the part contributed by every other. The captain of a salvaging ship who stays aboard his ship, gets a larger share than his mate who goes with and actually conducts the enterprise, and has all the personal risk and exposure. This is because of the great responsibility borne by the captain. 1 Conk. Adm., 498, and cases cited; *Thetis*, 2 Knapp, 409.

In this case, did not the Company representing its stockholders assume a very grave responsibility?

For the carrying on of a salvage or wrecking business on a large and effective scale, there is really no comparison between the efforts of individuals casually employed for the occasion, often but poorly provided with vessels or other appliances, and under any circumstances unprepared for any long, remote or costly enterprises; on the one hand and on the other, a powerful company like the libelants, established expressly for the business; provided with capital, trained men, vessels, apparatus, machinery, a thorough organization, which enables it at any time to undertake and carry through the most arduous and protracted salvage services, in the face of great risks, anywhere on American waters, however remote and at whatever expense.

The question to be now determined is: shall these powerful corporate organizations be recognized in admiralty on the same footing with individual salvors, and like them be rewarded according to the merit of the service performed?

7. In any view the decree below should be affirmed.

The sum to be collected under it is no more than was justly earned by the libelants.

An important element of compensation is the expense incurred by the Company in keeping its boats, apparatus, equipment and general organization of men and materials, always in a state of preparation to perform any salvage service, however difficult, remote or protracted. Public policy dictates a liberal consideration of all this, without too strict reference to the *quantum* of service in the particular case. Ships have to pay largely for lighthouses, though this or that ship may derive no benefit from them on this or that particular occasion.

The Sarah, 3 C. Rob., 381, n.; *The Susan*, 1 Sprague, 504.

The decision in *The Caroline*, 6 Am. L. Reg., 222, is a vigorous and explicit assertion of the same general principle.

The libelant had to expend nearly \$64,000 before it was entitled to receive anything. It might never have been so entitled.

No judge nor jury in a court of law or *Chancellor* in equity would have hesitated to say that in such a case, on such a risk, a contingent reward of \$187,500, as fixed in the contract with the underwriters, was unreasonable.

In this cause the libelant proceeds for the salvage of $\frac{1}{100}$ of the materials of *The Camanche*, being the portion not covered by insurance. The contract between the underwriters and the libelant, under which the latter agreed to take the salvage of the materials, etc., assumed this value to be as stated in the policies, \$400,000; of this amount \$340,000 was covered by the policies, leaving \$60,000 uninsured. The agreed salvage was \$110,000, one half gold and one half currency, to be paid by the several insurance companies, in the proportions which the sums insured by them respectively bore to the whole amount of \$400,000. One company, the Columbian, became insolvent before paying anything. This left \$75,000 of the policy value uninsured.

The agreed salvage was equal, at then current rates of gold, to about \$187,500 or about \$4,000 more than one third of the assumed value; and very nearly just double the actual cost to the libelants of the salvage service.

See 8 WALL.

Mr. Justice Clifford delivered the opinion of the court:

Compensation, as salvage, is claimed by the libelants for services rendered by them in saving the cargo of the ship *Aquila*, which was wrecked in a storm, and sunk in the harbor of the Port of San Francisco, to which she was bound, with all her cargo on board.

Such portion of the cargo as constitutes the basis of the investigation in this case consisted of certain materials manufactured for the construction of an ironclad monitor, and the armament for the same, which was to be constructed at San Francisco by the claimants, under a contract with the government. They manufactured the materials and armament in New York, and the ship, with the same on board, sailed from that port on the 29th of May, 1868, and arrived and came to anchor in perfect safety, on the 10th of November following, off North Point dock, in the harbor of her port of destination, where she remained until the 14th of the same month.

Aided by a steam tug she attempted, on that day, to proceed to the wharf where she was to unload, but was obliged, by the state of the wind and tide, to come to anchor before she accomplished that object, and at midnight she encountered a heavy squall, which caused her to drag her anchors, and forced her into a more unfavorable position. Preparations were made on the following morning to get up to the wharf, and the wind having abated, the ship weighed anchor, and being again assisted by the steam tug, proceeded to the southern side of the wharf, where she was directed to discharge her cargo, and was there moored with her stern to the eastward and her stern towards the shore.

When she was moored the weather was good, but at ten o'clock in the evening the wind increased, and soon rose to a gale, from the south-east, which caused the ship to strike with such violence that she made a breach in her aft-port quarter to such an extent that in spite of any use which could be made of the pumps she filled with water, and at three o'clock on the following morning sunk in the dock, her stern lying in forty or fifty feet of water, and her stern in twenty feet, and she lay with a list to the starboard at an angle of thirty-five to forty degrees.

Both the ship and the cargo belonged to the claimants, and they immediately abandoned the whole adventure to the underwriters and the agent of the underwriters, though he declined to accept the offer of abandonment, commenced without delay to employ the best means in his power to raise the vessel and save the cargo, calling into requisition for that purpose all the nautical experience and mechanical skill at his command, but his efforts were fruitless, except that he succeeded in dismantling the ship, and in saving a small portion of the cargo.

Apprised of the failure of the measures adopted by their agent to raise the ship and save the cargo, the underwriters at that juncture employed the libelants to undertake what their agent, with all the assistance he could command in the port of the disaster, was unable to accomplish.

Pursuant to their engagement, the libelants

instructed their general agent to proceed to that port and take possession of the wreck, and they also dispatched with him a party of men, selected for the occasion and having experience as divers and wreckers, and provided them with the most approved machinery and apparatus to promote the success of the enterprise.

Chosen and qualified as described, the party, under the superintendence of the general agent of the corporation, sailed from the Port of New York on the 24th of December, 1863, and took possession of the wreck, in the port of the disaster, on the 23d of January following. Although the undertaking was beset with difficulties and dangers on all sides, they made no objection on that account, but proceeded at once to the examination of the wreck, and the plan which they adopted and executed was to get out the cargo by divers, as far as was necessary to prevent it from being injured, and to lighten the ship, so that she could be raised and secured, and then to hoist out the remainder of the cargo by the apparatus and machinery prepared for the purpose.

They completed the work of securing the cargo, so far as it was necessary to lighten the ship, in less than three months, and when that was accomplished they were able to raise the ship, stopped the leaks, removed the mud (estimated at six hundred tons), pumped out the ship by means of steam pumps, and finally hoisted out the residue of the cargo and restored it to the owners in an undamaged condition, and the proofs show that the whole was accomplished with success in less than seven months from the time they were employed by the insurance companies.

Payment of their claim being refused, they filed their libel against that portion of the cargo which consisted of the materials for the construction of the ironclad monitor and the armament for the same, as set forth in the record, and the district court entered a decree in their favor for the sum of \$28,428.44, as compensation for the salvage services rendered by them in raising the ship and saving the cargo. Appeal was taken by the claimants to the circuit court, where the decree of the district court was affirmed; whereupon the claimants appealed to this court.

Argument to show that the libelants were entitled to compensation for the services which they rendered is hardly necessary, as the proposition is several times impliedly admitted by the claimants in their answer. They were the owners of the ship as well as of the cargo, and they admit that she sunk near the wharf where she was to unload, at the time and by the means and substantially in the manner alleged in the libel, and they also admit that the efforts made by the agent of the underwriters to raise the ship and save the cargo were wholly unsuccessful, except as to a small portion of the cargo taken out while the men employed were engaged in dismantling the ship.

Implied admissions to the effect that important services were rendered by the libelants are contained in every article of the answer, but it is unnecessary to refer to those passages with more particularity, as the claimants expressly admit in the fourth article of the answer that the libelants secured and saved all the

cargo which was on board the ship when their general agent took possession of the wreck, and they also admit that the libelants raised the ship, but they deny that any of the services rendered were attended with much difficulty or danger, and they allege that *employés* of the libelants, in accomplishing the work, unnecessarily damaged the ship, her tackle, apparel and furniture, and insist that the salvage compensation to be allowed in the case ought to be greatly diminished on that account.

Apart from these disparaging allegations, the claimants do not set up in the answer any defense to the merits of the claim made by the libelants, except that they allege that the insurance companies have paid the libelants for all the services which they rendered as to thirteen sixteenths of that part of the cargo described in the first article of the libel.

Most of the discussion at the bar has been addressed to topics other than those here enumerated, and much of it to questions not directly presented in the pleadings. Questions not raised by the pleadings, strictly speaking, are not before the court, but inasmuch as no objection on that ground was made by the libelants to any of the propositions submitted by the claimants, they will all be considered in the order adopted at the argument. Briefly stated, they are as follows:

1. That the Corporation libelants cannot maintain a salvage suit, because they are incapable as a corporation of rendering any personal services, and they insist that no party can be regarded as a salvor unless personally engaged in the service of saving the salvaged property.

2. That even if the corporation libelants may be regarded as salvors, still they were not the sole salvors in this case and, consequently, that the decree rendered in the circuit court would not be a bar to a subsequent suit for the same services if instituted by their *employés*.

3. That the services rendered by the libelants were not salvage services, because they were rendered under and in pursuance of a contract with the underwriters.

4. That the amount allowed in the court below was excessive, and that the decree in that respect violates the established principles of admiralty law regulating compensation for salvage.

1. Objection cannot be taken to the first proposition submitted by the claimants, that the question is not presented in the pleadings, as it necessarily arises upon the face of the record, and, therefore, if it is sustained, the decree must be reversed, as the compensation allowed is for salvage service, and not merely compensation *pro opere et labore*, as it should have been if the theory of the claimants is correct.

Decided cases are referred to in which it is said "that a party not actually occupied in effecting a salvage service is not entitled to a share in a salvage remuneration," but the learned judge who is represented as having expressed that opinion, admitted in the same case that the owners of vessels, who rarely navigate their own ships, constituted an exception to that general rule. *The Vine*, 2 Hagg., 2; *The Mulgrave*, 2 Hagg., 79. Similar remarks were also made in the case of *The Charlotte*, 3 W. Rob., 73, and it is supposed by the claimants that the case of

The Lively, 3 W. Rob., 64, is an authority to the same effect; but the question whether the owners of a vessel, when not personally engaged in a salvage service, were entitled to a salvage compensation for assistance rendered in the case by their vessel was not in any way involved in that record.

Examples where the suit for salvage was promoted by the owners of the salving vessel are quite numerous, in cases where the decisions were made before our judicial system was organized; and it was expressly determined in the case of *The Haidee*, 1 Notes of Cases, 598, that owners were by no means unfit persons or originate suits to recover compensation for salvage services. Strong doubts are entertained whether the court, in any of the cases before referred to, intended to decide otherwise, but the inquiry is of no importance, as all of the modern decisions in that country affirm the right and support it by reasons both satisfactory and conclusive. *The Waterloo*, 2 Dod., 443.

When steamers render salvage service the court held, in the case of *The Kingalock*, 1 Spinks, 267, that they are entitled to a greater award than any other set of salvors rendering the same service, because they can perform such services, owing to the power they possess, with much greater celerity than other vessels, and with much greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could be effectual. Consequently, the court having cognizance of such cases looks with favor on the exertions of steamers in assisting vessels in peril, as they can render such assistance with greater promptitude and with much more effect than vessels propelled in any other way. *The Alfen*, Swab., 190; *The Mary Anne*, 9 Irish Jur. (N. S.), 60; *The Raikes*, 1 Hagg., 246; *The Merchant*, 3 Hagg., 401; *The Perth*, 8 Hagg., 416.

Reported cases where the suits for salvage were promoted by the owners of steam vessels, and in many cases by the owners of steamers built for the special purpose of rendering such services, and devoted exclusively to that particular employment, are very numerous in the reports of decisions in admiralty published within the last twenty years. Indeed they have been multiplied to such an extent within that period that it would be a useless task to attempt to do more than to refer to one or two of a class as examples to illustrate the course of modern decisions upon the subject, but it may not be out of place to remark that many others to the same effect will be found in the very volumes from which the citations here made have been selected.

Take, for example, the case of *The Albion*, 1 Lush., 282, in which the sum of £350 was awarded to the owners. *The Saratoga*, 1 Lush., 318, in which the sum of £600 was awarded, and it was wholly given to the steam tug. *The True Blue*, 4 Moore (P. C. N. S.), 96, in which the suit was promoted by the owners, master and crew of a steamship, and the sum of £500 was awarded to the libelants.

Some discussion took place at the bar, in the case of *The Abercrombie*, 4 Moore (P. C. N. S.), 380, as to the relative claims of the owners of ships, and of the masters and crews of the same, but the court said that the discussion was unnecessary, because the rights of such parties

were so constantly under consideration that the principles regulating the distribution of salvage in such cases were so well understood, that the only difficulty that ever arises is in ascertaining the facts so as to be able to apply the principles to the particular case.

Services were rendered to a sailing vessel in the case of *The White Star*, 1 Adm. & Eccl., 71, and suitable remuneration for the services having been refused, the owners, master and crew instituted a salvage suit against the salved vessel and her cargo, whereupon the owners of the salved property appeared and pleaded that the services had been rendered under an agreement, but it appearing that the undertaking was attended with greater difficulty and danger than the parties supposed at the time the agreement was made, the court held that the libelants were entitled to recover a certain sum beyond that tendered under the agreement.

So where salvage compensation was claimed by the master, owners and crews of six luggers, a cutter, and a lifeboat, the court sustained the libel and awarded a sum equal to one third of the salved property, including the ship as well as the cargo. *The Cargo ex Venus*, Law. Rep., 1 Adm. & Eccl., 50.

Proceedings in salvage were instituted in the case of *The Canova*, Law Rep., 1 Adm. & Eccl., 54, by the owners and crew of a steam tug, for services rendered in towing the vessel from a place of danger to her dock in her port of destination, but it appearing that there was an agreement to do the work for an agreed price, the court declined to allow any salvage compensation.

Modern text writers, without an exception, uphold the right of the owners of ships and vessels, whether propelled by steam or otherwise, to claim salvage compensation when such services are rendered by their vessels, whether they are present or absent at the time the service is performed; and the author of the latest work published upon the subject states that one tenth of all the salvage awards collated in the Digest of the Decisions in Admiralty by the English courts are to owners and vessels, boats, tugs and steamers. Assuming his estimate to be correct, it appears that thirty-five cases collated in that work recognize owners as salvors, and twenty-five the vessels themselves as entitled to such compensation. Roberts, Adm., 108; 2 Pritch. Dig., 727 to 909; 2 Pars., Ship., 277, 278; *The Blaireau*, 2 Cranch, 269; *The Eubank*, 1 Sumn., 426.

Owners of the salving vessel, says MacLachlan, are entitled to remuneration, in the nature of salvage, in addition to expenses, when they show actual loss suffered, or risk in respect to their property encountered in the service, but charterers are not in the same position unless there is a stipulation giving them the control and benefit of the salvage, or unless the vessel is chartered and sailed on their responsibility. MacL. Ship., 529; Maude & P., Ship., 423; Abbott, Ship., 571.

Under ordinary circumstances the owners of the ship which rendered the service are allowed one third of the amount awarded as salvage compensation, but they are sometimes allowed much more where the salvage service was of a character to expose the ship to peculiar danger, especially if she was a steamer of large

size and of great value. 2 Pars., *Ship*, 299; *The Waterloo*, Blatchf. & H., 114; *The Rising Sun*, 1 Ware, 385; *The Beulah*, 1 W. Rob., 477; *The Martin Luther*, Swab., 287; *The Enchantress*, 1 Lush., 96; *The Splendid*, 2 Mar. Law Cases, 216; *The N. Hooper*, 8 Sumn., 578.

Suppose it to be conceded that the owners of a vessel may promote a suit for salvage and that they may be entitled to a salvage compensation, still the claimants insist that the libel in this case does not come within the operation of that rule of pleading, as the libelants are a Corporation, but they assign no reasons in support of the proposition, which, if adopted and held to be sound, would not also require the court to hold that the owners of vessels are not entitled to salvage compensation, and are not competent to promote a salvage suit, which cannot be admitted.

Corporations, it is said, are not entitled to salvage remuneration, because no party, as the argument is, can be so entitled except such as actually engages in rendering the salvage service; but if that is the reason for denying such compensation to corporations, then it is clear that the owners of vessels must also be excluded from participating in any such reward, as they seldom or never navigate their own ships. *The Bark Edwin*, 1 Cliff., 326.

Remuneration for salvage service is awarded to the owners of vessels, not because they are present, or supposed to be present when the service is rendered, but on account of the danger to which the service exposes their property and the risk which they run of loss in suffering their vessels to engage in such perilous undertakings; and if that is the legal foundation of their claim it is difficult to perceive any reason why the same rule should not be applied to corporations as the owner of ships and vessels similarly employed and exposed.

No satisfactory reason for such a discrimination can be given, because it is believed that the two cases are precisely analogous. But the question is hardly an open one in this court, as will appear by an attentive examination of the case of *The Island City*, which was elaborately argued by able counsel, and very carefully considered by the court.

Three libels were filed against the bark in that case in the district court, but the district judge being concerned in interest, the three records were removed into the circuit court. By the original record it appears that one of the libels was filed by the owners of the steamer *Western Port*; another in behalf of the steam tug *R. B. Forbes*, which was owned by an incorporated company, and the third by persons on board the schooner *Kensington*.

Sole salvage was claimed by the owners of *The Western Port*, and they denied that anything should be awarded to the steam tug, but the circuit judge held otherwise; and having determined that the property saved ought justly to pay the sum of \$18,000 to all concerned, awarded \$5,200 of that amount to the owners of the steam tug. *The Island City*, 1 Cliff., 210, 219, 221.

Dissatisfied with the decree of distribution, the owners of *The Western Port* appealed to this court. Even a slight examination of the decree in the case will show that the appeal involved the whole question under consideration,

but this court affirmed the decree of the circuit court, which in effect established the rule that the owners of ships, whether individuals or corporations, may promote a salvage suit, and are entitled, in a proper case, to salvage remuneration. *The Island City*, 1 Black, 121 [66 U. S., XVII., 70].

Prior to that time the same point had been decided by the late *Chief Justice* and two of the associate justices of this court as then constituted. *The Caroline*, 6 Am. L. Reg., 223; *The Independence*, 2 Curt., 351; *The William Penn*, 1 Am. L. Reg., 584.

Certain unreported decisions of the district judges are referred to where a contrary doctrine is held, but they appear to overlook the fact that vessels disabled, or otherwise in need of assistance from the shore, depend, everywhere at this time on our coast, almost entirely upon steam tugs, constructed and equipped for the purpose, and whose business it is to be always ready and at command whenever assistance is required. Such steamers are generally owned by incorporated companies, and having been built and equipped for the purpose, and being manned with officers and seamen having the requisite experience and skill, the interests of commerce cannot safely dispense with their services. *The Perth*, 8 Hagg., 416.

Considerations of the character suggested seem also to have induced the admiralty courts of England to adopt principles of adjudication and rules of practice consistent with the employment of these comparatively new and effective instruments of relief in cases of disasters upon the seas. Reference is made to a few cases as establishing that proposition, and to show that the course of decision in the two countries is entirely coincident in every particular involved in this record. *The Pericles*, 1 B. & Lush., 80.

Claim in that case was made for a salvage compensation, and the suit was instituted by the Liverpool Steam Tug Company. Assistance in the case of *The Paul*, Law Rep., 1 Adm. & Eccl., 57, was rendered to a ship and her cargo, and the salvage suit was commenced and prosecuted by the Anglo Egyptian Steam Navigation Company. Libelants in the case of *The Collier*, Law Rep., 1 Adm. & Eccl., 83, were the Brighton Railway Company as owner of the steamship *Lyons*, and the master and crew, and the libel was sustained. *The Minnehaha*, 1 Lush., 335; *The Annapolis*, 1 B. & Lush., 355; *The Pensacola*, 1 B. & Lush., 306; *The Fusilier*, 1 B. & Lush., 341, 349; *The Bartley*, Swab., 196; *The Galatia*, Swab., 349.

II. Next proposition of the claimants is that the libelants, even if they may be regarded as salvors, were not the sole salvors and, consequently, that the decree of the circuit court ought not to be affirmed, as it would not be a bar to a subsequent suit for the same services if instituted by their employees.

Evidently the objection is in the nature of a plea in abatement, and should have been taken in the answer, or by a proper exception in the court below. Motion, in due form, was made at the commencement of the proceedings, which was a notice to every one interested to appear and show cause, if any, why the prayer of the libel should not be granted.

Adjudged cases, besides those already cited,

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are quite numerous, where salvage suits have been instituted in the name of the ship or of the owners, without any allegation that the suit was prosecuted for the benefit of the master and crew, and no case is referred to where it has been held that the claimants, even in the court of original jurisdiction, can abate the suit on that account. All persons interested may appear on the return of the monition, and become parties to the suit, or, by some proper proceeding, have their rights adjudicated; and in many cases, even after the decree upon the merits is pronounced, they may appear at any time before the fund is distributed and claim any interest they may have in the proceeds of the property libeled, if any, in the registry of the court; but it is quite clear that the claimants in this record are in no condition to present for decision any such question as that involved in the proposition under consideration.

III. If the defense is not sustained on that ground, then the claimants contend that the services rendered were not salvage services, because, as they allege, they were rendered under an agreement for a fixed sum.

Three answers may be given to that proposition, each of which is sufficient to show that it cannot be sustained: (1) No such defense is set up in the answer. (2) Nothing was ever paid or tendered to the libelants for that part of their claim now in controversy, and it is well settled law that an agreement of the kind suggested is no defense to a meritorious claim for salvage, unless it is set up in the answer with an averment of tender or payment. Such an agreement does not alter the character of the service rendered, so that if it was in fact a salvage service, it is none the less so because the compensation to be received is regulated by the terms of an agreement between the master of the ship or the owners of the salvaged property. *The Emulous*, 1 Sumn., 210.

Defenses in salvage suits, as well as in other suits in admiralty, must be set up in the answer, and if not, and the services proved were salvage services, the libelants must prevail. *The Boston*, 1 Sumn., 328. Agreements of the kind suggested ought certainly to be set up in the answer, as it is not every agreement which will have the effect to diminish a claim for salvage compensation. On the contrary, the rule is that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage. *The Versailles*, 1 Curt., 355; *The Lushington*, 7 Notes of Cases, 361; *The Centurion*, 1 Ware, 477; *The Foster*, Abb. Adm., 222; *The Whitaker*, 1 Sprague, 283; *The Susan*, *Id.*, 503; *Parsons, Ship.*, 275; *The Phantom*, Law Rep., 1 Adm. & Eccl., 61; *The White Star*, 1 Ad. & E., 70; *The Saratoga*, 1 Lush., 321; *McL., Ship.*, 531; *The John Shaw*, 1 Cliff., 236.

(3) But if the agreement had been set up in the answer, it would constitute no defense, as by the terms of the instrument the libelants were not to receive any compensation whatever, or be entitled to any lien upon the property, unless the materials and machinery were substantially saved, so that it is clear that the compensation was not to be paid at all events.

IV. Discussion as to the amount allowed in the decree is hardly necessary, as it is clear that it does not much exceed the amount the claimants agreed to pay for the services, in case the libelants were successful in raising the ship and in saving the materials intended for the construction of the monitor and her armament.

Attempt was made by the agent of the underwriters, at great expense, to pump out the ship, as before explained, but the record shows that he was unsuccessful, although the men engaged in the attempt were under the superintendence of one of the claimants. Expensive preparations became necessary before they could commence pumping, and in the course of those arrangements they were obliged to cut openings in the decks, and through those openings they took out sixty or seventy tons of the cargo, but the attempt to pump out the ship proved an utter failure, from the intrinsic impracticability of raising the vessel by that plan.

Next attempt by that party was to lift the vessel, with the cargo on board, by means of chains; but the scheme as projected proved to be impracticable, as the bottom of the dock where the ship sunk was solid rock, and the divers found it impossible to get the chains under the vessel. Efforts of a similar character were continued by the agent of the underwriters until he expended \$38,000 in gold, but all his efforts to raise the ship or save the cargo, except the fractional part before mentioned, were wholly unsuccessful.

Complete success attended the efforts of the libelants, as is admitted by the claimants in their answer.

When the property in question was insured, it was valued at \$400,000, for which policies were granted by the underwriters for the sum of \$340,000; and under the contract between the claimants and the libelants they adopted the same valuation. Of that sum \$60,000 was uninsured, and \$15,000 of the amount insured was never paid, and the record shows that the whole of the property on board, when the agent of the libelants took possession of the wreck, was rescued from imminent peril and was delivered to the claimants or their order.

Difficulties almost unexampled attended the undertaking, and the divers, in taking out the cargo to lighten the ship so that she could be raised and secured, were exposed to great danger. Expenses were incurred by the libelants exceeding \$60,000 in rescuing and saving the property, including moneys paid out and loss of apparatus and machinery. Considering the skill required to perform the work, and the expense incurred, and the time and labor spent in completing the enterprise, the court is not satisfied that the amount awarded is excessive.

Appellate courts are reluctant to disturb an award for salvage, on the ground that the subordinate court gave too large a sum to the salvors, unless they are clearly satisfied that the court below made an exorbitant estimate of their services. *The Frutier*, 1 B. & Lush., 350; *Hobart v. Drogan*, 10 Pet., 119.

Judge Story said, in the case of *Hobart v. Drogan* (*supra*), that "The court is not in the habit of reversing such decrees as to the amount of salvage, unless upon some clear and palpable mistake or gross over-allowance of the

court below. *The True Blue*, 4 Moo. (P. C., N. S.), 101; *The Emulous*, 1 Sumn., 214.

Evidence to show any such errors in the case is entirely wanting, and in view of the whole record, the court is of the opinion that the decree of the Circuit Court is correct.

Decree affirmed, with costs.

Cited—10 Wall., 12, 13; 101 U. S., 390; 108 U. S., 359; 2 Hughes, 42; 5 Hughes, 128, 357, 360; 1 Bro., 216, 371; 7 Blatchf., 240; 2 Low., 505, 503.

JOSHUA BARRELL, *Appl.*,

THE PROPELLER MOHAWK, THE WESTERN TRANSPORTATION COMPANY, Claimant.

(See S. C., "*Propeller Mohawk*," 8 Wall., 158-163.)

Acceptance of goods discharges carrier—abandonment—exception in bill of lading.

If the shipper of goods voluntarily accepts the goods at the place of disaster to the vessel, such acceptance terminates the voyage and all responsibility of the carrier, and the master is entitled to freight *pro rata itineris*.

This rule applies in case the ship is disabled or prevented from forwarding them to the port of destination, by a peril or accident not within the exception in the bill of lading.

The proofs of the acceptance of the goods at the intermediate port, in order to operate as a discharge of the vessel, should be clear and satisfactory.

It should appear that the acceptance was intended as a discharge of the vessel and owner from any further responsibility, by which the original contract in the bill of lading was rescinded.

The above rules applied to an insurance company to which property damaged had been abandoned, after disaster to the vessel.

The explosion of a steam boiler is not a peril within the exception of dangers of navigation in the bill of lading.

[No. 168.]

Argued Oct. 20, 1889. Decided Nov. 15, 1889.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Two libels in admiralty were filed in the District Court of the United States for the Northern District of Illinois, by the appellant, to recover damages for non-delivery of a certain cargo of wheat. The court dismissed both libels; whereupon the libelants took appeals to the circuit court, wherein the said cases were consolidated, and an amended libel filed by the present appellant. The circuit court having dismissed the amended libel, the libelant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Robert Rea and Samuel W. Fuller, for appellant:

1. The explosion of the boiler of *The Mohawk* was the immediate cause of the loss, and was not a danger of navigation within the exception of the bill of lading, and the carrier is, therefore, liable for the damages caused by such explosion.

"Perils of the sea denote natural accidents peculiar to that element, which do not happen

by the intervention of man, nor are to be prevented by human prudence."

"It is a loss happening in spite of all human effort and sagacity."

8 Kent., 216; Story, Bail. (ed. 1863), secs. 511, 525; *The Reindeer*, 2 Sumn., 567; *Garrison v. Memphis Ins. Co.*, 19 How., 312 (60 U. S., XV., 656); *Bulkeley v. Cotton Co.*, 24 How., 386 (65 U. S., XVI., 599).

In the case last cited, the loss was caused by the explosion of a steam boiler. The case was first heard in the District Court of Massachusetts, and reported under the name of *The Edwin*, 1 Sprague, 477, and must be regarded as decisive of the question in this court.

N. J. Nav. Co. v. Merch. Bk., 6 How., 344; Ang. Car., sec. 166 (ed. 1868); *Marsh v. Blythe*, 1 McCord, 360; *Jones v. Pitcher & Co.*, 3 Stew. & P., 155; *Backhouse v. Sneed*, 1 Murphey, 173.

2. There having been an abandonment of the cargo to the underwriter—the Buffalo Mut. Ins. Co.,—the latter was subrogated to the rights of the shipper against the respondent, and might maintain any appropriate action in admiralty, recover damages for the loss, either in its own name or that of the owners of the cargo.

3 Pars. Mar. L., 372; *The Monticello v. Mollison*, 17 How., 155 (58 U. S., XV., 70); *Garrison v. Memphis Ins. Co.*, 19 How., 317 (60 U. S., XV., 658); *The Ann C. Pratt*, 1 Curt., 343.

In the present case, the suits were begun in the names of the owners of the cargo, and after they had appealed to the circuit court, the appellant was subrogated to their rights and places, as the *dominus litis*, he being the owner of the claim by purchase and assignment from the insurance company. These proceedings were regular and warranted by the 34th Admiralty Rule of this court, as construed and applied in the two cases last cited, and sanctioned by the cases of *Newell v. Norton*, 3 Wall., 267 (70 U. S., XVII., 273).

These considerations seem to withdraw the case from all effect or control of the New York Statutes relating to assignments.

3. The sale of the cargo on the *St. Clair Flats* and at Detroit, by or for account of, the underwriters, did not release the respondent from liability for the damage done to it by its negligence.

The acceptance was not a voluntary, but a compulsory act, to save the most of the damaged cargo for the benefit of all concerned.

4. The real controversy here is not about the freight, but whether if the respondent had occasioned a loss to the owners of the wheat, its claim for damages was waived or discharged by the sale of the damaged cargo, under the circumstances shown in the record.

1 Pars. Mar. L., 167; *The Ann D. Richardson*, 1 Abb. Adm., 499; *Miston v. Lord*, 1 Blatchf., 354; *Vlietboom v. Chapman*, 13 Mees. & W., 230 and note to Amer. ed., 240; Abb. Ship., 430, Marg.; *Rogers v. West*, 9 Ind., 400; Chit. Car., 200, *et seq.*, marg. p. and notes; Ang. Car., sec. 407, *et seq.*; *Smyth v. Wright*, 15 Barb., 51; *Atlantic Ins. Co. v. Bird*, 2 Bos. 195; *Richardson v. Young*, 88 Pa., 169; *The Nathaniel Hooper*, 3 Sumn., 550; *Case v. Balt. Ins. Co.*, 7 Cranch, 363.

5. The assignment to Barrell was made substantially, if not technically, by the Directors or Executive Committee of the Buffalo Mut. Ins. Co., and none but the corporation or its

NOTE.—Abandonment. See, note to *Pennock v. Dialogue*, 37 U. S. (2 Pet.), 1. Abandonment; what is; effect of; when insured may abandon; not bound to abandon. See, note to *Bradley v. Maryland Ins. Co.*, 37 U. S. (12 Pet.), 378.

stockholders or creditors, can impeach a transfer of property by the corporation, for the want of the previous action of the Board of Directors, and then only by direct action brought for that purpose.

Eno v. Cooke, 10 N. Y., 66; *Warner v. Chapell*, 32 Barb., 809; *Elwell v. Dodge*, 33 Barb., 336.

In ignorance of the fact that the boiler exploded, the insurance company sold, for \$2,800 or \$3,400, to the appellant, a claim which is regarded as worthless, and after suits had been brought in the name of the owners of the cargo, the court, for economy and convenience, allowed the two suits to be consolidated, and the real owner of the claim to be admitted to prosecute the suit. In this there was nothing unlawful nor champertous; nothing but what was sanctioned in *Cobb v. Howard*, 3 Blatchf., 524, and in the case of *The Monticello v. Mollison*, *supra*.

Mr. C. Beckwith, for appellee:

1. As to Barrell's standing in court.

The right of action was in the insurers, and not in the original libellant, at the time the libels were filed in the district court.

The order of subrogation gave Barrell no better right to prosecute the suits than the original libellant had; which was no right whatever.

The only party to bring suit could not for the first time be brought before the circuit court by amendment on appeal. His interest, as assignee of the insurers, was not brought before the circuit court in such manner as to permit a decree in his favor. *Houseman v. The North Carolina*, 15 Pet., 49.

All rights, claims and interests which are indissolubly connected with the property insured, pass to the insurers by an abandonment of the property, so far as the same belonged to the assured, and to the extent of the interest covered by the policy.

2 Pars. Mar. Ins., 194-196, and cases there cited.

Barrell's standing in court is that of a volunteer purchasing and prosecuting a claim which he alleged assignor declined to prosecute or insist upon; and indeed, the extent and nature of which, as now set forth, appear not to have been known to the insurers at the time of the alleged assignment nor until long after. The assignment savors of maintenance; the right thereunder is claimed by a volunteer; and in a court of equity the appellant would not, for these reasons, be entitled to relief.

Ward v. Van Bokkelen, 2 Paige, 289; *The Ann C. Pratt*, 1 Curt., 342.

2. But if Barrell, as assignee of the insurers, is properly in court, still the merits of the case are against him.

In favor of the insurers he makes two claims: (a) To have damages for injury to the cargo by the sinking of the propeller.

(b) To have the 1,100 bushels retained by the propeller, or the value, upon paying the freight earned on that parcel only.

3. The appellee, if without fault, is protected against the first claim by the bill of lading, exempting it in cases of injury, from dangers of navigation.

In this case, the immediate cause of damage was the sinking of the vessel; the vessel was sunk by the explosion of its boiler; the boiler exploded in an effort to set afloat the grounded

vessel; and the vessel was grounded in the channel of the St. Clair Flats, without fault of its officers or men.

By the stipulations of the parties, as well as by appellant's libel, it is admitted that the propeller left port in good and seaworthy condition. The appellant is bound by his admission, and cannot, as the evidence stands, dispute that the boiler was in good condition. *Parfitt v. Thompson*, 13 Mees. & W., 392.

4. The appellee resists the second claim of the appellant, on the ground that it is entitled to retain 1,100 bushels wheat, not only for the freight due thereon, but for so much *pro rata* of the freight on the damaged parcel as had been earned at the time of its sale. The agents of the vessel did nothing to waive right to the freight *pro rata* earned on the property sold. *Abb. Ship.*, marg., 434, 435, and *notes* 8th ed.; *Fland. Ship.*, secs. 552-555; *Smith v. Wright*, 15 Barb., 51, and cases there cited.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Northern District of Illinois.

Two libels were filed in the district court against the propeller—one in the name of the Chicago Marine and Fire Insurance Company, and the other in the name of David and Ammie Dowse and others—to recover damages for the non-delivery of a large quantity of wheat laden on board at Chicago, to be carried to Buffalo. After hearing proofs and the arguments of counsel, the district court dismissed both libels; whereupon appeals were taken to the circuit court.

On application to the court by Joshua Barrell, stating that the causes had been consolidated in the district court, and that he was the real party in interest, having purchased the subject of litigation July 1, 1862, he was substituted as libellant in the suit. Leave was also given him to file an amended libel. As no question arises on the pleadings, it is not material to refer particularly to them. The case is this:

The propeller, with twenty thousand bushels of wheat, on her way from Chicago to Buffalo, grounded on the St. Clair Flats, about thirty miles above Detroit; and in her efforts to get off, the boiler exploded and the greater portion of the wheat became wet and damaged.

The wheat was insured in the Mutual Insurance Company of Buffalo, to which, on being advised by the master of the loss, the shippers abandoned, the abandonment accepted, and the insurance money paid. Immediately hereafter the company instructed their agent at Detroit to take possession of the damaged wheat, and sell it as it lay in the vessel at the Flats; all of which was done accordingly. Afterwards, the company hearing that the master would claim freight, the agent was directed to have nothing to do with it. It was arranged, however, between the agent and the master, that as the sale was a good one, it should stand and the freight be left for after consideration. All but one thousand bushels of this wheat were damaged; the latter quantity was forwarded to Buffalo by another vessel. The insurance company demanded it at that port, offering at the same time to pay the freight on this parcel, and, in addition,

a sum to cover any general average charges; but the carrier refused to deliver the same unless freight was paid on the entire shipment, the damaged as well as the sound portion.

The insurance company, having accepted the abandonment of the wheat by the owner, after the disaster to the vessel, became subrogated to all the rights of the shipper, and might have left the responsibility upon the master to refit his vessel, or procure another, and forward the wheat to its port of delivery, according to the contract in the bill of lading. The vessel could have been refitted within a short time; and this port was but a few day's navigation from the place of the disaster. Besides, it occurred in the track of vessels from Chicago, and other ports on the upper lakes, and there could have been but little difficulty in procuring the shipment in another vessel.

But no choice was left to the master, whether to refit his vessel or send on the cargo in another, or to communicate with his owners, who were in Buffalo, as to the proper course to be pursued. The second day after the disaster, the agent of the insurance company appeared with instructions to take possession of the damaged wheat, and sell it as it lay in the vessel. Possession was given up accordingly, and the wheat sold on the same day, the sale perfected, and a delivery into lighters commenced to the purchaser. After this the company, fearing that the master would charge freight upon this damaged wheat, countermanded the original order to sell, unless the master would relinquish it. This he declined to do, but suggested to the agent the sale was a favorable one, and that the question of freight might remain for after consideration; which was agreed to.

We think it quite clear that the counter order, not to sell, came too late. The wheat had been turned over into the possession of the agent, who had sold it, and a portion had been delivered from the vessel to the purchaser. The agent had received complete possession and control of the wheat, and thereby rescinded the contract in the bill of lading for further shipment; and it required the assent of both parties to revive it. This counter order, however, and the action under it, are significant of the intent of the insurance company in accepting the delivery of the wheat. It was to receive the possession in discharge of any further responsibility of the vessel. The only thing in controversy was the claim of freight, and, undoubtedly, if the counter order had not been too late, unless the master had consented to give up the freight, he could have been compelled to forward the wheat as per bill of lading, or be answerable for the refusal or neglect.

In cases where the disaster happens in consequence of one of the perils within the exception in the bill of lading, or charter-party, the only responsibility of the vessel is to refit, and forward the cargo, or the portion saved, or if that is impracticable, to forward it in another vessel, and the owner is then entitled to freight. If part of the cargo is so far damaged as to be unfit to be carried on, the master may sell it at the intermediate port, as the agent of the shipper, for whom it may concern, and carry on the remainder. In this class of cases the vessel is only responsible for carrying on the cargo, being exempt from any damage by the excep-

tion in the contract of affreightment. And it is perfectly settled, that if the shipper voluntarily accepts the goods at the place of the disaster, or at any intermediate port, such acceptance terminates the voyage and all responsibility of the carrier, and the master is entitled to freight *pro rata itineris*. *Welch v. Hicks*, 6 Cow., 504; *Abbott, Ship.*, 554-555, and *note*; 1 *Parsons, Ship.*, 289, n. 2; *Id.*, 278; *M. & Pollock, Law of Shipp.*, 289, 221.

The same rule, as it respects the effect of the voluntary acceptance of the goods at the place of the disaster, or intermediate port, applies in case the ship is disabled or prevented from forwarding them to the port of destination by a peril or accident not within the exception in the bill of lading. *Osgood v. Groning*, 2 Camp., 471; *Liddard v. Lopes*, 10 East, 526; *The Newport, Swab.*, 335, 342; *Abbott, Shipp.*, 452, 453-455; *Hadley v. Clarke*, 8 T. R. 259; *Spence v. Chadwick*, 10 Q. B. (N. S.), 517.

The only difference between the cases is, that inasmuch as, in the latter, the vessel is responsible for all the damages that have resulted from the misfortune to the cargo, the proofs of the acceptance of the goods at the intermediate port, in order to operate as a discharge of the vessel, should be clear and satisfactory. The mere acceptance in such cases, and nothing else passing between the parties, ought not to preclude the shipper of his remedy. It should appear from the evidence and circumstances attending the transaction that the acceptance was intended as a discharge of the vessel and owner from any further responsibility—what would be equivalent to a mutual arrangement, express or implied, by which the original contract in the bill of lading was rescinded. The ground of the exemption from responsibility of the vessel, in both cases, is the voluntary acceptance of the goods at the intermediate port. Applying these principles to the present case, we think the court can come to but one result. It falls within the second class of cases above referred to, as the explosion of the boiler was not a peril within the exception in the bill of lading. *Buikley v. Naumkeag Cotton Co.*, 1 Clifford, 322, 324; *The Edwin*, 1 Sprague, 477; 24 How., 386 [65 U. S., XVI., 599].

The acceptance, as we have already seen, was the voluntary act of the insurance company, without any solicitation or interference on the part of the master; and what would seem conclusive of the intent of the company in the transaction is, that they refused to bring a suit against the carrier to recover for the damaged wheat, although urged to it by the parties who afterwards took an assignment of the subject of litigation. Some \$2,300 was paid for a claim which, if real and substantial, amounted to \$20,000.

What is still further evidence of the understanding of the insurance company of the effect of the acceptance and sale is, that they brought a suit to recover the value of the one thousand one hundred bushels of sound wheat in the Superior Court of Buffalo alone; but even this was subsequently discontinued. The suit in the present case has been instituted by a volunteer, on a speculation; and we are not sorry that, upon the application of the principles of law governing it, the experiment must fail.

As to the freight, the cases we have above referred to establish that the master is entitled to freight *pro rata itineris* in all case where there has been a voluntary acceptance of the goods at the port of disaster. The rate is to be ascertained by comparing the portion of the voyage performed with the entire length of it. 1 Kent, Com., 230.

In the present case the goods were carried something more than half the distance; and, upon the facts as admitted in the record, the freight would exceed the value of the one thousand and one hundred bushels of wheat at the port of delivery at the time it arrived.

No balance is shown to be due to the libellant on the wheat. The libel, therefore, was properly dismissed by the court below.

Decree below affirmed.

HENRY W. DRAKELEY, AARON FENTON AND JOEL HINMAN, *Pliffs. in Err.*,
v.

RICHARD GREGG AND WILLIAM T. HUGHES.

(See S. C., 8 Wall., 242-269.)

Ratification by principal—question for jury—consideration.

If a principal, with the full knowledge of the facts, ratify a contract made by another with reference to his property, he thereby makes himself a party to it, as much so as if the original agreement had been made with him.

If he ratified it, no new or additional consideration was required to support the ratification.

Where the evidence tended to show such ratification, the question of ratification should be submitted to the jury.

[No. 178.]

Argued Oct. 28, 29, Nov. 1, 2, 1869. Decided Nov. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This action was brought in the court below, by the defendants in error, to recover moneys alleged to be due them from the proceeds of sale of a certain quantity of hams. The said hams had been consigned to defendants by McCabe & Co., who had also previously consigned to them quantities of mess pork, shoulders, etc., upon an agreement that said defendants should make certain advancements of money, and should have a lien thereon on all said goods consigned. While said hams were *in transitu*, plaintiffs notified defendants of a claim thereto by themselves, as owners. Upon the trial, defendants contended that plaintiffs had adopted and ratified the agreement of McCabe & Co., and that the said hams and the proceeds thereof were subject to the lien of the defendants thereon, for a deficiency in the proceeds of the sales of the said shoulders, etc., in making up the sums advanced. A large number of telegrams and letters sent by the parties were put in evidence by agreement, from which

NOTE.—Ratification proves agency. See note to Bank of U. S. v. Dandridge, 25 U. S. (12 Wheat.), 64. Ratification of unauthorized act of agent without knowledge of the facts is not binding on the principal; ratification with knowledge discharges agent. See note to Owings v. Hull, 34 U. S. (9 Pet.), 607. Implied agency; ratification by principal. See note to Parsons v. Armour, 28 U. S. (3 Pet.), 413.

See 8 WALL.

the defendants claimed and the plaintiffs denied that the agreement with McCabe & Co. was ratified and adopted by the claimants. The court upon the said evidence instructed the jury to find for the plaintiffs; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court, and a part of the documentary evidence most relied upon by the defendants, will be found in the abstract of the argument for the plaintiffs in error.

Messrs. J. H. B. Latrobe and I. Nevitt Steele, for plaintiffs in error:

The court below, in its instructions to the jury, ignored the facts relied upon by the plaintiffs in error, to prove the substitution and establish their right to a lien on all the pork products consigned to them. If these facts were not irrelevant, in if point of law they were material to the decision of the question of lien, the instruction of the court below was erroneous. It, therefore becomes necessary to examine in some detail the proof in the cause, so that its character and legal effect may be fully seen by this court.

R. McCabe & Company were pork packers in Chicago. Gregg & Hughes, the defendants in error, were merchants who made advances to McCabe & Company on pork products, taking from them as security the warehouse receipts covering all the property in question here, and which, it is conceded, gave Gregg & Hughes the legal title to the property described in them.

These being the relations between R. McCabe & Company and Gregg & Hughes the former addressed to the plaintiffs in error, Drakeley & Fenton, Jan. 6, 1865, the following letter:

CHICAGO, Ill., January 6, 1865.

Messrs. Drakeley & Fenton,
Baltimore, Md.,

DEAR SIRS: I have about one thousand tierces of sweet pickled hams and five hundred tierces of pickled shoulders, with some mess—prime mess and extra prime—which I would like to send to you, provided you think you could sell for good prices. Please let me know what you could get for the above, to arrive, and what amount you would allow me to draw on the shipment.

The sales you made for McCabe & Hughes were all satisfactory. Mr. H. has retired, and I have taken my sons in the house. The hog crop will be short one million.

Yours Truly,

R. MCCABE & COMPANY.

The property here referred to, pork, shoulders and hams, was all of it, at the date of the letter, the property of Gregg & Hughes, by virtue of the warehouse receipts already mentioned—and Drakeley & Fenton, replied to it as follows:

BALTIMORE, January 10, 1865.

Messrs. R. McCabe & Co.,
Chicago, Ill.

GENTLEMEN: Yours of 6th inst. came to hand this morning and contents noted. Our market is quite firm for provisions, and the general impression is, that the demand will be greater and prices will advance. We quote prices for to-day as follows: S. C. Hams in pickle, 21 cts. to 22 1-2 cts. do. Shoulders, 12 cts. to 18 1-2 cts.; P. M. Pork, \$41 to \$42;

Mess, \$42.50 to \$43; Leaf lard 24 to 24 1-2 cts. We would be pleased to receive consignments from you, and would advance you as follows on sight draft, accompanied with, bills of lading: on pickled hams say \$40 per tierce, do. shoulders, \$30 per tierce. Mess pork, \$30 per barrel; P. M. Pork, \$25. Should you favor us with shipments, we will use our best endeavors to obtain for you the highest market prices.

Hoping to hear from you soon,

We are very respectfully yours,

Drakeley & Fenton,

By LOUIS DUNAN.

P. S.—We have no doubt we could make quick sales soon afterward.

The present litigation has reference mainly to 983 of the one thousand tierces of hams, the first mentioned articles in both of the foregoing letters; though in considering the questions to be decided here, it is to be remembered that the legal title to all the property—hams, shoulders and pork, was in Gregg & Hughes.

Satisfied apparently with the terms of Drakeley & Fenton, R. McCabe & Co. write the following letter:

CHICAGO, Ill., January 13, 1865.
Messrs. Drakeley & Fenton,
Baltimore, Md.

DEAR SIRS: Yours of 10th is before me and contents are noted. I will ship to you by the 16th, fifteen hundred barrels pork, and probably will ship one thousand tierces of ham and six hundred tierces of shoulders next week. I have about five hundred tierces prime lard, probably I may ship that too. I will draw on the fifteen hundred barrels on the 16th, as directed by you, for about \$42,000. I will write fully on that day.

Yours Truly,
R. MCCABE & COMPANY.

Drakeley & Fenton, replied to this letter, Jan. 18, advising of a fall in prices, and suggesting that in shipping the hams and shoulders a small lot of each should be sent forward so that there might be a sample for examination before making any considerable advances.

Jan. 16, R. McCabe & Company forwarded the pork described in the letters of that date, of which the following is an extract:

"On which (the items enumerated) I have drawn on you to the order of Gregg & Hughes, for \$41,000. I will ship to order about six hundred tierces of shoulders, and on Thursday I will ship the hams. I hope you will put the property in store on arrival until I come on, which will be in February."

On the 17th January, R. McCabe & Company write again to Drakeley & Fenton, informing them of the shipment of "six hundred and three tierces of shoulders," and saying "I will ship the hams next week, if I can get cars."

The bill of lading for the nine hundred and eighty-three tierces of hams is dated Jan. 23, 1865, which was Tuesday; but the hams appear to have been forwarded in fact on Sunday; and on Monday, the 22d, Gregg & Hughes telegraph Drakeley & Fenton as follows:

CHICAGO, Illinois, Jan. 22, 1865.

Drakeley & Fenton—

Don't negotiate bill lading for nine hundred and eighty three tierces of hams shipped yesterday by McCabe & Company, consigned

to you; hams belong to us. Particulars by mail. Answer. GREGG & HUGHES.

This was the first intimation that Drakeley & Fenton had of Gregg & Hughes' interest in the property mentioned in the original letter of R. McCabe & Company of January 6, or any part of it. They acknowledged the telegram Jan. 24, 1865. The letter promised by the telegram—and of the same date—followed in due course.

CHICAGO, January 23, 1865.
Messrs. Drakeley & Fenton,
Baltimore, Md.,

GENTLEMEN: We have been advancing large sums of money during the past winter to R. McCabe & Company of this city, to pack pork with, and have been getting from them their warehouse receipts, with policy of insurance covering the same security. We have been shipping the property to New York on B. L. in our name, where it was held for our account. Some few days ago, Col. McCabe, of the firm name, handed us a letter from your house, authorizing them to make sight drafts on you on the basis of certain figures therein named, the drafts to be accompanied by B. L. These shipments they made without our knowledge in their own name, and gave us only a portion of the proceeds of the drafts made on you, payable to our order, viz.: one for \$41,000 and another for \$18,000. To this we did not make any serious objection, as they had been cutting a few hogs with money obtained from another source, and we presumed they wanted to close that account. There was still a considerable quantity of lard and hams remaining here, which we supposed was sufficient to secure us for our advances here, in addition to what we had in New York. Subsequently they shipped the lard to you on their own account, for which we got nothing yet. Colonel McCabe, however, told us that we could have the benefit of anything that might be in your hands from the sale of the property shipped you on B. L. in the name of McCabe & Co., the lard included, after your advances and charges were paid. We were satisfied with that arrangement, and on Friday last proposed that we would ship you in a few days, the hams that were still here, there being then about a thousand tierces in which we were interested, and we would not draw anything upon them until they were sold. Col. McCabe told us at that time he would leave on Saturday morning for New York, and we were to attend to the shipping of the hams ourselves. To our surprise this morning (Monday), we found that McCabe did not go to New York as contemplated, but remained here and shipped the hams himself to your house on yesterday (Sunday), and this morning left for your city himself. Now, the last move to us does not look right, and we are not satisfied with it. We consequently write to you all the facts in connection with our dealing with McCabe & Company, and will deem it an especial favor if you will hold off making further advances to them over and above the \$41,000 and \$18,000 sight drafts drawn in our favor. The property shipped you is virtually and legally ours, and we hold McCabe's warehouse receipt for it. If you will delay the payment of anything further to McCabe & Company until we can advise with them and direct the property to be placed with you for our account, we will feel very grateful to

75 U.S.

you; and if they refuse to comply with our request, we can then take steps to make them surrender the property or reimburse us for our advances.

We do not wish your interest in the matter to be impaired in the least; we want you to sell all the property consigned to you; but we do not want the proceeds paid over to McCabe & Company until we are secured, nor do we want any sale for the future made, unless the sales are placed to our credit. McCabe & Company may have the very best intentions in this matter, and we hope they have, but the course pursued is not exactly as we would have done, and we think very strange of McCabe & Company for having moved property belonging to us without our consent. We desire that they shall have the benefit of everything the pork, lard, shoulders and hams bring, over the amount we have in them.

Yours,

GREGG & HUGHES.

This letter is important and may be dwelt upon before going further. It is the statement by Gregg & Hughes of "all the facts."

It admits, in the first place, that they held warehouse receipts for all the property that had been consigned to Drakeley & Fenton—that their title to the hams was no better than their title to the pork and shoulders—but the same.

It admits that they saw the letter by which Drakeley & Fenton agreed to make advances.

It admits that the advances on the first consignments made, to use their own language, "on the basis of certain figures named," in Drakeley & Fenton's letter of Jan. 10, were in drafts to their own order—a part of the proceeds of which they gave to R. McCabe & Company, to enable them to close an account with other parties.

It admits that, although the first consignment of the property of Gregg & Hughes was made without authority by R. McCabe & Company, yet they made "no serious objections to it;" in other words, that they ratified it and received the proceeds of it, availing themselves of the acts of R. McCabe & Company as their agents in the premises.

It admits that, with a knowledge of the letter of Drakeley & Fenton of Feb. 16, 1865, they proposed to send them—the same consignees that McCabe & Company had employed—the property which, but for the negotiation opened by R. McCabe & Company, by letter of January 6, and which alone introduced Drakeley & Fenton into the transaction, would have been sent to New York.

In this letter Gregg & Hughes propose, in fact, to place themselves in the shoes of R. McCabe & Company, as regards the property consigned by them to Drakeley & Fenton (pork, shoulders and hams) and although they say they had not proposed to draw, had they themselves made the shipment of the hams, until they were sold, yet they did obtain advances on them, as will be seen presently from the correspondence—making a reference at the time to the letter of Drakeley & Fenton, of Jan. 10, which was "the basis" of the transaction.

In this letter, too, they set up this title to the whole, which is not disputed, by virtue of their warehouse receipts.

They claim in it also the proceeds, not of the hams only, but of all the pork products con-

signed by R. McCabe & Company to Drakeley & Fenton.

"We want you" they say, "to sell all the property consigned to you * * * nor do we want any sales for the future made, unless the proceeds are placed to our credit." And further they say: "We desire that McCabe & Company shall have the benefit of everything the pork, shoulders and hams bring over the amount we have in them."

The same letter admits that it was McCabe's conduct in forwarding the hams that created distrust and produced their telegram and letter of January 22d.

These admissions, the plaintiffs in error contend, will alone prove the transaction to have been one where the owners of property, after permitting an agent to establish in his own name relations with a third party, or, which is the same thing, not objecting to those relations when he learns they have been established, but availing himself of them, becomes dissatisfied, discloses his ownership, and takes upon himself the further conduct of the business.

It remains now to show wherein the court below erred in the instructions given to the jury.

The court says: "If the jury shall find from the evidence in this cause that the pork and shoulders were shipped to defendants, Drakeley & Fenton, for sale by McCabe & Company, as their own property, without the knowledge and consent of Gregg & Hughes, and that McCabe & Company drew on defendants for the amount of advance agreed to be made by them on said shipments; that Gregg & Hughes, on learning of the same, did not object to the said shipment but received and negotiated for McCabe & Company the drafts drawn by them on Drakeley & Fenton for the advance, and received and credited said McCabe with a part of the same, and paid the balance to said McCabe & Company; that they agreed that Gregg & Hughes should receive any balance that might remain from the pork and shoulders after deducting said advances, expenses, etc., and shall further find that McCabe & Company shipped the hams to Drakeley & Fenton without the knowledge and consent of Gregg & Hughes, but before they reached Drakeley & Fenton were notified by Gregg & Hughes that the hams belonged to them and could only be received as their property; and if, after said notification, Drakeley & Fenton received and sold said hams; and if the jury shall find that at the time when said hams were shipped to, received and sold by Drakeley & Fenton, Gregg & Hughes held the legal title to the same by virtue of the warehouse receipts held by them, then Gregg & Hughes are entitled to recover, etc."

In addition to the above instruction, the court stated to the jury that the facts upon which the instructions were founded being admitted, they must find for plaintiffs.

At the trial of this cause in the court below, the plaintiffs in error offered five prayers:

1. The first prayer asked the court to instruct the jury that the warehouse receipts gave to Gregg & Hughes the right to hold the pork products as security for advances, and made them owners by law of said products.

2. The second prayer, after enumerating the facts of the case at length, asked the court to instruct the jury that those facts, if true, af-

fording evidence from which the jury might infer that the relations existing between the defendants in error and the plaintiffs in error were those of principal and factor as to both consignments.

3. The third prayer was founded on the recognition and adoption by the defendants in error of all the consignments and their receipt of advances thereon as evidence from which the jury might infer that the relation of principal and factor existed between them and the plaintiffs in error, as to the whole consignment of pork, shoulders and hams.

4. The fourth prayer asserted that the assent of the defendants in error to the shipment of the pork and shoulders, and the fact that the advances thereon were received by them under the circumstances of this case, gave to the plaintiffs in error a right to have said advances deducted from any money in their hands belonging to the defendants in error.

5. The fifth prayer had reference to the fact that the assignment of the bill of lading was antedated.

The court below granted the first and fifth prayers, but rejected the second, third and fourth prayers, and gave to the jury the instruction above set forth. The court thus, out of the mass of facts all bearing on the issues, selected a few that were not denied, and ignoring all the rest, told the jury to find their verdict for the defendants in error. The plaintiffs in error excepted as well to the instruction given by the court below as to its refusal to grant their second, third and fourth prayers.

The evidence, if not conclusive, goes far to establish that, by arrangement between the parties, Gregg & Hughes were to take as assignees; if so, it is clear that they took the assignment of the proceeds, *cum onere*—they took only that to which McCabe & Co. had a right (and that was the proceeds) subject to all equities which existed between that firm and the plaintiffs in error.

Spring v. Ins. Co., 8 Wheat., 268; 2 Story, Eq. Jur., sec. 1047.

The law would not permit them to affirm what was beneficial, and to reject the remainder. They must adopt the agency *cum onere*, in the absence of special agreement to the contrary.

Hovil v. Pack, 7 East, 164; *Wilson v. Poulter*, 2 Str., 859; *Billon v. Hyde*, 1 Atk., 128.

Besides, it seems clear that one who adopts a contract in reference to his property which had been entered into by another, accepts the original consideration of the contract as a sufficient consideration for his adoption of it.

Pearson v. Chapin, 44 Pa., 9; *Keenan v. Holway*, 16 Ala., 53; *Forreth v. Day*, 46 Bing., 176; *Wilnot v. Richardson*, 6 Duer., 328.

It is, therefore, contended that the court below erred in submitting the case to the jury upon the simple question of legal title to the hams in the defendants in error, and notice of that title given to the plaintiffs in error; that the court should either have, itself, construed the agreement between the parties as appearing in the documentary evidence, or, more properly under the circumstances of this case, have submitted it to the jury as the appropriate tribunal, to find from the evidence what was the true agreement between the parties.

Brown v. McGran, 14 Pet., 493; *Turner v. Yates*, 16 How., 23.

Messrs. S. T. Wallis and J. H. Thomas, for defendants in error:

The appellees contend that:

1. Their title to the hams was not derived from any agreement of the appellants nor from anything which occurred after the hams came into the possession of the appellants, but from the warehouse receipts which made them their property before they left Chicago.

Gibson v. Stevens, 8 How., 897.

2. Even if McCabe had received an advance on them before the appellants became aware of his title, it would not have been binding on the appellees.

Wilson v. Nason, 4 Bosw., 155.

3. They were informed of the appellees' rights before the hams reached them, *a fortiori*, they are not entitled to deduct from the proceeds a general balance due by McCabe for advances made on other articles.

Sweeney v. Easter, 1 Wall., 166 (68 U. S., XVII., 661).

4. The hams being their property could not cease to be theirs nor become subject to a lien in favor of anyone else, except by some contract of their own, founded upon a legally adequate consideration, of which there is no pretense.

5. McCabe had entered into no obligation to ship the hams to cover possible deficiencies which might arise on advances made on the other meats. If, however, the arrangement between him and the appellants had been different, the appellees only acquiesced in the shipment of the other meats and the imposition of a lien thereon by him; they and their property were bound to the extent of that acquiescence, but no further.

Dunl. Paley, 139; *Woodruff v. N. R. R. Co.*, 2 Head, Tenn., 87.

The appellants recognized McCabe's right to divert the consignment, suggested the probability of its having been exercised, made no objection to it as far as they were concerned, and did not even inquire whether the hams had been consigned to them or not.

6. If McCabe had been under an obligation to ship the hams, and the appellees had been bound by it, they would have been entitled to the corresponding benefits of the contract—to the advance of \$40 per tierce on the 983 tierces, to \$39,320, which is more than the amount they now claim out of them; but they never asked for more than \$25,000, and the appellants refused to advance even that.

Allen v. Williams, 12 Pick., 297; *Fland. Ship.*, 465; *Coolidge v. Payson*, 2 Wheat., 75; *Lewis v. Kramer*, 8 Md., 289.

The appellees claimed the hams as their own; claimed none of the benefits, admitted none of the liabilities arising from the contract between McCabe and the appellants, except as to the shipment of the pork and shoulders, and the lien imposed on them.

7. Their receiving a portion of the proceeds of the drafts drawn on the pork and shoulders did not affect their right to the hams. It was immaterial to the appellants who received the proceeds, and the appellees received them as a payment from McCabe, and not as an advance from appellants.

8. The taking, by the appellees, of the order for the proceeds of pork and shoulders and the assignment of the bill of lading for the hams, did not impair the right they already had to the hams. They do not claim title under those papers.

9. Admissions are useful to determine doubtful questions; not to take away nor qualify clear rights. They must be deliberate, not fished out of loose expressions in mercantile correspondence.

Coal & Iron Co. v. Sherman, 20 Md., 149.

10. They might have replevied the hams from the railroad company before they reached the appellants, or from the latter afterwards, on tendering the freight and other similar charges on them specifically.

11. If the hams had never been shipped, the loss arising from deficiencies of the other meat to cover advances made on them, would have fallen on the appellants, not on the appellees. Nothing in the case justifies the transfer of the loss to the latter.

12. Although factors have a lien upon goods actually in their hands or the proceeds of them, for a general balance, it is only for a balance due by the principal against whom it is sought to be asserted. The balance, for the drafts drawn, on the pork and shoulders was due by McCabe. The appellants' effort is simply to make one man's property liable for the debts of another—to make the appellees' hams, to which they waived no rights without consideration, liable for McCabe's debts, because the appellees agreed, for an adequate consideration, that the pork and shoulders might be liable therefor.

Wilmerding v. Hart, Hill & Den., Lalor's Sup., 305.

13. All the facts assumed in the court's instruction were admitted; and the court, construing the letters between the parties according to their proper legal effect and force, was right in substantially saying to the jury that they contained no sufficient agreement whereby the appellants had acquired the right to charge the property of the appellees for advances made on other property to McCabe, and not to the appellees.

The lien of factors for a general balance is an implication of law, and therefore never arises where there is a special arrangement, or the circumstances rebut such implication. Special circumstances, indeed, always control it.

Cross, Lien, 259 (34 Law Lib., 172); *In re Leith*, L. R., 1 P. C. Appeals, 305; *Young v. Bk. of Bengal*, 38 Eng. C. L., 633; *Neponset Bk. v. Leland*, 5 Met., 262; *Randel v. Brown*, 2 How. 425; *Story*, Ag., sec. 381.

The doctrine of lien applies only where a deposit of the goods is in the nature of a pledge, and does not apply where it is made for a special purpose. *Walker v. Birch*, 6 T. R., 262.

Nor does any lien arise for antecedent debts of the principal, by reason of the subsequent creation of the relation of principal and factor.

Houghton v. Mathews, 3 Bos. & P., 488.

The property on which the lien is sought to be fixed, must not only belong to the party from whom the debt is due to the factor, but it must come to his hands as the agent of that party.

Bruce v. Wail, 8 Mees. & W., 15; *Russ. Fact. and Bro.*, 206; 48 Law Lib., 135.

And where the factor is not acting in the capacity of general factor, but only in regard to a special consignment or adventure, he has no lien for a general balance. *De Wolf v. Howland*, 2 Paine, 364.

The appellants had no right to receive the hams except with the assent of Gregg & Hughes, and did not, but received them with full notice of the title of Gregg & Hughes, which is not disputed. How they could acquire a lien upon them under such circumstances, for the general balance of McCabe, or how Gregg & Hughes could agree to their doing so without motive or consideration, it is difficult to imagine.

Mr. Justice Davis delivered the opinion of the court:

The correctness of the charge of the court to the jury, and the refusal of the court to charge as requested, present the only questions in this case which we are required to consider.

The plaintiffs in error, who were the defendants below, insist that they are injured by the action of the court, in not allowing their defense to go to the jury. Their position is that the evidence in the case proves their defense, or at least tended to prove it; and if it did, it was the province of the jury and not of the court to say what effect should be given to it. In order to understand whether, in fact, they were deprived of any of their legal rights, it is necessary to state the nature of this controversy and the character of the evidence introduced at the trial.

The controversy grows out of the last of three shipments of pork products in January, 1865, to Drakeley & Fenton, of Baltimore, by McCabe & Co., of Chicago. Drakeley & Fenton had agreed to receive on consignment from McCabe & Co., hams, shoulders, prime and mess pork; to sell the property at the highest market price, and to advance on each shipment at certain specified rates. In pursuance of this understanding, McCabe & Co. made two shipments, one of barreled meat, and the other of shoulders in tierces, on which they drew drafts in favor of Gregg & Hughes to the amount of \$59,000, which were paid.

Soon after this the hams were sent. On the day succeeding their shipment, the Baltimore firm received a telegram, which was followed by a letter from Gregg & Hughes from Chicago, claiming title to all the property, and requesting that the bills of lading for the hams might not be negotiated until the whole matter was properly adjusted. Until then Drakeley & Fenton did not know that Gregg & Hughes had any interest in the property consigned. It seemed from Gregg & Hughes' letters, that they had furnished McCabe & Co. with money to cut and pack hogs, and had taken in security the warehouse receipts on all the pork products which afterwards came into the possession of Drakeley & Fenton. The intervention of Gregg & Hughes resulted in nothing more being paid to McCabe & Co., and in a final direction from McCabe & Co. to Drakeley & Fenton to place the proceeds of all the pork products consigned to them, to the credit of Gregg & Hughes.

It appears from the conduct of the parties that there was no apprehension, until long after Gregg & Hughes had intervened, that the portion of these products covered by the first two shipments would not bring, when sold, enough to re-imburse Drakeley & Co. for what they had

advanced on them. But it so happened, in the vicissitudes of trade, that the hog market greatly declined, and the proceeds of the pork and shoulders were inadequate to repay the money which was advanced upon them, and hence this litigation. The hams having realized a large sum over charges and advancements, the plaintiffs in error insist that they are entitled to liens on their proceeds for their general balance arising out of the deficiency on the sale of the pork and shoulders, which right is denied by the defendants in error.

It is not denied that in the dealings between McCabe & Co. and Drakeley & Fenton there existed the relation of principal and factor, and that if Gregg & Hughes had not intervened, Drakeley & Fenton would have had a lien on the surplus, after all the consignments were closed up, for their general balance. The question then arises, whether this relation was changed by the intervention of Gregg & Hughes. The defendants in error contend that it was, so far as the shipment of hams was concerned, because they were received as the property of Gregg & Hughes, after notice that it was their property; on the contrary, the plaintiffs in error insist that the relation of principal and factor was unchanged as to all the shipments, for the reason that Gregg & Hughes, after the receipt of the hams by Drakeley & Fenton, put themselves in the place of McCabe & Co. in regard to the whole transaction, adopted what had been done in reference to each shipment, and claimed to be the owners of all the property, and did direct and control the disposition of it. The case was tried substantially on this issue.

There is no dispute that the warehouse receipts gave to Gregg & Hughes the legal title to all the property described in them; and if so, it necessarily follows that McCabe & Co. could not lawfully contract with Drakeley & Fenton to receive and sell this property without the consent of Gregg & Hughes. There is no doubt, if this consent had been obtained in advance of the making of the contract, that Gregg & Hughes would have been bound by it, and could not free themselves from any of the obligations which rested on McCabe & Co. to discharge.

But as this consent was not obtained before the movement of the property commenced, the important inquiry is: whether the consignment of hams is separable from the preceding consignments, and whether the loss on the pork and shoulders must be borne by Drakeley & Fenton, or by Gregg & Hughes. This must depend on the terms on which the hams were received; and these terms need not be embodied in the form of a written agreement, but can be gathered from the correspondence and conduct of the parties. If the case stood alone, on the naked fact that notice of title was given while the hams were *in transitu*, there would be no difficulty. But it is claimed that Gregg & Hughes adopted McCabe & Co.'s contract throughout; substituted themselves in their place as to all the consignments—pork, shoulders and hams—and continued in their own name, the relation of principal and factor before existing between McCabe & Co. and Drakeley & Fenton. If this were so, the case would be equally free from difficulty; for, if

Gregg & Hughes were not bound by a contract which McCabe & Co. had entered into with reference to their property, they could elect, after being informed of the nature of the contract, to reject it or adopt it. If, with a full knowledge of the facts concerning it, they ratify it, they thereby make themselves a party to it, as much so as if the original agreement had been made with them. And if they ratified it, no new or additional consideration was required to support the ratification; because in adopting the contract, they accepted with it the original consideration on which it was founded, as a sufficient consideration for their adoption of it.

With this general statement of the principles of law applicable to the controversy, we are met with the inquiry, whether there is any evidence in the case to support the theory of the plaintiffs in error, that Gregg & Hughes intended to, and did, adopt the contract of McCabe & Co. with them. It is not enough that Drakeley & Fenton should have so understood the agreement, but the proof must also show that Gregg & Hughes had a similar understanding of it, and manifested their intention to be bound by it.

The evidence in the case, to which no exception was taken, consists of a voluminous commercial correspondence, and some parol proof, explanatory of the conduct of the parties. The correspondence covers many pages of the record, and there is a marked difference in its tone and bearing after it had progressed for several months. It would be difficult to discuss the evidence in reference to the theory advanced by the plaintiffs in error, without indicating, in a greater or less degree, our views as to the effect that should be given to it. If the case is to be tried again, it is not proper to do this, for in that event it is the province of the learned court and the jury to determine the effect of the evidence.

The only question with which we have to deal at the present time is: whether the evidence in this record tended to prove the position assumed by the plaintiffs in error; for if it did, the learned court should either have submitted the evidence on this point to the consideration of the jury, or, if in the opinion of the court, there were no material extraneous facts bearing on this question, and the contract relied on must be determined by the commercial correspondence alone, then to have interpreted this correspondence and informed the jury whether or not it proved the contract to be of the character contended for by the plaintiffs in error. *Turner v. Yates*, 16 How., 23.

We have examined the record in this case carefully, and are of the opinion that there was evidence at the trial which tended to prove that, after the hams were received by Drakeley & Fenton, Gregg & Hughes, with full knowledge of the agreement between McCabe & Co. and Drakeley & Fenton, and its partial performance, ratified and adopted it. Whether the evidence actually proves this ratification and adoption, we express no opinion. It is enough, as we have seen, for the purposes of this writ of error, that it tended to prove it.

As the learned court below submitted the case to the jury, on the single issue of legal title to the hams in Gregg & Hughes, and notice of that title to Drakeley & Fenton, it follows

that the judgment of the Circuit Court should be reversed, and a venire de novo awarded.

Cited—66 U. S., 238.

ROBERT PATTERSON, *Plff. in Err.*,

v.

EMILIE DE LA RONDE, Widow and Executrix of PIERRE HOA, Deceased.

(See S. C., 8 Wall., 292-301.)

Registry laws—effect of, as notice—actual notice—priority.

The object of all registry laws is to impart information to parties dealing with property, respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens.

Actual knowledge by a purchaser of an existing mortgage or title is equivalent to a notice resulting from the registry.

Where a grantee in a deed assumes to pay a mortgage, he cannot avoid payment on the ground that the mortgage has lost its priority, because the registry laws are not complied with.

[No. 175.]

Argued Oct. 26, 1869. Decided Nov. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

An action was brought and judgment obtained in the court below, by the plaintiff in error, upon certain promissory notes secured by a mortgage.

The mortgaged premises were sold upon *fieri facias*, and thereupon an intervention and third opposition were filed by Pierre Hoa, claiming satisfaction of an alleged prior claim upon said premises, out of the proceeds of said sale.

A peremptory exception filed to the intervention and third opposition was overruled; whereupon the plaintiff sued out this writ of error.

The said Pierre Hoa having died, his executrix and widow became the defendant herein, in his stead.

A further statement of the case appears in the opinion of the court.

Mr. Thomas J. Durant, for plaintiff in error:

An intervention is a demand by which a third person requires to be permitted to become a party to a suit between other persons. La. Code of Pr., art. 389.

And a third opposition is a demand brought by a third person, not originally a party to the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him. La. Code of Pr., art. 392.

Hoa's petition of intervention and third opposition avers that the mortgage, which he seeks to enforce against Patterson, was recorded in the office of the recorder of mortgages, May 9, 1853.

To this, Patterson answered that said mortgage and priority of Hoa had been prescribed and all right of action on it barred by the Statute of Limitations of Louisiana.

1. In Louisiana, mortgages are allowed to See 8 WALL.

prejudice third persons only when they have been publicly inscribed on the records kept for that purpose. La. Civ. Code, arts. 3314, 3315.

2. There is an office for the recording of mortgages in each parish of the State. La. Civ. Code, arts. 3349, 3350.

Mortgages are extinguished by prescription; i. e., Statute of Limitations. La. Civ. Code, art. 3374.

4. The prescription operating as a release from debt has also the effect of releasing the owner of an estate from every species of real right to which the property may have been subject, if the person in possession of the right has not exercised it during the time required by law. La. Civ. Code, arts. 3494, 3495.

The hypothecary action is barred by the lapse of ten years after the plaintiffs' right to sue accrued, and before the institution of the suit. *Lanusse v. Minturn*, 11 La., 256.

5. The registry or inscription of a mortgage preserves the evidence of it during ten years from the day of its date. The effect ceases even against the contracting parties, after that time, unless the inscription is renewed. La. Civ. Code, art. 3333.

6. This re-inscription is indispensable to the enforcement of the mortgage against third persons; and prescription results from the omission to re-inscribe within ten years from the date of the first registry.

See *Young v. City Bk.*, 9 La. Ann., 194, and cases there cited.

7. Hoa, in the case at bar, alleges that his mortgage was inscribed May 9, 1853; his inscription of mortgage, consequently, became extinct May 9, 1863; his suit was not instituted until more than three years after that date; it can have no effect.

8. Robert Patterson being also a mortgage creditor, and having a judgment recognizing his mortgage as existing against the property from July 30, 1858, cannot be prejudiced by Hoa's mortgage, the inscription of which had become null by the lapse of ten years from its date without renewal.

Purchasers of property sold under *fi. fa.*, in Louisiana, are required to take it subject to such recorded mortgages as, upon investigation, may turn out to be *bona fide* and existing.

The amounts of these mortgages added to the amount of the bid, form the total price to be paid by the purchaser for the thing sold. In case it turned out afterwards that any of the mortgages had been unpaid or were unlawful simulations, the purchaser would owe their amount to the judgment debtor. *Pickersgill v. Brown*, 7 La. Ann., 305.

9. A plaintiff, who is a judgment creditor and has a judicial mortgage on the property sold, has the right to dispute any prior mortgage and inquire into its validity and amount. *Pickersgill v. Brown*, 7 La. Ann., 306.

Messrs. Wm. M. Evarts, P. Phillips, and P. H. Morgan, for defendants in error:

The articles of the Code that relate to the necessity and effect of the inscription of mortgages applicable to this case, are as follows:

Art. 3297: "Among creditors the mortgage, whether conventional, legal or judicial, has force only from the time of recording it in the manner hereafter directed, except in the cases mentioned below.

Art. 3314: "Conventional mortgage is acquired only by consent of the parties; and judicial or legal mortgages only by the effect of a judgment or by operation of law.

But these mortgages are only allowed to prejudice third persons when they have been publicly inscribed in records kept for that purpose, and in the manner hereinafter directed."

Art. 3315: "by the words *third persons* used in the foregoing article are to be understood, all persons who are not parties to the act or to the judgment on which the mortgage is founded, and who have dealt with the debtor, either in ignorance or before the existence of this right."

Art. 3338: "*The inscriptions preserve the mortgage and the privilege* during ten years, reckoning from the day of their date. Their effect ceases even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

(The words in italics are a literal translation from the French side of this article; the English side, as printed, leading to obscurity.)

It is manifest that certain general principles so familiar to us in their application to the recording Acts of the other States and England, equally obtain in the law of Louisiana.

I. Inscription, whether of privileges or of mortgages, is of no application in respect to the efficiency of the instruments between the parties to the contracts, or their privies in law or fact, or those brought by their own contract into knowledge or obligation of knowledge of the privilege or mortgage in question.

II. Inscription is solely to affect third parties within the definition of the Code with knowledge of what is lawfully inscribed, by giving them the opportunity of knowledge by inspection.

III. Re-inscription or its omission is of no more consequence between parties and privies to these contracts, in regard to the efficacy of the contracts, than original inscription.

Shepherd v. Orleans Cot. Press Co., 2 La. Ann., 118.

"The object of the re-inscription is to dispense from searching for the evidence of the mortgages more than ten years back."

IV. Prescription of a right (which is its extinction in respect of remedy by too long neglect after it accrues to enforce it) has no relation to inscription or its omission.

The authorities in the Louisiana reports to support these propositions are abundant and uniform.

Planters' Bk. v. Allard, 8 Mart. (N. S.), 136.

"A purchaser, with a knowledge of an existing mortgage, cannot avail himself of a want of registry."

See, also, to the same effect, *Rachal v. Normand*, 6 Rob., 88; *Robinet v. Compton*, 2 La. Ann., 846; *Sean v. Moore*, 14 La. Ann., 845; *Parker v. Waldon*, 6 Mart. (N. S.), 718; *Sanders v. Dossou*, 3 La. Ann., 587; *Haines v. Verret*, 11 La. Ann., 122.

"A mortgage is equally binding between the contending parties without registry."

See, also, to similar effect, *Thompson v. Parrent*, 12 La. Ann., 183; *Sauvignet v. Landreaux*, 1 La. Ann., 221; *Noble v. Cooper*, 7 Rob., 44; *Parker v. Walden*, 6 Mart. (N. S.), 718.

Mr. Justice Field delivered the opinion of the court:

In April, 1858, one Pierre Hoa sold to one Mrs. McGee a plantation and several slaves attached thereto, in Louisiana, for the sum of \$95,000, and for a portion of the purchase money took her seven promissory notes, two of which were payable respectively in five and six years from date. In the act of sale before the notary, which was subscribed by the parties, the officer and the attending witnesses, the purchaser stipulated for a special mortgage on the property as security for the payment of her notes; and it was declared that the vendor's mortgage and privilege should extend, not merely to the land and slaves, but to the appurtenance of the land and the improvements. The act of sale was duly recorded in the register's office of the parish.

Before the maturity of the last note given by Mrs. McGee on this purchase, and in July, 1858, she executed a mortgage on the same property to the plaintiff, to secure several notes made by her at the time, amounting to \$35,000. This mortgage was also duly recorded in the office of the register of the parish. In it reference is made to the previous mortgage given by Mrs. McGee, in favor of her vendor, Hoa.

In October, 1865, Patterson brought a suit in the Circuit Court for the District of Louisiana upon these notes, and in February, 1866, recovered judgment for their full amount and interest. Upon this judgment execution was issued and the mortgaged property was sold by the marshal to the plaintiff, he being the highest bidder, for the sum of \$26,200.

By the law of Louisiana, where property, which is susceptible of being mortgaged, is to be sold under execution, the sheriff is required to obtain from the office of the register of mortgages in the parish a certificate setting forth the mortgages and privileges inscribed against the property on the books of the office, and to read the certificate to the bystanders at the place of sale before he cries the property. Code of Procedure, art. 678.

The sheriff is also required to give notice at the sale that the property will be sold subject to all privileges and hypothecations of every kind with which it is burdened. The purchaser, in such case, is only obliged to pay to the officer so much of his bid as may exceed the amount of the privileges and special mortgages upon the property, and is allowed to retain in his own hands the amount required to satisfy them.

The law, in these particulars, was followed in the sale made on the execution in this case. The Marshal states in his return, that the sum bid by Patterson was retained in his hands—First, to pay the mortgage in favor of Hoa, and second, to be applied on account of Marshal's and clerk's fees and the purchaser's own claim. And in his deed to Patterson, the Marshal recites his proceedings at the sale; his announcement to the bidders of the subsisting mortgages on the property, of which the first was the mortgage of Mrs. McGee to Hoa; and the retention of the sum bid by the purchaser to satisfy the amount due thereon.

Soon after the sale, and before the return was made by the Marshal or the deed to the purchaser was executed, Hoa filed what is termed

in Louisiana a petition of intervention and third opposition, a proceeding by which a third person is allowed to become a party to a suit between other persons for the purpose, among other things, of enabling him to present any claim which he asserts on the proceeds or property seized and sold under the order of judgment of the court. The object of the intervention of Hoa was to obtain payment, out of the proceeds of the sale, of the amount due him on the purchase money of the mortgaged premises. To the petition Patterson, in the first instance, filed an answer, stating that at the sale he bought the property for the sum of \$26,300; that out of this sum he undertook, according to law and the proclamation of the Marshal, to pay whatever sum might be due to Hoa, alleged to be a creditor of McGee, with a mortgage and a vender's privilege on the plantation superior to his own; but that the amount was uncertain, and was not stated by the Marshal and did not appear by the register's certificate, read by him at the sale. The answer then proceeds to detail certain transactions which he insisted resulted in a novation of the debt of McGee to Hoa, and to a forfeiture of Hoa's right by virtue of his mortgage and privilege to prior payment out of the proceeds of the sale.

No point is made in this court upon the sufficiency of the new matters thus set out, and no further reference to it need be made. Subsequently, and on the day set for the trial of the intervention, Patterson filed a peremptory exception to the demand contained in the petition, to the effect that the mortgage and priority of privilege of Hoa had been prescribed, and that his privilege had been lost by reason of the non-re-inscription of the mortgage to him within the delay provided by law.

On the trial, the peremptory exception was overruled and the intervention and third opposition were sustained, and judgment was given for the representatives of Hoa (he having died during the pending of the proceedings), for \$25,000 and interest, "with preference and privilege in the proceeds of the plantation sold," superior to that of all persons, and particularly to that of Patterson, the plaintiff. And a second trial granted by the court resulted in a similar judgment.

The only error alleged in the action of the circuit court lies in its ruling upon the peremptory exception. It is contended here, as in that court, that the mortgage and vendor's privilege of Hoa were prescribed, and that the prescription resulted from the failure to re-inscribe the mortgage within ten years from the date of the first inscription.

It is supposed that support for this position is found in article 8833 of the Civil Code of Louisiana; and such would be the case if, in the construction of the article, we were confined to its language, as given in English, in the printed volume published by authority of the Legislature of the State. It would seem from its reading, as thus given, that the omission to re-inscribe a mortgage within the time designated, was intended to have the effect of defeating and annulling its operation. But, upon examining the language of the article as given in French, in the same volume (the English and French being printed in parallel columns), this construction becomes impossible. Read, in the light thus af-

See 8 WALL.

forded, its meaning is obvious. It was intended to declare the effect of the inscription in preserving the evidence of mortgages and privileges, and the effect of the omission to renew the inscription in destroying such evidence. It declares that the inscription preserves such evidence for ten years, and that its effect ceases if not renewed before the expiration of that period. It is the effect of the inscription when not renewed, which ceases; not the effect of the mortgage. The object of requiring re-inscription is to dispense with the necessity of searching for evidence of mortgages more than ten years back. *Shepherd v. Orleans Cotton Press Co.*, 2 La. Ann., 118.

Besides, the object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of the property must look, and if not otherwise informed, they can rely upon the knowledge there obtained. But if they have notice of the existence of unregistered conveyances and mortgages, they cannot, in truth, complain that they are, in any respect, prejudiced by the want of registry. In equity, and in this country generally at law, they are not permitted to defeat, under such circumstances, the rights of prior grantees or incumbrancers, but are required to take the title or security in subordination to their rights. The general doctrine is that knowledge of an existing conveyance or mortgage is, in legal effect, the equivalent to notice by the registry. And such is the law of Louisiana as expounded by the decisions of her highest court. Thus, in *Robinett v. Compton*, 2 La. Ann., 854, that court said: "The doctrine is now well settled, that the actual knowledge by a purchaser of an existing mortgage or title is equivalent to a notice resulting from the registry. The formality of recording is for the benefit of the public, and for the purpose of giving notice to individuals. But if a party have knowledge of that of which it is the purpose of the law to notify him by causing an act, instrument or lien to be recorded, the effect is the same, and he is as much bound by his personal knowledge as if his information was derived from an inspection of the record."

The cases of *Planters' Bank of Georgia v. Alford*, 8 Mart. N. S., 136; *Bell v. Haw*, 8 Mart. N. S., 243; *Rachal v. Normand*, 6 Rob. La., 88, and *Swan v. Moore*, 14 La. Ann., 845, are to the same effect.

In the case at bar, Patterson had knowledge of the mortgage and vendor's privilege of Hoa. They are stated in the mortgage to himself, which he placed on record. If, therefore, the act of sale, stipulating for the special mortgage and acknowledging the vendor's privilege, had not, in fact, been recorded, he would have been bound by his knowledge of their existence. He could not have urged the want of inscription to defeat Hoa's priority and, for like reasons, he cannot urge the want of re-inscription.

Prescription of the mortgage and vendor's privilege did not follow from the omission to re-inscribe the act of sale. From its nature, prescription could not have begun to run until the debt secured had matured.

But there is a further answer to the objection founded on the want of re-inscription. By the terms upon which Patterson purchased the property at the Marshal's sale, and the stipulations contained in the Marshal's deed accepted by him and placed on record, he assumed to pay the amount due on Hoa's mortgage. He cannot now avoid compliance with his contract, in this respect, on the ground that Hoa's mortgage had, in fact, at the time, lost its priority by not being re-inscribed before the expiration of ten years from its first inscription. *Parker v. Walden*, 6 Mart. N. S., 713; and *Noble v. Cooper*, 7 Rob. La., 44.

Judgment affirmed.

Cited—3 Wood, 66.

J. R. YOUNG ET AL., *Piffs. in Err.*,

v.

WILLIAM MARTIN.

(See S. C., 8 Wall., 354-358.)

Exceptions not in transcript, not available—practice as to—abandoned demurrer.

Where there is no evidence in the transcript that any exceptions were taken to the action of the court below, except such as appear from the minutes of the clerk, this court cannot take any notice of them.

To be of any avail, exceptions must be drawn up so as to present distinctly the ruling of the court, and be signed and sealed by the judge.

Unless so signed and sealed they do not constitute any part of the record which can be considered by an appellate court.

But no bill of exceptions is necessary where the error alleged is apparent upon the record.

Where the plaintiffs, instead of relying upon the sufficiency of an alleged demurrer, filed a replication to the answer, they abandoned their demurrer and it ceased to be a part of the record.

[No. 182.]

Argued Nov. 3, 1869. Decided Nov. 15, 1869.

IN ERROR to the Supreme Court of Utah.

In this case a writ of replevin was issued in behalf of the plaintiffs in error, in the District Court for the Third Judicial District of the Territory of Utah, for the recovery of certain goods. The copy of the record shows the following entries, viz.:

Plaintiff's counsel filed demurrer to the defendant's answer, which was argued by *Messrs. Baskin & Hempstead* for plaintiffs, and *Messrs. Marshall & Carter* for defendant.

Pleadings submitted to the court and held under advisement.

Court overruled demurrer filed by plaintiffs to defendant's answer, and ruled that defendant has a lien on the goods of E. R. Young & Sons, now in possession of defendant, for freight both by the McWhurt train and the Irwine train.

Plaintiffs ordered to reply as though demurrer had not been filed.

Charles H. Hempstead, Esq., counsel for plaintiffs, excepted to the ruling of the court, and made a verbal motion, praying for judgment and damages on the pleadings. Motion argued by *Messrs. Baskin & Hempstead* for plaintiffs, and *Messrs. Marshall & Carter* for defendant.

Pleadings submitted to the court and held under advisement. Motion for judgment over-

ruled. Rulings excepted to by plaintiffs' counsel. Judgment having been given for the defendant upon the trial of the case by a jury, the plaintiffs took an appeal to the court below on the following assignment of errors, viz.:

First. That the court erred in overruling the demurrer filed by said plaintiffs to the said defendant's answer.

Second. That the court erred in ruling thereon that the "defendant has a lien on the goods of E. R. Young & Sons, now in possession of defendant, for freight both by the McWhurt train and the Irwine train."

Third. That the court erred in ordering plaintiffs to reply as though demurrer had not been filed; to which several rulings and order the plaintiffs, by their counsel, then and there excepted, as appears of record.

Fourth. That the court erred in overruling the verbal motion of plaintiffs for judgments and damages in the proceedings; to which ruling plaintiffs then and there excepted, as appears from the record hereto.

The court below entered a decree dismissing the appeal; whereupon the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. R. N. Baskin, C. H. Hempstead, and S. De Wolfe, for plaintiffs in error:

When the error is apparent on the face of the record, a bill of exceptions is unnecessary in a case brought up on writ of error."

Rogers v. Burlington, 3 Wall., 661 (70 U. S., XVIII., 82); *Gorman v. Lenox*, 15 Pet., 115; *Suydam v. Williamson*, 20 How., 436 (61 U. S., XV., 981); *Bennett v. Butterworth*, 11 How., 669; *Cohens v. Va.*, 6 Wheat., 410; *Stockton v. Moore*, 4 How., 155; *Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How., 131.

The demurrer was lost from the files before the transcript was made out, and does not, therefore, appear in form in said record.

This court can only judge of its nature from the ruling of the district court on said demurrer.

From this ruling it is manifest that said demurrer questioned the lien claimed on said goods. Besides, the demurrer must have been general or special; and in either case all the substantial defects of the pleadings were brought before the court. For it is a rule of law that "Under a special demurrer advantage may be taken as well of all substantial defects, though not assigned for cause, as of those formal faults which are so assigned; and this for the reason last before stated, viz.: that, as to faults not so assigned, a special demurrer operates precisely like a general one."

Gould, Pl., 435, sec. 20, and context; *Steph. Pl.*, 142; 1 Chit. Pl., 18th ed., 664; 1 Tidd, Pr., 695; *Burnett v. Bischoff*, 4 Johns., 235.

Formal defects, but not defects of substance, are cured by the adverse party answering over.

Gould, Pl., 442, sec. 36; p. 346, sec. 23; p. 468, sec. 18; p. 471, sec. 27; p. 154, sec. 192; *Steph. Pl.*, 146; 1 Chit. Pl., 571; *White v. De Lavin*, 21 Wend., 26, and cases cited; *Burnham v. De Bevoise*, 8 How. Pr., 159; *Garland v. Davis*, 4 How., 131, and cases cited.

We now come to the third assignment of error. Said exception was not waived by answering over, because, as has already been

stated, and as appears from the record, no pleadings were filed after the motion for judgment on the pleadings was made. Neither was said exception waived by trial or verdict for the defendant, because the defects in the defense are substantial, and such as a verdict cannot cure.

Gould, Pl., 159, *et seq.*; *Idem.*, ch. 10, secs. 7, 13, 21, 22, 27; 1 Chit. Pl., 674.

Said motion was in the nature of a motion for judgment, *non obstante veredicto*.

Steph. Pl., 97, 146; 1 Chit. Pl., 656; Gould, Pl., 482, sec. 46.

There can be no doubt that said motion would have been good if it had been made *non obstante veredicto*, and a *fortiori*, it was good before verdict.

Burnham v. De Bevoise, 8 How. Pr., 159.

Messrs. Marshall & Carter, and **Joshua M. Van Cott**, for defendant in error:

It is a rule of law, that a demurrer admits all such matters of fact as are sufficiently pleaded.

Steph. Pl., 6 Am. ed., 143; 1 Chit., 662; Gould Pl., ch. 9, secs. 4, 42-44; 1 Saund. Pl. & Ev., 5th Am. ed., 948, 953.

The judgment of the court was, that the defendant had in law a lien upon the property in question.

The plaintiffs had their election, either to let the judgment of the court become final and save their exception, or to abandon their demurrer and reply to defendant's answer.

"If the defendants had intended to have a review of that judgment in a writ of error, they should have refused to amend the pleadings and permitted the judgment on demurrer to stand."

See, also, *Clearwater v. Meredith*, 1 Wall., 25 (68 U. S., XVII., 604); *Bell v. U. & M. R. R.*, 4 Wall., 598 (71 U. S., XVIII., 838); *Pierce v. Minturn*, 1 Cal., 470.

On the contrary, the error assigned must appear on the record.

The exception noted to the judgment of the court upon the demurrer was waived, and the demurrer ceased to form part of the record from the time of the filing of plaintiff's replication.

2. There was no exception noted as assigned in plaintiffs' third assignment of errors.

3. The motion on the pleadings for judgment was in substance and effect a demurrer, and was waived when the parties went to trial on the merits.

Mr. Justice Field delivered the opinion of the court:

There is no evidence contained in the transcript that any exceptions were taken to the action of the District Court of the Territory, except such as appears from the minutes of the clerk. These minutes are mere memoranda, stating, in the briefest and most general manner, the proceedings had in court. They do not purport to give the particulars of the proceedings, but only to describe their character. They were made to preserve an account of the general order of business of the court, and to assist the clerk in the subsequent preparation of the formal record. In this case they state that, on a day mentioned, the plaintiff's coun-

sel filed a demurrer, which was argued and taken under advisement; that, on the subsequent day, the demurrer was overruled, and the plaintiffs excepted. And, also, that afterwards, on a certain day, the plaintiff's counsel made a verbal motion for judgment and damages on the pleadings; that the motion was argued, and, on the following day, overruled, and that the ruling was excepted to.

These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court. To be of any avail, exceptions must not only be drawn up so as to present distinctly the ruling of the court upon the points raised, but they must be signed and sealed by the presiding judge. Unless so signed and sealed, they do not constitute any part of the record which can be considered by an appellate court.

Williams v. Norris, 12 Wheat., 119; *Levering v. Dayton*, 4 Wash. C. C., 698.

It is true, as stated by counsel, that the object of a bill of exceptions is to make matter of record what would not otherwise appear as such, and that no bill is necessary where the error alleged is apparent upon the record. So here, had the demurrer been in the transcript, and it had appeared that the plaintiffs had relied upon its sufficiency, and final judgment thereon had passed against them, the error of the court, if any existed, would have been open to examination, for it would have been disclosed by the proceedings. No bill of exceptions, then, could have presented more clearly the ruling of the court.

Suydam v. Williamson, 20 How., 427 [65 U. S., XVI., 978].

But the demurrer is not in the transcript, and it is only a matter of conjecture whether it was a special or general one; to the form or substance of the answer. Nor is any order, overruling the demurrer, shown; a statement of the clerk in his entries that such was the fact is all that appears. But, independent of this consideration, the ruling of the court on this point would not be noticed, for it appears that the plaintiffs, instead of relying upon the sufficiency of the alleged demurrer, filed a replication to the answer. They thus abandoned their demurrer, and it ceased to be a part of the record.

Aurora v. West, 7 Wall., 92 [*ante*, 42]; *Clearwater v. Meredith*, 1 Wall., 42 (68 U. S., XVII., 609); *Brown v. Saratoga R. R. Co.*, 18 N. Y., 495.

The exception to the ruling in denying the motion for judgment on the pleadings is not only subject to the general objection already stated, but to the further objection, that the grounds upon which the motion was made or denied are not given. The motion was not made at the trial and, as counsel suggests, it may have been denied on a point of practice without respect to the merits.

Judgment affirmed.

Cited—10 Wall., 423; 12 Wall., 84; 21 Wall., 162; 91 U. S., 133; 104 U. S., 633; 2 Wood, 382; 18 Kan., 125.

JOHN MAGWIRE, *Plff. in Err.*,

v.

MARY L. TYLER ET AL.

(See S. C., 8 Wall., 668-672, *Note*.)*Decree modified, as to its direction to the court below.*

On motion to modify the decree, the court decide that the decree of reversal will stand unchanged, but the direction is modified so that the cause is remanded for further proceedings, in conformity to the opinion of the court.

[*Mr. Justice NELSON* did not sit in this cause.]

[No. 107.]

Argued Apr. 9, and Oct. 25, 1869. Decided Nov. 15, 1869.

IN ERROR to the Supreme Court of Missouri. On motion to modify decree.

For the history of this case and a statement of the facts, see the preceding report of the decision of this court on the merits.

On Apr. 5, 1869, this court entered a decree reversing the decree of the Supreme Court of Missouri, and remanded the cause to said court with directions to enter a decree affirming the decree of the St. Louis Court of Common Pleas in favor of the plaintiff in error. On the following day counsel for the defendants in error filed a motion to modify the decree of this court, so as not to require the Supreme Court of Missouri to affirm the decree of the St. Louis Court of Common Pleas.

After the first argument on the motion, Apr. 9, 1869, the court ordered the case to stand continued until the adjourned session of the court, in October following, for argument on the question "whether the decree should require the Supreme Court of Missouri to affirm the decree of the Court of Common Pleas of St. Louis."

A further statement of the case, as it now stands, appears in the opinion of the court.

Messrs. P. Phillips, B. R. Curtis, Britton A. Hill, and J. R. Shepley, for defendants in error:

The defendants were entitled, under the laws of their State, to appeal to the Supreme Court on all the points raised in the court below.

This is not the mere naked right of appeal, but the substantive right of having the judgment of the Supreme Court upon all the questions raised.

The Supreme Court did not decide the secondary question, because, being for the plaintiff on the primary one, it was unnecessary.

But if this court affirms the judgment of the Court of Common Pleas, or, which is the same thing in effect, directs the Supreme Court of the State to do it, then the defendants have never had the benefit of their appeal to the Supreme Court on their secondary questions—thus finally settled by an affirmance of a court which had no jurisdiction of them, and which never considered them.

If this court determines that the judgment of the Court of Common Pleas should have been affirmed by the Supreme Court of the State, then the Judiciary Act authorizes this court to enter such judgment as that court should have rendered. But we find no authority in the Act to issue a mandate to that court to enter such affirmance.

The point of interest to these defendants is, that the judgment of this court should not conclude them on any other question but the precise one which this court has jurisdiction to determine.

When this court, therefore, reverses the judgment of the Supreme Court of the State, and holds that the plaintiff has a valid title under his patent of 1862, and that this title is superior to that held by the defendants under their patent of 1852, it has done all that the plaintiff has the right to claim, and all that the Constitution and laws permit it to do.

The 25th section concludes with a declaration that "No error shall be assigned or regarded than such as immediately respects the before mentioned questions of validity, construction of the said Constitution, treaties, statutes, commissions or authorities in dispute."

It would seem to be very obvious that, as the particular question to be decided is so carefully defined, the court would see to it that on the entry of its judgment, no other question should be concluded.

The order of this court for judgment, setting up the vacated annulled decree of 1864, of an abolished inferior court of Missouri on questions of local law, is improvidently made without any power in the court, under any Act of Congress or decision to do so.

Messrs. T. Ewing, J. M. Carlisle, and S. T. Glover, for plaintiff in error:

As to the power of this court to make the decree complained of. The Act of 1867, 14 Stat. at L. 886, 887, directs that this court "may at their discretion proceed to a final decision of the same and award execution, or remand the same to an inferior court." The 24th section of the Act of 1789 directs the circuit court, on reversing a judgment in the district court, to render such judgment as the district court should have rendered. And on error to the circuit court, the Supreme Court shall do the same, except where the reversal is in favor of the plaintiff in the original suit, and the damages to be assessed are uncertain. The fact that the judgment of reversal is in favor of the plaintiff in the original cause, does not change the rule, unless also "the damages assessed are uncertain." There is no modifying element of the kind in this cause. Here the damages are already assessed; they are certain and definite; not even questioned of record. So that, if this were a writ of error to a circuit court, this court must render such a decree as the circuit court ought to have rendered.

Under the Act of 1867, vol. 14, p. 887, this court may, at their discretion, "proceed to a final decision and award execution," or "remand the cause to an inferior court."

Under the Act of 1789, if that stood alone, the court should amend their order so as to affirm the decree of the Court of Common Pleas of Missouri, to which we do not object; but under the Act of 1867 this court may, at their discretion, affirm the decree of the Court of Common Pleas or order the Supreme Court of Missouri to affirm it. The order as it stands is right, under the Act of 1867.

While we maintain that the judgment is right, under the Act of 1867, we adopt the reasoning of the learned counsel as to the powers of this court under the Act of 1789.

"As this case was never remanded before, and the reversal is in favor of the plaintiff in the original suit, the statute, as we have seen, requires that the case should be remanded for final hearing."

Here the conclusion forgets just one half of the premises. This court is required, by the Act of 1789, to enter such judgment as the court below ought to have entered, unless "the reversal was in favor of the plaintiff in the original suit, and the damages to be assessed or matter to be decreed are uncertain."

The *and*, with the half of the sentence which follows it, patent as they are, seem to have escaped the notice of defendant's counsel. The order complained of is, therefore, within the jurisdiction of this court. It is also within its practice.

Martin v. Hunter, 1 Wheat., 804; *Clerke v. Hardwood*, 8 Dall., 842; *Skellorn's Ex'r v. May's Ex'r*, 6 Cranch, 267; *Ex parte Story*, 12 Pet., 339; *West v. Brashear*, 14 Pet., 51; *U. S. v. Marvin*, 8 How., 618; *Walden v. Bodley's Heirs*, 9 How., 34.

Mr. Justice Clifford delivered the opinion of the court:

Explanations as to the nature of the controversy involved in the suit, or the proceedings in the courts of the State before the cause was removed into this court for revision, are unnecessary, as they are given with sufficient fullness in the opinion of the court delivered on the 5th of April last, on the same day and immediately before the decree was entered reversing the judgment of the Supreme Court of the State; and all those matters are well known to the parties before the court.

Pursuant to the order given at that time, the decree entered was, "that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed, with costs, and that this cause be, and the same is hereby remanded to the said Supreme Court, with directions to enter a decree affirming the decree of the St. Louis Court of Common Pleas." Dissatisfied with the directions given in the decree, the respondents moved the court that the decree in that respect might be modified, and the court, on the 15th of the same month, passed an order that the motion should be continued to this session, for oral argument on the question whether the decree should require the Supreme Court of the State to affirm the decree of the Court of Common Pleas, as therein directed. Leave for any further argument upon the merits was not granted in that order, nor has the court reconsidered the questions previously examined and decided when the opinion was delivered. The court at that time decided the following propositions:

1. That the documentary evidences of title exhibited in this case, as derived under Spanish rule, did not invest Joseph Brazeau, the donee of the tract of four by twenty *arpents*, with a complete title to the tract.

2. That the legal title to the same, under the Treaty, vested in the United States, as the successor of the former sovereign.

3. That the donees of incomplete titles in the Territory ceded by the Treaty, could not convert an incomplete title, derived from the former government, into a complete title under

the United States in any other mode than that prescribed by an Act of Congress.

4. That the incomplete title to the whole tract of four by twenty *arpents* was granted by Governor Zenon Trudeau to Joseph Brazeau, as described in the concession evidencing the grant.

5. That the deed from the donee of the tract to Louis Labeaume did not convey the four by four *arpents* now in controversy, but that the title to the same, as acquired under the concession, still remained in the donee of the tract, by virtue of the reservation contained in the deed.

6. That the survey made by the Spanish surveyor did not have the effect to impair the incomplete title of the donee, nor to convey, assign or transfer any interest whatever in the tract of four by four *arpents* to the grantee in that deed.

7. That the tract of four by four *arpents* was confirmed to the donee by the decree of the commissioners of September 10, 1810, and that the same was never confirmed to Louis Labeaume.

8. That the survey of Joseph C. Brown, in which he certified that he had surveyed for the applicant "two tracts in one," was in that particular erroneous, and that the survey so made did not have the effect to impair in any way the incomplete title held by the donee of the tract.

9. That Louis Labeaume did not acquire the legal title to the tract of four by four *arpents* under the patent granted to him, as the saving clause in the same reserved any valid adverse right which may exist to any part of the tract.

10. That the patent granted to Joseph Brazeau at the same time never became operative, as he refused to accept the same, and promptly returned it to the Land Department.

11. That the subsequent action of the Secretary of the Interior in canceling the same, and in ordering a new survey, was authorized by law.

12. That Joseph Brazeau, by virtue of that survey and the patent granted to him, June 10, 1862, acquired the legal title to the tract of four by four *arpents*, notwithstanding the saving clause in the patent, as he was the rightful owner of the incomplete title to the same as acquired by the concession granted under Spanish rule.

13. That the tract as granted by the Governor was bounded on the north by Rocky Branch, and on the south by the concession to one Esther, a free mulatto woman, and the reservation in the deed was of a tract of four *arpents* of land, to be taken at the foot of the hillock in the southern part of the land.

14. That the land reserved is bounded on the south by the concession to the mulatto woman, and north by the south line of the "sixteen *arpents* in depth" conveyed by the deed, and lies north of the ditch.

15. That the legal title to the tract of four by four *arpents* remained in the United States until June 10, 1862, when the patent was granted to the donee of the incomplete title under the former sovereign.

16. That the title of the donee before he obtained his patent was incomplete and attached to no land, and could not be converted into a

complete title except by legal survey and by a patent, as required by law—because it stood as it existed in 1810, when the Board of Commissioners confirmed it as valid.

17. That the title of the donee, as perfected by the last survey and patent, is wholly unaffected by the judgment of this court in the case of *Maguire v. Tyler*, 1 Black, 195 [66 U. S., XVII., 187], as this court in that case had no jurisdiction of the merits and did not decide any question, except that the action of the Secretary of the Interior, in setting aside the survey therein described, was a rightful exercise of authority.

Based upon these conclusions of law, the court gave the directions recited in the order passed at the regular session of this term, for an oral argument on the motion now pending before the court. In conformity to that order, the question involved in the motion, and therein recited, has been argued by counsel, and the court has reconsidered that part of the decree, and has come to the conclusion that a different direction would be more in accordance with the usual practice of the court in such cases than the one contained in the decree.

Governed by that consideration, the court will modify the particular direction specified in the order for an oral argument; but the court adheres to the several propositions of law here recited, and refers to the opinion of the court delivered at the time the decree was entered for further explanations, as to the grounds upon which these conclusions rest.

The decree of reversal will stand unchanged; but the directions, as modified, will be, *that the cause be remanded for further proceedings, in conformity to the opinion of the court.*

Dissenting, *Mr. Justice Grier.*

AVENDANO BROTHERS, *Plffs. in Err.*,

v.

EDWARD J. GAY.

(See S. C., 8 Wall., 376, 377.)

Ruling made at party's request, no error—statement of facts, when nullity.

Plaintiff cannot complain of an error in a ruling which was made at his request, and to the prejudice of defendant.

A statement of the facts filed several days after the issue and service of the writ of error, is a nullity.

[No. 176.]

Submitted Oct. 27, 1869. Decided Nov. 15, 1869.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The petition in this case was filed in the court below, by the plaintiffs in error, to recover damages for an alleged wrongful seizure of a certain quantity of sugar cane. On the trial of the cause, the plaintiffs offered certain evidence to which the evidence defendants objected; but the court overruled the objection and admitted the evidence, to which ruling of the court the defendants took an exception. The court having subsequently entered a decree dismissing the suit, the plaintiff sued out this writ of error, July 9, 1867. He filed a statu-

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ment of facts under the hand of the judge of the court below, July 16, 1867.

Mr. Thomas J. Durant, for plaintiffs in error.

Mr. Louis Janin, R. T. Merrick, and Jas. Hughes, for defendant in error:

The writ of error was allowed July 9. The citation in error was issued July 10 and served on the following day, and the statement of facts was filed July 16. The following extract from the decision of this court in *Genere v. Bonnemor* (*ante*, 227), delivered last term, applies equally well to this case.

"To permit the judge to make a statement of facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy. This statement of facts, filed without consent of the parties, must be treated as a nullity; and as there is nothing on which error of the court below can be predicated, the judgment must be affirmed."

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in error was plaintiff below, where judgment was rendered against his claim.

In order to show error in the proceedings in the circuit court his counsel here refers to a bill of exceptions taken by the defendant to the ruling of the court admitting evidence, offered by plaintiff against defendant's objection. If there was error in the ruling, it was at plaintiff's request, and to the prejudice of defendant and can form no ground of reversing the judgment, which, notwithstanding this testimony, was for the defendant.

Counsel also attempts to impugn the judgment, as not being supported by the facts of the case, and relies on what purports to be a statement of the facts found by the court. But the statement is filed in the court several days after the issue and service of the writ of error in this case, and is, therefore, a nullity, as we decided in the case of *Genere v. Bonnemor* [*ante*, 227].

Judgment below affirmed.

Cited—13 Wall., 3; 21 Wall., 552.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE CHICOPEE BANK,

Plff. in Err.,

v.

THE SEVENTH NATIONAL BANK OF PHILADELPHIA.

(See S. C., "*Chicopee Bank v. Philadelphia Bank*," 8 Wall., 641-650.)

Bill lost by negligence of bank—effect on drawer and indorser—action against bank—insufficient notice—burden of proof.

Where a bill of exchange is lost among a pile of loose papers, in the bank at which it was payable, it is not present in the bank, so as to constitute a presentment or demand against the acceptors. As a consequence, the holder loses his remedy

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against the drawer and indorser, which entitles him to an action against the bank through whose negligence the bill was lost.

A telegram from the bank that the bill had not yet been received, is no notice of non-payment.

The loss of the bill by the bank carries with it the presumption of negligence and want of care, and the burden of proof to rebut such presumption is on the bank.

[No. 308.]

Argued Nov. 10, 1869. Decided Nov. 29, 1869.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This action was brought in the court below, by the defendant in error, to recover the amount of a bill of exchange for \$10,000, sent to the defendant by mail for collection and by the defendant lost, whereby the plaintiff was prevented from effectually charging prior parties. The trial resulted in a verdict and judgment in favor of the plaintiff. Whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court. An important portion of the charge of the court below, appears in the abstract of the argument for the defendant in error.

Mr. R. H. Dana, Jr., for plaintiff in error:

The case of the Philadelphia Bank rests solely on the allegation that, by the fault of the Chicopee Bank, it lost the power to hold the prior parties.

There was no question at the trial, and the court ruled that in a case of principal and agent like this, the prior parties can be held by a notice from the principal, as well as from the agent. The case was placed upon the ground that the prior parties could not be held by any notice, from whoever received, or whenever or however. All question of notice, therefore, may be thrown out of the case.

The question is simply this: were the prior parties absolutely discharged by what was done or omitted at the Chicopee Bank on the 18th?

As to what was done or not done there, the record finds only these facts. The bill was delivered at the Bank by the mail before the 18th, and placed on the cashier's desk. No call nor provision was made for it by the acceptor. When the cashier was asked on the 20th by the Philadelphia Bank, he did not know that the bill had been in his Bank on the 18th. These are all the facts bearing on the discharge of the prior parties.

Nothing done or omitted at the Chicopee Bank caused nor contributed to the default of the acceptor.

It cannot be assumed that if the acceptor had called for the bill on the 18th or had made provision for it, it would not have been found. It may be assumed that the call or provision would have stimulated the cashier to a search, and led to telegraphic communication between the Bank and its principal. These might have resulted, if not in the finding of the bill, at least in the presentment of a substantial copy with security.

The ruling of the court can be sustained only on this proposition.

Where the acceptor has neither provided nor called for the bill at the Bank at which he agreed to pay it, the prior parties, although

duly notified, may escape payment on the ground that, although the bill was duly sent to the Bank by the owner and was there on the day of payment, the Bank did not know it was there—nothing having occurred to call its attention to the subject, and it being entirely uncertain whether the Bank would or would not have ascertained it, had the acceptor not been in default; or whether it might or might not have made a presentment by copy and with security.

We respectfully suggest that the instructions were erroneous in assuming, absolutely, that if the acceptor had called for the bill, the Bank was and must have been without means of meeting his demand.

We do not find any case or opinion of the commentators, to meet such a state of facts as this. The cases cited on the other side will be found to be those of an individual owner and legal holder who has attempted a personal presentment, or otherwise neglected to place the bill at the Bank for payment; or, they are the statement of what the holder must be prepared for in case the acceptor should call. We respectfully submit the two following propositions:

1. The prior parties on a bill accepted, payable at a particular bank, if their acceptor is in default and they are duly notified, cannot defend themselves against the owner of the bill, unless it appears that some act or omission of the owner or his agent in some way caused or contributed to that default.

If the above is not maintained, then,

2. On a bill of exchange accepted, payable at a particular bank, where the bill has duly been sent to the bank, and is in the bank through the day of payment, and the acceptor makes no provision or call, and the prior parties are duly notified by the owner of the bill, they cannot defend on the mere ground that it appeared afterwards that the officers of the bank did not in fact know it was there on the day of payment.

If the authorities have not actually decided, they establish doctrines that lead to the decision that, as between the prior parties on a bill accepted, payable at a particular bank, and the holder, the prior parties are held if the acceptor does nothing towards payment, unless some neglect of the holder causes or contributes to his default, or puts them to material disadvantage.

U. S. Bk. v. Smith, 11 Wheat., 171; *Folger v. Chase*, 18 Pick., 63; *Lockwood v. Crawford*, 18 Conn., 361; *State Bk. v. Napier*, 6 Humph., 270; *Smith v. Rockwell*, 2 Hill, 482; *Windham Bk. v. Norton*, 22 Conn., 214; 1 Pars. N. & Bills, 368, n. W.

It does not appear from the record, whether the jury found the usage upon which His Honor instructed them, and under the rulings they may well have found their verdict without considering the usage, for their verdict was required for the plaintiff below if the note was lost (or not known to be there) by negligence of the cashier.

The plaintiff below could not have recovered unless the jury were satisfied of the negligence of the defendant. The facts show that the point was one fit for a jury to pass upon; and if there was any burden of proof resting on the

plaintiff, it was the defendant's right that the jury should be so informed.

Fullerton v. Bk. of U. S., 1 Pet., 604; *Merch. Bk. v. Elderkin*, 25 N. Y., 178; *Whitwell v. Johnson*, 17 Mass., 449; *Bk. of U. S. v. Carneal*, 2 Pet., 548.

Mr. George Putnam, Jr., for defendant in error:

1. It seems to be conceded by the defendant, that if its negligence in the performance of its duty as a collecting Bank, did in fact cause the discharge of the drawer and indorser, it is liable in damages to the amount of the loss sustained by the plaintiff in consequence of such discharge. Such at all events is the law.

Bowling v. Harrison, 6 How., 248; *Smedes v. Utica Bk.*, 20 Johns., 373; *Bk. of Wash. v. Triplet*, 1 Pet., 25; *Fabens v. Merch. Bk.*, 28 Pick., 332; *Mech. Bk. v. Merch. Bk.*, 6 Met., 20.

2. The court ruled, that although the bill being payable at the defendant Bank need not be presented to the acceptor elsewhere, yet it must be in the Bank ready for delivery on funds being provided for its payment. As it was not contended that the presence of the bill in the cashier's waste paper drawer, unknown to anybody, was a presence ready for delivery on payment, this ruling was, in effect, a ruling that the bill was not dishonored.

The court also ruled that, although the bill in question was not a foreign bill and although inland bills need not ordinarily be protested; yet, if the jury found that it was the general usage of banks to protest inland bills when received for collection, then it was the defendant's duty to have protested this bill for non-payment.

No ruling was made upon the effect of the telegram "not yet received," as a notice of dishonor.

The only other matters in the charge material to be considered are the rulings as to the degree of care required of the defendant, and the refusal to instruct the jury as to the burden of proof.

3. The ruling, in relation to the effect of a usage to protect bills for collection by one bank to another, was correct. It was the duty of the defendant Bank to do what is usually done by collecting banks with negotiable paper sent to them for collection.

Dickinson v. Gay, 7 Allen, 35; *Bk. of Wash. v. Triplet*, 1 Pet., 25; *Renner v. Bk. of Col.*, 9 Wheat., 582.

4. If the ruling as to what constitutes dishonor was right, the verdict must stand, whatever may have been the true rule as to the effect or validity of the usage proved.

The ruling on this point was as follows: "Where a bill is payable at a bank, it is not necessary to present it to the acceptor and demand payment at any other place. Where the bank is itself the holder of the bill so payable, no formal presentment and demand are necessary; but the bill must be there, as in that case it is the fact that the bill is there in the bank, which constitutes the presentment, and if the acceptor has no funds there, the rule is, that the want of funds and provision for payment is a refusal of payment. Unless the bill is in the bank at the maturity of the bill payable at the bank, there is no presentment of the bill."

*** If the bill was not in the Bank on the

day of the maturity of the bill, so that the Bank could not deliver the same if payment had been duly tendered, then due presentment was not made and the bill was not dishonored."

These instructions are precisely in accordance with the authorities.

1 Pars. Bills & N., 487; *Fullerton v. Bk. of U. S.*, 1 Pet., 604; *Bk. of U. S. v. Carneal*, 2 Pet., 548.

5. Even if a demand on the acceptor and a refusal of payment by him, sufficient to dishonor the note, were shown, no notice of dishonor was given to the plaintiff to enable it to hold the drawer and indorser.

Even if the position of the defendant was sound, that the absence of funds provided by the acceptor for the payment of the bill did, in fact, dishonor the bill without its presence in the Bank, the words "not yet received" do not inform the plaintiff of the absence of such funds.

The absence of funds is the only evidence of dishonor relied on by the defendant, and the only notice relied upon neither states nor by any reasonable intendment implies such absence of funds.

Gilbert v. Dennis, 3 Met., 506; *Lewis v. Gompertz*, 6 Mees. & W., 399; Pars., Bills & N., 469, and note; *Ransom v. Mack*, 2 Hill, 587; *Bank of U. S. v. Carneal*, 2 Pet., 548.

6. The refusal of the court to rule upon the burden as to the plaintiff's negligence, is not a subject of exception. It was a matter wholly within the discretion of the court.

To have instructed the jury as requested by the plaintiff that, upon all the evidence in the case the burden was upon the plaintiff in respect to the negligence of the defendant, could have had no effect unless to mislead them.

There was no conflicting evidence as to a disputed fact, which might leave a doubt in the minds of the jury, to be solved by determining upon whom was the burden of proof. It was admitted that the letter slipped through a crack in the cashier's desk; and the question for the jury was, whether the loss of the letter in that manner amounted to negligence. Upon a question of this character the burden of proof has no bearing. The ruling was, if anything, too favorable to the defendant.

Stokes v. Saltanstill, 13 Pet., 181.

7. The instructions as to the degree of care which the defendant was bound to exercise, and the want of which would constitute negligence, were exactly in accordance with the authorities.

The New World v. King, 16 How., 469; *Stokes v. Saltanstill*, 13 Pet., 181; *Wilson v. Brett*, 11 Mees. & W., 118; *Beal v. So. Devon R. Co.*, 3 Hurl. & C., 337; *Grill v. Iron Screw Co.*, L. R., 1 C. P., 600; *Readhead v. Midlands R. Co.*, L. R., 4 Q. B., 379; *Bk. of Wash. v. Triplet*, 1 Pet., 31.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

An action was brought by the National Bank, the plaintiff, against the Chicopee Bank in the court below, to recover the amount of a bill of exchange for \$10,000 sent by the former

to the latter for collection, by mail; the acceptors residing and doing business in Springfield, Massachusetts, where the Bank was located. The bill fell due on the 18th February, 1865, and was payable at the Chicopee Bank. The letter inclosing it was received in due course by the mail some days before it fell due. It appeared, however, that when received at the Bank with the other letters that came with the same mail they were placed upon the desk of the cashier and by accident, it is supposed, fell through a crevice in the lid into a drawer among waste paper and was not discovered until the 18th April, nearly two months after it had been received, and of course had not been opened until then, this being the first information that the officers had that the bill was in the Bank. On the 20th February (Monday), the second day after the bill fell due, the plaintiff telegraphed to the cashier of the Chicopee Bank inquiring whether he had received the acceptance for \$10,000 forwarded on the 18th by mail, and was answered that it had not been received.

The bill had been discounted at the plaintiff's Bank by Rhodes, the payee and indorser, to whom information was given of the supposed miscarriage of the paper by mail on the same day received. The acceptors had no funds in the Chicopee Bank where the bill was payable when it fell due, and are insolvent.

The case was put to the jury, whether or not the loss of the bill, and consequent inability of the collection Bank to take the proper steps against the acceptors to charge the prior parties, was attributable to negligence, and want of care on the part of the Chicopee Bank, and that, if it was, the Bank was responsible. The jury found for the plaintiffs.

In cases where the drawee accepts the bill, generally, in order to charge the drawer or indorser, the holder must present the paper, when due, at his place of business, if he has one, if not, at his dwelling or residence, and demand payment; and, if the money is not paid, give due notice to the prior parties. If he accepts the bill, payable at a particular place, it must be presented at that place, and payment demanded. In these instances, as a general rule, the bill must be present when the demand is made, as in case of payment the acceptor is entitled to it as his voucher. When the bill is made payable at a bank, it has been held that the presence of the bill in the bank at maturity, with the fact that the acceptor had no funds there, or, if he had, were not to be applied to payment of the paper, constitute a sufficient presentment and demand; and, if the bill is the property of the bank, the presence of the paper there need not be proved, as the presumption of law is, that the paper was in the Bank, and the burden rests upon the defendant to show that the acceptor called to pay it. *Chitty, Bills*, p. 365 a, 353, Spring. ed., 1842; *1 Parsons, Notes and Bills*, pp. 363, 421, 437; *Byles, Bills*, p. 251, and note; *Fullerton v. Bank of United States*, 1 Pet., 604; *Bank of United States v. Carneal*, 2 Pet., 543; *Seneca Co. Bank v. Nease*, 5 Denio, 329; *Bank v. Napier*, 6 Humph., 270; *Folger v. Chase*, 18 Pick., 63.

In the present case, it is argued that the bill was in the Chicopee Bank at the time of its maturity, and, as the acceptors had no funds

there, a sufficient presentment and demand were made, according to the law merchant. It is true the bill was there physically, but, within the sense of this law, it was no more present at the Bank than if it had been lost in the street by the messenger on his way from the postoffice to the Bank, and had remained there at maturity; and this loss which occasioned the failure to take the proper steps, or, rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting Bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant. The radical vice in the defense being the failure to prove a presentment and demand upon the acceptors at the maturity of the bill, the question of notice is unimportant.

But, if it had been otherwise, the notice itself was utterly defective. That relied on is the answer of the defendant to the telegram of the plaintiff of the 20th February, which was, that the bill had not yet been received. This was after its maturity, and it simply advised the holder and payee indorser, to whom the information was communicated the same day, that the drawer and indorser were discharged from any liability on the paper. It showed that the proper steps had not been taken against the acceptors to charge them.

Some criticism is made upon the refusal of the court below to charge, as to which side the burden of proof belonged, in respect to the question of negligence and want of care, after the paper came into the hands of the defendant. No objection is taken to the charge itself, upon this question and, indeed, could not have been, as the point was submitted to the jury as favorably to the defendants as could have been asked. We think the court, after having submitted fairly the evidence on both sides bearing upon the question, had a right, in the exercise of its discretion, to refuse the request.

If, however, the court had inclined to go further and charge as to the burden of proof, it should have been that it belonged to the defendant. The loss of the bill by the Bank carried with it the presumption of negligence and want of care; and, if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. Where a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is that the loss or damage was occasioned by his negligence, or want of care of himself or of his servants. This presumption arises with respect to goods lost or injured, which have been deposited in a public inn, or which had been intrusted to a common carrier. But the presumption may be rebutted. *Dawson v. Chamney*, 5 Q. B., 164; *Coggs v. Bernard*, 2 Ld. Raym., 918; *Day v. Ridley*, 16 Vt., 48; 1 Phil. Ev., C. & Hill, Notes, p. 633.

Judgment affirmed.

HENRY CARPENTER, *Plff. in Err.*,

v.

JAMES DEXTER, Executor of JOHN B. JAMES, Deceased.

(See S. C., 8 Wall., 513-533.)

Certificate of acknowledgment—technical objection—evidence of official character—judicial cognizance of state laws—vague objection—releases, not necessary in partition—Illinois recording Act.

In aid of a certificate of acknowledgment of a deed, reference may be had to the instrument itself, or to any part of it.

It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances to be defeated by technical or unsubstantial objections.

Unless the statute requires evidence of official character to accompany the official act which it authorizes, none is necessary.

Where one State recognizes acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws.

The objection to a record of partition that it did not show jurisdiction of the persons and subject-matter, is vague and pointless.

Mutual releases are not necessary in suit for partition under the Statute of Illinois, to invest the several parties with the title to the parcels respectively allotted to them.

In Illinois, deeds are deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law.

[No. 211.]

Submitted Nov. 11, 1869. Decided Nov. 29, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of ejectment, brought in the court below by the defendant in error, to recover a certain quarter section of land in Bureau County, Illinois. Both parties claim title from the patentee of the United States, under a patent issued in May, 1818; the controversy turning upon the effect to be given to the deed from the patentee through which the plaintiff derived title.

Each of the four trials below having resulted in a verdict and judgment in favor of the plaintiff, the defendant sued out this writ of error.

The case is very fully stated by the court.

Messrs. A. Garrison and C. F. Peck, for plaintiff in error.

1. We claim that in this case the court is imperatively called upon to recognize the well established rule relating to ejectment, to wit: that the plaintiff in error being in possession under these circumstances, the defendant in error was bound to prove a perfect and complete title in himself, before he could call upon the party in possession for the evidence of his title.

Marshall v. Barr, 35 Ill., 106; *Joy v. Berdell*, 25 Ill., 537; *Ricard v. Williams*, 7 Wheat., 59; *Pitkin v. Yaw*, 13 Ill., 259; *Covert v. Irwin*, 3 Serg. & R., 283; *Colston v. McVay*, 1 Marsh. (Ky.), 251; *Jackson v. Paul*, 2 Cow., 502; *Hamilton v. Doolittle*, 37 Ill., 473.

2. The deed of Davenport to Hawley, Sep. 1, 1818, is not proved, because it was not acknowledged; the pretended acknowledgment before H. Wendell, Jr., a justice of the peace, is no proof of execution.

The laws of New York, at that time, did not allow justices of the peace to take acknowledgment of deeds, notwithstanding J. K. Winne has given a printed certificate to that effect, evidently though without consideration.

1 Rev. Stat., N. Y., 1828, p. 756, sec. 4; *McCormick v. Evans*, 83. Ill., 337; *Lyon v. Kain*, 36 Ill., 362.

The authority to a justice of the peace in New York to take acknowledgments was first given in 1840, ch. 38, sec. 1, Act of 1840.

The laws of Illinois did not then allow justices of the peace out of the State to take acknowledgments of deeds, to be recorded in this State. This deed was made prior to Act of Illinois of 1819, relating to the execution of deeds out of this State, and is governed by the Territorial Act of 1807.

Purp. Real Est. Stat., 459; Acts Sep. 17: 1807, sec. 3; *Adams v. Bishop*, 19 Ill., 395; *Buckmaster v. Job*, 15 Ill., 323; *Simple v. Miles*, 2 Scam., 315.

It was not acknowledged in conformity to the laws of either State. It was a nullity utterly void as proof.

The acknowledgment in form is defective, because it does not state that the grantor was personally known to the officer, which was required by the laws of New York and Illinois then in force, and is an indispensable condition.

1 Rev. Stat., N. Y. (1828), 758, sec. 9, 12, or 1 Rev. Laws, 369, sec. 1, 2; *Montag v. Linn*, 19 Ill., 399; *Tully v. Davis*, 30 Ill., 103; *Wiley v. Bean*, 1 Gilm., 303.

And this last defect is not aided by the affidavit of Wooster (made the next day after the date of the deed, which is a very suspicious circumstance), because that has no assignable locality, the venue being simply "State of New York, ss.," which is fatally defective.

2 Rev. Stat. N. Y., 1828, p. 262, sec. 12; *Vance v. Schuyler*, 1 Gilm., 160; *Montag v. Linn*, 19 Ill., 399.

Nor does the subscribing witness state that he became such at the request of the grantor, or signed the same at the time of the execution, as required in that State.

2 Scate, Comp. Laws, Ill., 964; *Hallenback v. Fleming*, 6 Hill, 306; Greenl. Ev., sec. 569.

Nor does the officer certify that said William D. Wooster was known to him to be a subscribing witness, nor was there any proof of that fact.

2 Scate, Comp. Laws, Ill., 964; *Montag v. Linn*; *Job v. Tebbetts*, 4 Gilm., 143; *Tully v. Davis*, 30 Ill., 103.

This proof by a subscribing witness was not in conformity to the laws of New York at that time, nor to the laws of Illinois.

1 Rev. Stat. N. Y., 758, sec. 12; Purple, Real Est. Stat., Ill., 457, sec. 2.

The affidavit of W. T. Davenport indorsed thereon is a nullity, not having been sworn to and having no *jurat* attached.

This deed was not proved at common law. The deposition of Van Ranslaer attached thereto, simply testifies to the genuineness of the signature of one of the subscribing witnesses. There is no evidence of the death or absence of the other subscribing witness (Wooster), nor any proof whatever of the signature or identity of the grantor. These were indispensable.

Kelsey v. Hamner, 18 Conn., 31; *Wiley v. Bean*, 1 Gilm., 303; *McConnell v. Reed*, 2 Scam., 374; *Hallenback v. Fleming*, 6 Hill, 306; *Dundy v. Chambers*, 23 Ill., 369; *Ountiff v. Sifton*, 2 East, 182.

This deed cannot be treated as an ancient

deed. No possession or claim to the land was made thereunder, until the commencement of this suit. An ancient deed must be accompanied by possession, or what is equivalent.

1 Greenl. Ev., sec. 144, and n. 1.

The signature of the recorder is absolutely essential to prove the recording of a deed. A certificate without any signature is fatally defective, and no proof whatever.

The defective acknowledgment of this deed was attempted to be obviated by the deposition of Van Ranslaer; but the law of this State requires the oath of two witnesses swearing to each signature. 2 Scate, Comp. L., 964, sec. 41.

And we make this point to all the certificates of like character; that the certificate of the clerk is not conclusive that the deed is or was acknowledged in conformity to the laws of the State when it was so made, but the law of such State can be shown to contradict such certificate and show the laws on that subject.

Lyon v. Kain, 36 Ill., 363; *Adams v. Bishop*, 19 Ill., 398.

2. The deed from Hawley to Munson dated Dec. 12, 1818, is not proved because to the certificate there is no assignable locality; "State of New York, ss." is not sufficient.

2 Rev. Stat. N. Y., 1828, p. 288, sec. 38, 40; *Montag v. Linn*; *Vance v. Schuyler*, 1 Gilm., 160.

Commissioners of deeds in New York had no jurisdiction to take acknowledgments beyond the county in which they resided.

Adams v. Bishop, 19 Ill., 395; 2 Rev. Stat. N. Y., 1828, p. 282; 1 Rev. Stat. N. Y., 1818, p. 756, sec. 4; see, also, dep. of J. R. VanRanslaer.

Nor does this certificate identify the person described in the deed, as the same person who executed. The same must be certified or proved. *Lyon v. Kain*, 36 Ill., 369.

The laws of Illinois, at that time, did not authorize commissioners to take acknowledgments of deeds, to be recorded in this State. Purp. Real Est. Stat., 462.

3. The deed from Thaddeus Munson to William James of Feb. 13, 1819, is not proved. The certificate of acknowledgment has no assignable locality; "State of New York, ss." is not sufficient. Estes Howe could not act out of the County of Albany.

1 Rev. Stat. N. Y., 756, sec. 4., ed. 1828; 2 Rev. Stat. N. Y., 1828, p. 282, sec. 38; 2 Rev. Laws, N. Y., p. 149, sec. 16; *Montag v. Lynn*; *Vance v. Schuyler*.

There is no proof that this deed was acknowledged according to the laws of New York. There is no certificate of conformity.

Nor has there ever been recorded a certificate that the same was made before a proper officer, or in conformity to the laws of New York.

It is a well settled rule in that State, that deeds must be acknowledged or proved wholly in conformity to the laws of the State or in entire conformity to the laws of the State where executed. The laws of the different States cannot be invoked at the same time, to aid the defect.

Lyon v. Kain; *Montag v. Lynn*; *Adams v. Bishop*, above cited.

4. The defendant in error sought to connect himself with the title of William James, by showing a decree of the Circuit Court of Pike County, Illinois, in a chancery proceeding for

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the partition of certain lands; by the terms of which this land was allotted to John B. James, of whom defendant in error is the executor.

The court allowed this decree to go to the jury against the objections of the plaintiff in error, which went to the jurisdiction of the court as follows:

The Circuit Court of Pike County, Illinois, had no jurisdiction to make the decree of partition as against the infant heirs of William James, without full proof; nor to take the bill "pro confesso," as against such infant heirs.

Proof must be made in full; against infants nothing can be taken *pro confesso*. No proof was made, and this goes to the jurisdiction.

Chaffin v. Kimball, 28 Ill., 26; *Enos v. Capps*, 12 Ill., 255; *McClay v. Norris*, 4 Gilm., 370; *Hough v. Doyle*, 8 Blackf., 800.

A mere chancery decree of partition of the Pike County Circuit Court (and this was such), without the execution of deeds in pursuance thereof and recorded where the land lies, could not affect lands beyond the county, nor does it change the legal title in the county (and this land is in a different county), and should have been rejected as evidence.

Aldridge v. Giles, 3 Hen. & M., 186; *Chickering v. Philes*, 29 Ill., 804.

The defendant in error, having declared for the whole estate in fee simple, and not having divested the heirs of William James who were infants at the time of said partition, cannot recover. *Murphy v. Orr*, 33 Ill., 489.

Mr. W. C. Goudy, for defendant in error:

1. The deed was acknowledged before a justice of the peace in Albany County, N. Y., Sep. 1, 1818.

At that time a justice of the peace was not authorized by the laws of New York to take the acknowledgment of deeds, and such officer was not allowed by the laws of Illinois to take the proof of deeds out of the State. For these reasons, it is admitted that the proof of the execution of the deed before the justice was insufficient, at the time it was taken. Yet this acknowledgment was made good by a Statute of Illinois passed in 1847.

In form, the certificate conforms to the law in force in Illinois at the time it was made. The statute governing the case was passed in 1807, by the Territorial Legislature of Indiana. Purp. Real Est. Stat., 460.

The law of 1819, by the first State Legislature of Illinois, is a copy of the Statute of 1807, changing the word "Territory" to "State."

The Statute of 1819 did not require any officer to certify to the identity of the person acknowledging the deed. *Ayers v. McConnel*, 2 Scam., 808.

Such a provision was first adopted in 1827. Purp. Real Est. Stat., 476.

The certificate to the deed from Davenport to Hawley was, therefore, in accordance with the laws of Illinois, except that it was not made by an officer authorized by the statute at that time.

The Legislature of Illinois in 1847 passed a statute, that all deeds of land lying within the State should be acknowledged before certain officers named, and that "Such proof and acknowledgment may also be made before any justice of the peace; but if such justice of the peace reside out of this State, there shall be

added to the deed a certificate of the proper clerk, setting forth that the person before whom the proof or acknowledgment was made, was a justice of the peace at the time of making the same;" and then declares that "All deeds and conveyances which have been or may be acknowledged or proved in the manner prescribed by this section shall be entitled to record, and be deemed as good and valid in law, in every respect, as if the same had been acknowledged or proved in the same manner prescribed, etc." Laws 1847, 37.

2. Sept. 2, 1818, a second certificate of acknowledgment was made by a Commissioner of Deeds for the City of Albany, N. Y., in conformity with the law of New York. 1 Rev. Law N. Y., 1818, p. 369.

Being according to the law of a sister State, the Statute of Illinois declared that it was duly proved, entitled to record, and to be read in evidence.

Purp. Real Est. Stat., 465; Laws of 1847, 37.

3. The deed from Hawley to Munson was properly proved, as appears from the certificate of H. Wendell, Jr., a Commissioner of Deeds in New York.

The acknowledgment was in conformity with the laws of New York. 1 Rev. Laws, 1818, N. Y., 369.

Being so, it was legally proved according to the State of Illinois.

Purp. Real Est. Stat., 465; Laws 1847, 37.

An objection is made to this certificate, and to one of the certificates to the former deed, because the only venue to it is "State of New York, ss."

The counsel for plaintiff in error refers to *Vance v. Schuyler*, 1 Gilm., 168, as authority that such a certificate has no assignable locality. In that case, the Supreme Court held a certificate bad, because the only means of determining where it was acknowledged was the venue, Lincoln, ss. Wiscasset.

It will be observed at once that the State of New York is a definite place, while "Lincoln ss. Wiscasset," does not certainly show any State, county or town.

This deed differs from the one rejected in *Vance v. Schuyler* in other respects.

1. It has a certificate attached, that H. Wendell, Jr., was a Commissioner of Deeds in and for the City of Albany, in the County of Albany, in the State of New York, dwelling in said city, authorized to take the acknowledgment, and that the deed was executed and acknowledged according to the laws of New York.

2. The grantee is described as being of the City of Albany, and the deed is written on the back of the deed from Davenport to Hawley, the grantor, which was executed at Albany, in the County of Albany, in the State of New York, and describes Hawley as being from the same place.

The Supreme Court of Illinois, in a recent case where the certificate and venue were exactly the same as that in *Vance v. Schuyler*, sustained the deed upon the ground that the grantor and grantee were described in the body of the deed, as being "of the State of Massachusetts," and there was a certificate that the officer was a notary public in Lincoln County, Massachusetts. These facts were held to be

sufficient to show that the deed was acknowledged in that county and State. *Harding v. Curtis*, 45 Ill., 252.

It may be true, as claimed by the counsel for the plaintiff in error, that a Commissioner of Deeds in New York could not take an acknowledgment out of his county; yet, the statute did not require that he should aver that he did act within his county. The presumption of law always is, that a public officer performs his official duty at the place appointed by law.

It is well settled that the court will examine the whole instrument to ascertain the place where it was acknowledged, and for this purpose it will be presumed that it was acknowledged where the parties or officer resided. *Bradford v. Dawson*, 2 Ala., 208; *Brooks v. Chaplin*, 3 Vt., 232; *Fuhrman v. Loudon*, 13 Serg. & R., 386; *Beckel v. Pettigrew*, 6 Ohio St., 247; *Truluck v. Peoples*, 1 Kelly, 3; *Chandler v. Spear*, 22 Vt., 386.

Mr. Justice Field delivered the opinion of the court:

This is an action of ejectment, to recover the possession of certain real property situated in the County of Bureau, in the State of Illinois. Both parties claim title from the same source—a patent of the United States issued to William T. Davenport, in May, 1818. The points in dispute arise from the deraignment of title from the patentee.

On the trial the plaintiff produced in evidence the patent; a deed from the patentee to Eliphalet Hawley, bearing date in September, 1818; a deed from Hawley to Thaddeus Munson, bearing date in December, 1818; and a deed from Munson to William James, bearing date in February, 1819—all of which embraced the demanded premises. The deeds were recorded in the proper register's office in May, 1819.

William James died in 1832, leaving several heirs at law, to one of whom, John B. James, the premises in controversy were allotted in severalty by a decree of one of the circuit courts of the State, in a suit for partition between him and his co-heirs. John B. James died in 1844, leaving a will by which he devised the premises to the plaintiff. The record of partition and the record of the will and of its probate were produced in evidence.

The defendant also, relying upon the patent of the United States to Davenport, introduced in evidence a conveyance of the premises from the patentee to Ephraim DeWitt, bearing date in August, 1818, and a conveyance from the heirs of DeWitt to himself, bearing date in July, 1861. The first of these deeds was recorded in December, 1861, and the other was recorded in February, 1862.

The defendant also produced what purported to be a deed from William James to Levi Bebee, bearing date in October, 1819, and what purported to be a deed from Bebee to Ephraim DeWitt, bearing date in November, 1822; but as these instruments were adjudged to have been forged, in a suit between the present plaintiff and defendant by one of the Circuit Courts of Illinois—the record of which judgment was produced on the trial—no further reference to them need be made.

To the introduction of the several deeds produced by the plaintiff, objection was taken that they were not duly proved, but in what particulars the proof failed, the objection does not specify, and it is only by the brief of counsel that we are informed.

General objections of this character are too vague to serve any useful purpose, and under them particular defects in evidence, or in proceedings, cannot be urged upon our notice, if their consideration, for want of specification, be opposed by the adverse party. Here, however, no such opposition is made, and we will, therefore, proceed to the consideration of the points raised in the brief of counsel.

The deed from Davenport to Hawley was executed in New York, and was acknowledged on the day of its date, before a justice of the peace of that State. The certificate of acknowledgment states, that the person who "signed, sealed and delivered" the instrument, "personally appeared" before the justice, but does not, in terms, state that he was personally known to that officer. The justice himself was one of the subscribing witnesses.

There is also attached to the deed a certificate of the proof of its execution by the other subscribing witness. This certificate is signed by the same person who took the acknowledgment, but not in his capacity as justice of the peace, but as commissioner of deeds. The certificate does not state that the commissioner knew that the affiant was one of the subscribing witnesses, nor does the affiant declare that he became such witness at the request of the grantor.

The objections taken in the brief of counsel to the proof of the deed bearing these certificates are, in substance, as follows:

1. That the justice of the peace had no authority, at the time, to take the acknowledgment;

2. That the certificate of acknowledgment is defective in not stating that the grantor was personally known to the officer; and,

3. That the certificate of proof by one of the subscribing witnesses is defective in not having any assignable locality, and in not stating that the affiant was known to the officer to be a subscribing witness, or that the affiant declared that he became such at the request of the grantor.

It is true that at the time the acknowledgment was taken, in 1818, a justice of the peace was not authorized by the laws of Illinois to take the acknowledgment or proof of deeds without the State. The only officers thus authorized were "mayors, chief magistrates, or officers of the cities, towns or places" where the deeds were executed. *Purp. Real Estate Stat.*, 463. But this want of authority of the justice of the peace was remedied by a statute passed on the 22d of February, 1847. The first section of that statute provides that all deeds and conveyances of land lying within the State may be acknowledged or proved before certain officers named, and among others before any commissioner of deeds and "before any justice of the peace," but enacts that "if such justice of the peace reside out of this State, there shall be added to the deed a certificate of the proper clerk, setting forth that the person before whom such proof or acknowledgment was

made, was a justice of the peace at the time of making the same;" and then declares that "all deeds and conveyances which have been or may be acknowledged or proved in the manner prescribed by this section, shall be entitled to record, and be deemed as good and valid in law, in every respect, as if the same had been acknowledged or proved in the manner prescribed" by a previous law providing for the acknowledgment and proof of conveyances before certain officers both within and without the State. *Laws of 1847*, 87.

The law of Illinois in force in 1818 did not require the officer taking the acknowledgment of a deed to certify, from his personal knowledge, to the identity of the party making the acknowledgment with the grantor. It did not require the acknowledgment to be certified in any particular form, except in case of a married woman. A certificate, without declaring such identity, or even personal knowledge of the parties making the acknowledgment, was held by the Supreme Court of that State to be as full and exact as was contemplated by the Law of 1819, a law which was identical in terms, so far as it relates to the point under consideration, with the law in force in 1818, except that the word "Territory" was changed to that of "State." *Ayres v. McConnel*, 2 Scam., 308.

But, it may be said that the object of the Act of 1847 was simply to give authority to additional officers to take the acknowledgment and proof of deeds, and to cure their defect of authority in cases where they had previously acted, and not to remedy defects in certificates already given by them; and that, therefore, the statute can only avail where the certificate conformed to the requirements of the law then in force. If this be the correct interpretation of the statute, we answer that the certificate to the deed in question, did, in substance, conform, when read in connection with the deed itself, to the requirements of that law. In aid of the certificate reference may be had to the instrument itself, or to any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections.

The law of Illinois in force in 1847, upon the manner of taking acknowledgments, provides that no officer shall take the acknowledgment of any person, unless such person "shall be personally known to him to be the real person who [executed the deed], and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness," and such personal knowledge, or proof, shall be stated in the certificate. *Revised Stat. Illinois of 1845*, chap. 24, sec. 20.

Looking, now, to the deed itself, we find that the attestation clause states that it was "signed, sealed and delivered" in the presence of the subscribing witnesses. One of these witnesses was the justice of the peace before whom the acknowledgment was taken; and he states in his certificate following immediately after the attestation clause, that the "above named William T. Davenport, who has signed, sealed and delivered the above instrument of writing, personally appeared" before him and acknowledged the same to be his free act and deed. Read thus with the deed the certificate amounts

to this: that the grantor personally appeared before the officer, and in his presence signed, sealed and delivered the instrument, and then acknowledged the same before him. An affirmation, in the words of the statute, could not more clearly express the identity of the grantor with the party making the acknowledgment.

But if we lay aside this acknowledgment as evidence, there remains the certificate of proof made on the 2d of September, the day following the execution of the instrument, before a commissioner of deeds in the State of New York. At that time commissioners of deeds were authorized by a law of New York to take the acknowledgment and proof of deeds (Act March 24th, 1818); and by the 3d section of the Statute of Illinois of 1847, deeds previously, or which might be subsequently, executed without the State and within the United States, acknowledged or proved in conformity with the law of the State where executed, are admissible to record in the counties of Illinois in which the property is situated, and "when so recorded," may be used as evidence without further proof of their execution. The terms "when so recorded" apply, we think, equally to past records as to those which might be subsequently made.

Now, the certificate of proof produced in this case shows a substantial conformity with the law of New York of 1818 on the subject which was in force when the certificate was made. An Act Concerning Deeds, passed April 12th, 1818. The venue to it is simply "State of New York," and it is objected that the certificate has no assignable locality, and is, therefore, fatally defective. In support of this position the case of *Vance v. Schuyler*, 1 Gilm., 163, is cited. In that case the Supreme Court of Illinois held a certificate insufficient to authorize the admission of a deed without proof of its execution, because the only means of determining where it was acknowledged was the venue, "Lincoln ss. Wiscasset." This is a different case from the one at bar. The words "State of New York" present some definite locality, at least, while there can be none to the words "Lincoln ss. Wiscasset." The commissioner of deeds, in New York, had authority to act only in his county; and it will be presumed, although the State be named, that the officer exercised his office within the territorial limits for which he was appointed. *Thurman v. Cameron*, 24 Wend., 87. But if such were not the presumption, the defect in this particular is supplied by reference to the deed and the previous certificate of acknowledgment by the same person. In the attestation clause of the deed the grantor declares that he has affixed his hand and seal to the instrument, "at Albany, in the County of Albany, and State of New York;" and the venue of the certificate of acknowledgment taken on the previous day, is "State of New York, County of Albany."

As already stated, courts will uphold a certificate, if possible, and for that purpose will resort to the instrument to which it is attached. Thus, in *Brooks v. Chaplin*, 3 Vt., 281, the certificate of acknowledgment did not show in what state the acknowledgment was taken, and the omission was supplied by reference to the deed, in which the grantor described himself as a "resident of Suffield, in the County of Hartford, and State of Connecticut." The acknowl-

edgment was taken two days after the date of the deed, having as its venue simply "Hartford County"—and the courts said that it was a fair presumption, in the absence of evidence to the contrary, that the deed was executed at the time it bore date and at the place of the grantor's residence, and that, finding the acknowledgment taken so soon afterwards in the County of Hartford, it could intend no other than the same County of Hartford where the deed was supposed to have been executed. "It is not indispensable," said the court, "that the place of taking should fully appear from the acknowledgment itself, provided it can be discovered with sufficient certainty by inspection of the whole instrument." There is good sense in this decision, and it answers the particular objection of counsel just stated, and the further objection that the certificate does not state that the officer knew that the party produced was a subscribing witness. The deed shows that Wooster was a subscribing witness with the officer, and the certificate states that "Wooster, one of the subscribing witnesses," to the officer known, came before him, and being sworn, said that he saw the grantor execute and acknowledge the indenture. When the officer, being a subscribing witness himself with Wooster, certifies that "Wooster, one of the subscribing witnesses," came before him and was known to him, he does, in fact, certify that he knew Wooster to be a subscribing witness as plainly as if he had added those words. There is here a compliance, in substance if not in form, with the statute, and that is all which is required. In *Luffborough v. Parker*, 12 Serg. & R., 48, the certificate of proof stated that A B appeared before the officer, and made oath that he saw the grantor sign, seal, execute, and deliver the deed, without stating that A B was a subscribing witness; but as it appeared upon the deed that A B was a subscribing witness, the court held the certificate sufficient. The Statute of Pennsylvania, under which the certificate was given, required the proof of deeds to be made by one or more of the subscribing witnesses. "The Act," said the court, "must be substantially complied with; but when substance is found, it is neither the duty nor the inclination of the court to defeat conveyances by severe criticism on language."

The remaining objection to the certificate, that it does not appear from it that the subscribing witness became such at the request of the grantor, or signed his name at the time the deed was executed, is answered by the fact that the statute of New York, under which the certificate was made, did not require any statement to that effect. Besides, the fact that the witness was present at the execution, which is all that is necessary, does sufficiently appear from the deed, with which the certificate is to be read. In the one, the declaration is made that the instrument was signed in his presence and, in the other, that he saw the grantor execute the deed.

After a careful consideration of the several objections, presented by counsel, we are satisfied, that the certificate of the commissioner was sufficient, under the Act of New York of 1818, to entitle the deed to be admitted to record in that State, had the land been there situated, and to be read in evidence in her courts, without further proof of execution; and was en-

titled to like record in the State of Illinois, and to be received in evidence in like manner, in her courts, under the 3d section of the Statute of 1847.

The several objections urged by counsel to the other two deeds produced by the plaintiff are, with one exception, sufficiently met by what has already been said in answer to those taken to the deed from Davenport. The certificate of acknowledgment to the deed, from Munson to James, is given by the "Judge of the Albany Common Pleas," an officer authorized at the time to take the acknowledgment and proof of deed by the laws of New York; and the objection referred to, not already met, is, that the certificate of this judge is not accompanied by any evidence of his official character, or that his certificate was in conformity with the laws of that State.

The answer to this objection is brief and conclusive. Unless the statute requires evidence of official character to accompany the official act which it authorizes, none is necessary. And, where one State recognizes acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. In this case, also, the laws of New York are, by stipulation of parties, considered as evidence. *Vance v. Schuyler*, 1 Gilman, 160; *Secrist v. Green*, 3 Wall., 749 [70 U. S., XVIII., 154].

When the record of partition in the suit between James and his co-heirs was produced, objection was made by the defendant, on the alleged ground that it did not show jurisdiction of the persons and subject-matter, but wherein it failed to show such jurisdiction, the objection does not indicate, and it is no part of our duty to act as counsel for the party, and search for particulars to give point to his objection. As it now stands, it is as vague and pointless as would be a general objection to either party's right of recovery. If the proof against the infant heirs was not as full as a due regard for their rights should have exacted, it will be time for us to consider that matter, when they, or parties representing them, are before the court. It is not a matter which defeated the jurisdiction of the local tribunal in the partition, and it is not a matter of any concern to the defendant, who was a stranger to, and in no way interested in, the proceeding. *Fridley v. Murphy*, 25 Ill., 146; *Goudy v. Hall*, 36 Ill., 318.

There was no necessity for mutual releases between the parties, in order to clothe John B. James in severalty with the entire ownership of the premises in controversy. The suit for partition was under the Statute of Illinois, which dispensed with the necessity of mutual releases, and authorized the court to invest, by its decree, the several parties with the title to the parcels respectively allotted to them, without requiring conveyances. *Street v. McConnell*, 16 Ill., 126. And the decree rendered in the case declared, that the land allotted should be held by the parties respectively, in fee simple, in lieu of all their respective rights and interests previously enjoyed in common in the entire tract.

The law of Illinois, relating to the record of deeds, and other instruments affecting the title
See 3 WALL.

to real property, differs materially from the law of nearly every other State in the Union. In most States, these instruments can only be recorded after they have been acknowledged or proved before certain designated officers, and the certificate of such acknowledgment or proof is attached. An inscription upon the books of record of an instrument, without such authentication, is considered a mere unofficial entry of the register, constituting no record, and imparting no notice to purchasers or creditors. *Carter v. Champion*, 8 Conn., 555; *De Witt v. Moulton*, 17 Me., 418; *Tullman v. Coward*, 12 Sm. & M., 262; *Mitchell v. Mitchell*, 8 Stew. & P., 83; *Kerns v. Swope*, 2 Watts, 75; *Müller's Lessee v. Holt*, 1 Tenn., 111.

But, in Illinois, the law requires all "deeds and other instruments, relating to, or affecting the title to, real property," with or without such authentication, to be recorded; provides that they shall not take effect, as to creditors and subsequent purchasers without notice, until they are filed for record; and enacts, that "they shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read as evidence, unless their execution be proved in manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof." Revised Laws of 1845, p. 108, 109, secs. 22, 23, and 28; see, also, *Reed v. Kemp*, 16 Ill., 445.

Upon this state of the law, after the proof of the deeds of the parties, and of their record, and the production of the record of partition, and of the probated will of John B. James, there could only be two matters of inquiry; one respecting the identity of the heirs of William James, deceased, with the parties to the partition suit; and the other, whether there was notice to Hawley, at the time he received his conveyance, of the unrecorded deed from Davenport to De Witt. These matters were left to the jury to determine, and rightly so left.

No question was raised in the court below upon the sufficiency of the evidence, that the deeds produced by the plaintiff were recorded, at the time indicated by the indorsement thereon, in May, 1819; nor was any exception taken to the instruction of the court, that the deed from Davenport to Hawley was recorded in the proper office, before the deed from Davenport to De Witt; nor was any question raised, or ruling asked, upon the will produced of William James, and, therefore, no point is presented thereon for our consideration.

We perceive no substantial error in the record, and the judgment of the court below must, therefore, be affirmed.

Ordered accordingly.

Cited—10 Wall., 32; 95 U. S., 713; 24 Minn., 166; 60 Mo., 40; 69 Mo., 146; 30 Wis., 549.

JAMES D. BENNETT AND SETH TURNER, *Appts.*,

v.

FINLEY F. FOWLER.

(See S. C., 8 Wall., 445-448.)

Two or more patents for same improvement, discretionary—proof of infringement.

It is difficult to lay down any general rule by which to determine when an invention or improvement shall be embraced in one, two, or more patents.

Some discretion on this subject must necessarily be left to the head of the Patent Office.

Proof of the infringements given, that the machines made and used by the defendants were substantially like the complainant's, was sufficient, if not rebutted.

[No. 209.]

Argued Nov. 10, 1869. Decided Nov. 29, 1869.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below, by the appellee, to enjoin the defendants from infringing two re-issued patents, and for an accounting. The court found for the complainant, and referred the case to a master, to take evidence as to the profits. A final decree having been entered in favor of the complainant, for \$1,500, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. Lewis L. Coburn, for appellants:

The said letters patent are not valid, for the following reasons:

1. That said re-issued letters patent are vague and indefinite; contain descriptions of differently constructed machines, and different results from any described in the original letters patent, and were clearly re-issued for the purpose of inserting therein expanded and equivocal claims.

Burr v. Duryee, 1 Wall., 531 (68 U. S., XVII., 650.)

2. Although the patentee calls his invention an improvement in elevating hay and other like products, he does not particularly specify and point out the parts, improvements or combinations which he claims as his own, so as to enable the public to know definitely what his claim is.

Curt. Pat., secs. 227, 229-233, 239; *Evans v. Eaton*, 7 Wheat., 356; *Lovell v. Lewis*, 1 Mas., 182; *Kneass v. Schuykill Bk.*, 4 Wash., 9; *Barrett v. Hall*, 1 Mason, 447; *Dixon v. Moyer*, 4 Wash., 68; *Hill v. Thompson*, 8 Taunt., 375.

3. He claims so constructing a machine for elevating hay or other like products, that it will produce certain results, which said results the machine will not produce.

Curt. Pat., secs. 234-242; *Turner v. Winter*, Web. Pat. Cas., 80; *Case v. Brown*, 2 Wall., 320 (69 U. S., XVII., 817).

Messrs. Goodwin, Larned & Towle, for appellee:

The defendants' machine is a clear infringement of the plaintiff's patents in every particular, and the making and sale of such machines undisputed. A comparison of the models, and an examination of the specifications and drawings of Fowler's patent, leaves no room for doubt on this point.

Nor can the defendants justify under any alleged patent granted to Seth Turner, as set up in the answer. No proof was offered of any such patent; and for the purposes of this case, none can exist.

But if such a patent was in the case it would not aid the defendants; for the addition of a spiral spring or lever at the bottom of the shaft to control the rotation, as an improvement upon

Fowler, would give the patentee no right to use the invention of Fowler.

Curt. Pat., 3d ed., sec. 24; *Crane v. Price*, Web. Pat. Cas., 377; *Poss v. Herbert*, 2 Fish. Pat. Cas., 81; *Tighman v. Werk*, 2 Fish., 242.

2. It is well settled, that either the specification or the claim of the patentee may be amended, no matter how often, when it is discovered to be necessary to describe the invention more precisely, or to make the claim cover the whole invention.

O'Reilly v. Morse, 15 How., 112; *Battin v. Taggart*, 17 How., 83 (58 U. S., XV., 40).

The legal presumption is, in all cases, that the re-issue is for the same invention as the original patent.

Hussey v. McCormick, 1 Fish., 509; *McLean, J.*; *O'Reilly v. Morse* (supra); *Stimpson v. R. R. Co.*, 4 How., 380.

In this case there is nothing to rebut the legal presumption, and it affirmatively appears fully and completely in the patents themselves.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois.

The bill was filed by Fowler to enjoin the defendants from infringing two re-issued patents for improvements in hay elevators, issued 14th February, 1865. The defendants put in an answer setting up various defenses to the bill; but, as no proofs were taken in support of it, we need not refer more particularly to it. The complainant filed a replication to the answer.

When the cause was brought on for hearing, no counsel appeared for the defendant. After proof of infringement, a decree was rendered for the complainant, affirming the validity of the patents and the infringement, and referring the cause to a master to take proofs of the gains and profits of the defendant for the use of the machine.

A good deal of testimony was taken before the master on the subject of the gains and profits, counsel on both sides appearing before him. The master reported in favor of the complainant, \$1,860. The counsel took one exception to the report, namely: that part of the allowance for profit against the defendants was for infringements of third persons. The court modified the report in this respect, and reduced the amount to \$1,500.

An objection has been taken by counsel for the defendants that the court erred in affirming the validity of the two patents, Nos. 1869, 1870.

It may be, that if the improvements set forth in both specifications had been incorporated into one patent, the patentee taking care to protect himself as to all his improvements by proper and several claims, it would have been sufficient. It is difficult, perhaps impossible, to lay down any general rule by which to determine when a given invention or improvement shall be embraced in one, two, or more patents. Some discretion must necessarily be left on this subject to the head of the Patent Office. It is often a nice and perplexing question. It is true, in the present case both patents relate to the lifting and depositing a load of hay in a mow of a barn, or in a rick or shed.

But, in No. 1870, the lifter is somewhat differently constructed, so as to adapt it specially to the stacking of hay, which, doubtless, led the office to divide the improvements and issue separate patents. The improvements were embraced in one, in the original patent.

The counsel also objects that the machines of the defendants do not infringe the complainant's patents, but, if he had intended to contest this point, he should have introduced proof to this effect. Proof of the infringements given, that the machines made and used by the defendants were substantially like the complainant's, was sufficient, if not rebutted. Models were also produced on the argument before the court, which confirm this proof.

Decree below affirmed.

OLIVER BRONSON, *Plff. in Err.*,

v.

STEPHEN KIMPTON.

(See S. C., 8 Wall., 444, 445.)

Bronson v. Rodes and Butler v. Horwitz followed.

The questions of this case being the same as those decided in *Bronson v. Rodes* (*ante*, 141), and *Butler v. Horwitz* (*ante*, 149), are decided the same way.

[No. 271.]

Argued Nov. 23, 1869. Decided Nov. 29, 1869.

IN ERROR to the Court of Appeals of the State of New York.

In this case, an action was brought in the Supreme Court of the State of New York, in and for the County of Orleans, by the defendant in error, to compel the satisfaction of a certain mortgage. Judgment was rendered, at a special term of that court, for the defendant. Thereupon an appeal was taken by the plaintiff to the general term of that court, which reversed the said judgment. The defendant then took an appeal to the Court of Appeals, in which the decision of the General Term was sustained. Whereupon defendant sued out this writ of error.

The case is sufficiently stated by the court.

Mr. J. T. Townsend for plaintiff in error. (No counsel appeared in this court for defendant in error.)

Mr. Chief Justice Chase delivered the opinion of the court:

The writ of error in this case brings before us no other questions than those which have been already considered and determined in the cases of *Bronson v. Rodes* (*ante*, 141), and *Butler v. Horwitz* (*ante*, 149).

The suit in the state court was brought by Kimpton, to compel satisfaction of a mortgage executed by him to Bronson, on the ground that it had been paid. The mortgage was given to secure a bond for the payment of a certain sum in gold and silver coin, lawful money of the United States. The payment relied on was a tender of United States notes, equal in nominal amount to the sum due on the bond and mortgage. The Supreme Court of New York held the tender sufficient, and adjudged satisfaction; and this judgment was affirmed by the Court of Appeals, and is now here for review.

The principles settled in the cases referred to re-

See 8 WALL.

quire the reversal of this judgment, and it is accordingly reversed. The case will be remanded for further proceedings.

ALONZO V. BLANCHARD, JOHN
D. BLANCHARD AND FRANKLIN
BLANCHARD, Partners as A. V.
BLANCHARD & Co., *Plffs. in Err.*,

v.

ANTOINE PUTNAM, CONRAD WEAVER
AND JOHN BITTINGER.

(See S. C., 8 Wall., 420-430.)

Evidence on immaterial issue, inadmissible—insufficient defense to infringement of patent—evidence of anterior use, how admitted—onus probandi—letters patent evidence of originality of invention.

Evidence is inadmissible which presents an immaterial issue not involved in the pleadings, as it is calculated to mislead the jury by withdrawing their attention from the real subject-matter in controversy.

Where defendants' machine infringes plaintiffs' machine, it is no answer to prove that the defendant is the licensee of the owner of another patent, and that his machine is constructed in accordance with that patent.

Testimony, showing that the machine was in public use anterior to the invention described in the plaintiffs' patent, is not admissible in patent cases under the general issue, unless defendant, thirty days before the trial, gives notice, in writing, to the plaintiff of his intention to give such special matter in evidence, and of the names of the witnesses, as required in the 15th section of the Patent Act.

The *onus probandi* is on defendant, to show that the required notice was given; and if he fails to do so, he cannot introduce any evidence to controvert the novelty of the patent.

Letters patent afford a *prima facie* presumption that the patentee was the original and first inventor of the improvement.

[No. 206.]

Argued Nov. 9, 1869. Decided Nov. 29, 1869.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought in the court below by the plaintiffs in error for damages alleged to have resulted to them from the infringement of a certain patent owned by them as assignees.

The trial having resulted in a verdict and judgment for the defendants, the plaintiffs sued out this writ of error.

A very full statement of the case appears in the opinion of the court.

Mr. G. M. Lee, for plaintiffs in error:

The defendants used their machine for wood bending, at Cincinnati, Ohio, and claimed a license to use the same under a patent granted John C. Morris, March 11, 1856, and re-issued May 22, 1862, for an improvement in wood bending machines.

The machine of defendants in appearance is somewhat unlike that patented by Blanchard, and defendants claim it works on a different principle from Blanchard's; while plaintiffs claim it is the same in principle and mode of operation as Blanchard's, and that it is covered by Blanchard's patent and claim.

The real question is, therefore: what construction shall be given to Blanchard's patent? I first call the attention of the court to the well known proposition that patents are to be liber-

ally construed, so as to save to the inventor the substance of his invention.

Curt. Pat., 126; *Winans v. Denmead*, 15 How., 830; *Blanchard v. Sprague*, 2 Story, 169; *Blanchard v. Warner*, 1 Blatchf., 259; *Blanchard v. Beers*, 2 Blatchf., 411.

If this patent shall receive the usual liberal construction given to such patents in this high tribunal, or the liberal construction given in the cases cited in the various Circuit Courts of the U. S., to the patents of this famous inventor, it certainly must cover the machine of defendants here in controversy.

From a full examination of the two machines, counsel concluded that the principal parts of the two machines are the same. Like Blanchard's, the bending tool of Morris' is a lever, or sometimes two. The forming and shaping tool is also a mold; the tools for end pressure are also clamps or abutments, and a wedge is used at the end of the stick, between the stick and the clamp, when the stick is too short. Relaxation or relief is obtained when needed by cutting the bent stick, a little shorter than the distance between the abutments or clamps. The wood slides upon the Morris lever as on Blanchard's sliding beam and is bent by end pressure after being properly confined in the machine in the same mode of operation as in Blanchard's. The substantial parts of the Blanchard and Morris machines are the same. The operation and principle are the same and the result is the same in both machines. By every known principle of patent law, there is an infringement.

Curt. Pat., sec. 221; *Wyeth v. Stone*, 1 Story, 278; *Odiorno v. Winkley*, 2 Gall., 51; *Winans v. Denmead*, 15 How., 830; *Battin v. Taggart*, 17 How., 80 (58 U. S., XV., 89).

The charge took the whole case from the jury and left them nothing to find, and was in direct antagonism with the law.

Battin v. Taggart (*supra*); *Winans v. Denmead* (*supra*).

The judge avoided any construction of the whole Blanchard patent, and spent his force in ruling out the stationary form, and charging that this stationary form could not be covered by the Blanchard patent. He appears to have been able to see nothing in this case but this stationary form, and went off on a tangent thereon, charging as a fact to the jury that the stationary form was different from the rotating, when he should have left this fact to the experts and the jury, and it was a matter of fact which he had no business to charge or pass upon. Certainly this is a clear error.

There is little else in the case except this construction of the Blanchard patent. I will merely glance at the other errors.

1. The first error claimed is the improper admission of E. S. Renwick's deposition. We claim that S. S. Fisher's affidavit and the written agreement thereto attached, with the officers' certificate, were not sufficient to entitle the deposition to be put in evidence.

2. We claim that Wm. F. Mitchell's evidence was improperly admitted on the promise of defendants' counsel to afterwards so connect it with other evidence as to make it admissible. There is nothing to show that it was ever so connected, and upon its face it was inadmissible.

3. We claim that Christian Leeburgh's evi-

dence was improperly admitted, by whom the court permitted proof that a bending machine, claimed by defendants to be made in conformity to Blanchard's patent, worked badly, and broke much timber; for there was no proof to show that the machine was, in fact, made in conformity to Blanchard's patent.

4. We claim that John Byrne's evidence was improperly admitted, who was allowed to testify that a machine made in conformity to the patent of John C. Morris, worked well; because there was no issue here as to the validity or utility of said Morris' patent.

We claim that John C. Morris' original patent was improperly ruled out by the court when we offered it in evidence. The court had allowed defendants to put in evidence the Morris re-issue, and to show that they were licensees under it; and if this was competent, it was certainly competent to put in the whole Morris record, in order to detract from his invention, to show that he invented something different from the re-issue, or had fraudulently obtained the re-issue.

Mr. Samuel S. Fisher, for defendants in error:

The defendants' machine had a stationary form, and contained all the features which Blanchard declared it was the object of his invention to avoid, that is to say:

1. The bed-piece and the lever were not connected at fixed distances.

2. The power was applied to the timber itself, as a means of communicating power to the parts of the bent.

3. End pressure was applied, but no means were provided for relaxation.

As this machine was as different from Blanchard's as it was possible to make it; as, in fact, it belonged to an entirely different class of machines, it would seem that the verdict was right, which declared it to be no infringement.

1. The deposition of Mr. Renwick was read by virtue of a written agreement between counsel. The deposition was properly taken in the case of *Morris v. Royer, Coleman and Young*, under the Act of Congress, and under the circumstances narrated in the affidavit. It was, therefore, properly admitted in this case.

2. As the bill of exceptions does not purport to recite the whole testimony, if the plaintiff wished to show that Mitchell's testimony was improperly admitted, he should have stated in the bill of exceptions, either that it never was connected with other evidence, or that the court subsequently refused to execute it. The bill must recite all the facts necessary to show the alleged error.

3. The testimony of Christian Leeburgh was offered to show the working of the Blanchard machine. That machine was for "bending wood." The patentee describes a plow handle machine, but says: "The machine represented in the accompanying drawings is designed for bending plow handles, but it is obvious that the details of the machinery must be varied when the invention is applied to bending other articles having different forms." The defendants were sued for using a machine for bending, not plow handles, but felloses; and, therefore, the evidence was perfectly pertinent.

4. John Byrnes was called to show that in the Morris machine, in operation, there was no

relaxation. As this relaxation was one of the peculiar features of the Blanchard "methods," it was certainly relevant to show that the machine used by defendants did not employ it.

5. Defendants being licensees under the re-issued letters patent of Morris, put them in evidence under the decision of the Supreme Court in *Corning v. Burden*, 15 How., 252. The plaintiffs thereupon offered the original letters patent.

As the Morris patent was not on trial, and the evidence afforded by the re-issued patent merely went to the extent of showing that defendants acted under color of title or right, it is not perceived what part the original patent could play in the case. Certainly oral evidence could not have been received, attacking the Morris re-issue. The court could not try two cases at once, and the original patent could neither strengthen nor weaken the presumption that the defendants were using a machine which the Patent Office had declared to be patentable, notwithstanding the prior patent of Blanchard.

6. The court refused the specific charges asked by plaintiffs, in the form in which they were offered, but gave them in substance.

Mr. Justice Clifford delivered the opinion of the court:

Damages for the infringement of letters patent may be recovered by the patentee, or by his assignee of the whole interest, or by his grantee of the exclusive right within and throughout any specified district, by a suit in equity or by an action on the case, at the election of the holder of the legal title. 5 Stat. at L., 123, 124.

Letters patent were granted to Thomas Blanchard, December 18th, 1849, for a new and useful improvement in bending wood, for and during the term of fourteen years from that date, but the specification being imperfect, on the 15th of November, 1859, he surrendered the patent, and the same was re-issued to him, with an amended specification, for the residue of the original term.

Granted for the term of fourteen years only, the patent expired on the 17th of December, 1863, but the patentee having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity and expense bestowed upon the same and the introduction thereof into use, the Commissioner of Patents renewed and extended the patent for the term of seven years from and after the expiration of the first term, giving it the same effect as if it had originally been granted for twenty-one years. Subsequent to the extension of the term the patentee deceased, and the patent was re-issued to his executrix, from whom the plaintiffs derive title by virtue of an assignment in due form, as is conclusively admitted by the defendants.

Undoubted owners of the title to the patent, the plaintiffs, on the 23d November, 1865, instituted this suit, and the charge is that the defendants, on the 2d of November of the previous year, and on divers other days and times between that day and the commencement of the suit, infringed the exclusive right to the invention vested in the plaintiffs, by constructing and using ten machines for bending wood in imitation of the plaintiff's invention, and in violation of the exclusive right secured to them in their letters patent. Process was issued, and

being duly served the defendants appeared and pleaded the general issue, and upon that issue, unaccompanied by any notice to the plaintiffs of any special defense, the parties went to trial, and the verdict and judgment were for the defendants.

Exceptions were duly taken by the plaintiffs to certain rulings of the court in admitting evidence offered by the defendants, and to the instructions of the court, as given to the jury, and the only questions presented for decision are such as are involved in the exceptions to those rulings and instructions.

On the trial of the cause the plaintiffs, to sustain the issue on their part, introduced in evidence the re-issued patent on which the suit was founded, together with the original patent and the certificate of renewal and extension; and having proved the assignment and introduced evidence tending to prove that the defendants had infringed the re-issued patent, as alleged in the declaration, rested their case.

They might well rest in that state of the case, as the letters patent afforded *prima facie* evidence that the patentee under whom they claimed was the original and first inventor of what is therein described as his improvement, and having introduced evidence tending to show infringement and damage, they were entitled to a verdict unless some evidence was introduced by the defendants to rebut the evidence given to prove infringement, or to establish some valid defense to the cause of action set forth in the declaration.

Influenced, doubtless, by that view of the case, the defendants offered in evidence the re-issued patent granted to one John C. Morris, dated May 27, 1862, as the foundation for the introduction of evidence to show that the machine or machines which they were using were constructed by them under a license from the patentee in that patent, and in accordance with the specification and claims of that patent as re-issued. Seasonable objection was made by the plaintiff to the introduction of that patent, as evidence in the case, but the court overruled the objection and admitted it in evidence, and the plaintiffs excepted.

Such evidence was inadmissible for the purpose for which it was offered, and should have been excluded, as the novelty of the invention was not open, and because it presented on the question of infringement an immaterial issue not involved in the pleadings, and because the evidence was well calculated to mislead the jury by withdrawing their attention from the real subject-matter in controversy. *Corning v. Burden* 15 How., 271.

Apart from the question of damages, two issues only were presented by the pleadings, and they were all which are involved in any similar case.

1. Whether the patentee in the patent on which the suit is founded is the original and first inventor of the alleged improvement, which the plaintiffs in this case established as a *prima facie* presumption when they introduced in evidence the letters patent described in the declaration. *Curtis, Pat.*, sec. 118; *Pitts v. Hall*, 2 Blatchf., 229; *Cahoon v. King*, 1 Cliff., 625.

2. Whether the machine of the defendants infringes the plaintiff's machine as described in

the specification and claims of their letters patent.

Attempts are often made in the trial of patent cases to introduce such collateral issues on the questions of infringement, but they are irregular and cannot be sanctioned, as the only proper comparison, on that issue, is of the defendant's machine with that of the plaintiff, as prescribed in the pleadings. What the jury have to determine is: does the machine of the defendant infringe the machine of the plaintiff? And if it does not, then the defendant is entitled to a verdict; but if it does infringe the plaintiff's machine, then the plaintiff is entitled to his remedy, and it is no answer to the cause of action to plead or prove that the defendant is the licensee of the owner of another patent, and that his machine is constructed in accordance with that patent.

Controversies between litigants in court cannot be completed in that way, nor should the plaintiff be subjected to such outside issues, as he is clearly entitled to a verdict when he has proved that he is the original and first inventor of his improvement, and that the defendant has infringed his patent. *Curt., Pat., secs. 350, 353; Carver v. Mfg. Co., 2 Story, 432.*

Suppose the rule in that respect is otherwise, still the judgment of the circuit court must be reversed, as the next exception to be considered is clearly well taken, and the error of the court is of such a character that it cannot be remedied in any other way than by granting a new trial.

Testimony was offered by the defendants to prove the existence and use, in 1858, at Grand Detour, in the State of Illinois, of a machine for bending plough handles similar to a model shown to the witness under examination, and which, as is claimed by the defendants, was the same in its mode of operations as the patented machine of the plaintiffs.

Objection was seasonably made by the plaintiffs to the admissibility of the testimony, but the defendants stating that they expected to connect the same with the other testimony showing that the machine was in public use anterior to the invention described in the plaintiff's patent, the court overruled the objection and admitted the testimony, and the bill of exceptions shows that other testimony was introduced by the defendants tending to prove that the machine described by the witness, or others like it, were in public use at that place before the date of the invention claimed and owned by the plaintiffs.

Evidence to prove such a defense is not admissible in any case without an antecedent compliance with the conditions specified in the 15th section of the Patent Act. Whenever the defendant relies, in his defense, on the fact of a previous invention, knowledge, or use of the thing patented, "he shall state in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used," and if he does not comply with that requirement no such evidence can be received under the general issue. 5 Stat. at L. 123; *Teese v. Huntingdon, 23 How., 10 [64 U. S., XVI., 482].*

Unless the rule of law was so the plaintiff might often be surprised at the trial, as he

would rely upon the presumption which the patent affords, that he or his assignor or grantor was the original and first inventor of the improvement in question, and would not think it necessary to summon witnesses to rebut the evidence introduced by the defendant attacking the novelty of his patent. *Agawam Co. v. Jordan [ante, 179].*

Other exceptions to the rulings of the court were taken by the plaintiffs to the same effect, but it is unnecessary to refer to them, as the charge of the court shows, to a demonstration, that the court throughout the trial overlooked the fact that such evidence is not admissible in patent cases, unless it appears that the defendant, thirty days before the trial, gave notice in writing to the plaintiff, or his attorney, of his intention to give such special matter in evidence, as required in the 15th section of the Patent Act, and that the notice given constituted a compliance with the several conditions therein specified.

Compliance with that provision being a condition precedent to the right of the defendant to introduce such evidence, under the general issue, it necessarily follows that the *onus probandi* is on him to show that the required notice was given to the plaintiff thirty days before the trial, and if he fails to do so he cannot introduce any evidence to controvert the novelty of the patent. *Phil. & T. R. R. Co. v. Stimson, 14 Pet., 459; Silsby v. Foote, 14 How., 222; Phillips v. Page, 24 How., 168 [65 U. S., XVI., 641].*

Undoubtedly, the plea of not guilty puts in issue the novelty of the invention as well as the charge of infringement; but the answer to that suggestion, as applied to this case, is that the letters patent, when introduced by the plaintiffs, afforded a *prima facie* presumption that the assignor of the plaintiffs was the original and first inventor of the improvement, and as the defendants had not given to the plaintiffs the required notice that they intended to offer evidence at the trial to overcome that presumption, they had no right to introduce any such evidence, and it necessarily follows that the court had no right to submit any such question to the jury.

Two defenses, said the court, are interposed by the defendants: (1) That the patent is void for the want of novelty. (2) That the machine constructed and used by the defendants does not infringe the patented machine of the plaintiffs; and the charge proceeds throughout upon the ground that both of those defenses were open and were to be determined by the jury.

Extended remarks were made by the judge to the jury, upon the evidence produced by the defendants to impeach the novelty of the invention, and very full explanations were given to them in respect to the principles of law by which they were to be governed in determining that question. Most of the rules of law as stated by the judge are correct, but the difficulty is that no such questions were involved in the pleadings.

Judgment reversed. New venire ordered.

Mr. Justice Swayne, dissenting:

I am unable to concur in the conclusion reached by the majority of my brethren, and will state briefly the grounds of my dissent.

The judgment is reversed, because no notice of the special matters which were proved to the jury is found in the record. If a sufficient notice had been given to the plaintiffs, according to the statute, the testimony was unquestionably proper to be received. It is shown by the bill of exceptions, that the admission of the evidence was objected to, but upon what ground, except as to one item mentioned hereafter, does not appear. The objection may have had reference to several considerations other than the want of notice. The case was tried in all respects as if no such defect existed. If due notice had not been given, and that fact had been brought to the attention of the learned district judge who tried the case, it cannot be doubted that he would at once have excluded the evidence, or have admitted it only after the defect had been properly supplied. It nowhere appears in the case that such an objection was made in the court below. A series of instructions were asked by the plaintiffs' counsel, and refused by the court; neither of them has any reference to this point. The court was not asked to rule out the evidence, nor to direct the jury to disregard it. The point was not made in this court by the counsel for the plaintiffs in error. Other errors were strenuously insisted upon, but nothing was said upon this subject. Other objections to the admission of the testimony excepted to in the court below were fully discussed here, but there was entire silence as to the want of notice. The discovery that there is no notice in the record, was made after the cause had been argued and submitted to this court, and the objection does not now come from the plaintiffs in error. It is not of a jurisdictional character.

Upon a careful examination of the record, it seems to me doubtful whether any of the testimony in question required a notice to authorize its introduction, *Corning v. Burden*, 15 How., 252, except that of Mitchell, which was objected to upon a distinct and different ground. But conceding this to be otherwise, under the circumstances, I think these propositions apply:

1. We are bound to presume that a proper notice was before the court below. This suggestion derives additional weight from the fact that the statute requires the notice to be given to the plaintiff, and does not prescribe that it shall be filed in the clerk's office, or made part of the record. In some of the circuits the practice has been heretofore simply to produce and prove it at the trial.

2. If there were no such notice, it was waived by the plaintiffs in error, and they are concluded by their conduct. *Laber v. Cooper*, [ante, 152].

3. The objection not having been made in the court below, according to the settled rule and practice of this court, it can not be made here. *Ibid*.

4. The plaintiffs in error not having made the objection, this court ought not to make and enforce it for them. They have not suffered, and do not complain. The interests of justice do not require such vicarious and voluntary action on the part of this court. The counsel for the defendant in error has had no notice and no opportunity to be heard. I think, therefore, that the judgment ought not to be reversed.

See 8 WALL.

U. S., BOOK 19.

I am authorized to say that my brothers **Grier** and **Miller** concur in this opinion.

Reviewing—2 Bond., 84.
S. C.—3 Fish. Pat. Cas., 186.
Cited—11 Wall., 569; 95 U. S., 215, 219; 98 U. S., 49; 4 Cliff., 181, 448.

THE TRAVELERS' INSURANCE COMPANY OF CHICAGO, *Plff. in Err.*,

v.

ISABELLA MOSLEY.

(See S. C., 8 Wall., 397-420.)

Evidence of damages from personal injury—mental and bodily feelings—declarations to prove cause of injury and extent of—what are res gestæ.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence.

The declarations of the party himself are evidence to prove his condition, illa, pains and symptoms, whether arising from sickness, or an injury by accident or violence.

Declarations of a party as to the cause of his injury, as that he had fallen down stairs, made immediately after the occurrence, are admissible as part of the *res gestæ* to show such cause.

The *res gestæ* are the statements of the cause, made by the person injured almost contemporaneously with its occurrence, and those relating to the consequences, made while the latter subsisted and were in progress.

[No. 200.]

Argued Nov. 8, 1869. Decided Nov. 29, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below, by the defendant in error, to recover the amount of a certain policy of insurance on the life of her husband, deceased.

The trial resulted in a verdict and judgment in favor of the plaintiff for \$5,000, with costs. Whereupon the defendant sued out this writ of error. The questions raised here relate to the admission of certain evidence on the trial below.

They are fully stated by the court.

Messrs. O. B. Sansum and S. W. Fuller, for plaintiff in error:

1. The undertaking is to pay to the defendant in error \$5,000 within ninety days after the death of Arthur H. Mosley, provided it occurred by accidental injury and within three months after the injury; and provided, too, the injury should be by outward and visible means, of which proof satisfactory to the plaintiff in error can be furnished.

2. The contract is not to pay the sum mentioned within ninety days after proof of death; but it is to pay the sum mentioned, within ninety days after it is proved to the Company's satisfaction that the death of the insured was caused by injuries, the result of accident.

3. Defendant in error must show: 1, that deceased died from injuries caused by accident;

NOTE.—Evidence; declarations of injured party as to injury, expressions of pain, suffering, etc.

Declarations of the injured party, though plaintiff, at time of disaster explaining the occurrence and its effects on him, are competent in his own favor, if part of the *res gestæ*. *Brownell v. Pacific R. R. Co.*, 47 Mo., 239; *Frink v. Coe*, 4 Greene (Iowa), 555.

Declarations subsequent to the act are also admissible. *Com. v. McPike*, 3 Cush., 181; *Harriman v.*

and 2, that proof thereof was satisfactory to plaintiff in error.

4. Declarations made by deceased to the defendant in error and to his son, are not proper evidence to establish the fact that deceased did fall down the stairs in question. *Queen v. Hepburn*, 7 Cranch, 290; *King v. Eriwell*, 3 T. R., 707; *Ellicott v. Pearl*, 10 Pet., 413.

5. If the declarations, made by deceased to defendant in error and to his son, are not admissible evidence to establish the fall down the stairs, then there is nothing to establish an accident; for the bill of exceptions states that no witness testified that deceased did fall down the stairs.

It is submitted that the first and second points are established by the terms and conditions of the contract, for it is not an insurance against death generally; but it is an agreement to pay to the defendant in error a sum certain provided Arthur H. Mosley died from injuries—not injuries generally, but accidental injuries.

In the second condition of the contract, it is expressly provided that proof, satisfactory to the plaintiff in error, shall be made. The plaintiff in error is the judge as to what proofs shall be satisfactory. It may be a hard agreement, but still it is the contract between the parties. The court will enforce the contract that the parties have made. The plaintiff in error, by refusing to pay the sum insured, and by contesting the demand, says that the proof of the injuries and accident are not satisfactory. There is no allegation in the declaration that proof of the injuries and accident has been satisfactory to the plaintiff in error. The court will presume that to have been proven which is properly alleged, but no presumption will be made as to things material which are not properly alleged; and if the allegations in the declaration are such as to show that a general demurrer would have been sustained had it been

made, there should have been an arrest of judgment.

Upon the 4th and 5th points it is submitted that the declarations of deceased made to his wife and son four days before he died, ought not to have been admitted to establish the fact that deceased did fall down the stairs in question, because they are clearly hearsay, and they do not come within any of the exceptions to the general rule, that derivative or second-hand statements are not receivable as evidence *in causa*.

Best, Ev., sec. 498.

The reasons against admitting them are, that the party against whom the evidence is offered has had no opportunity to examine the original source; and that assuming the original statement to be correctly reported, it was not originally made under the sanction of an oath; and though it were made under the sanction of an oath *in judicio*, it is not admissible unless the party against whom it is offered had the right and opportunity to cross examine, but neglected it.

The circumstances of this case are to be consulted to ascertain whether, according to the law of evidence, the tendered and admitted evidence comes within any of the exceptions to the general rule which excludes declarations of persons not examined *in judicio*.

Ex necessitate is one exception. But the death or lunacy of a witness who had immediate knowledge of the fact is not considered sufficient to relax the general rule. The exception *ex necessitate* must have arisen from a general presumption coming out of the nature of the case, and that in the common course of human affairs, there would be a defect of evidence and failure of justice, unless such evidence was admitted.

Stark., 28.

Marshall, *Ch. J.*, in *Queen v. Hepburn*, 7

Stowe, 57 Mo., 93. *Contra*, Cleveland, &c., R. R. Co. v. Mara, 26 Ohio St., 185.

The fact that it was a dying declaration does not make it admissible, if not part of the *res gestae*. *Marshall v. C. & G. E. R. R. Co.*, 48 Ill., 475.

Where evidence of a declaration is admissible, a person present may state what he heard said. *I. P. etc. R. Co. v. Anthony*, 43 Ind., 183.

Injured person may be asked extent and nature of injury, his condition, ability to work, &c. *Creed v. Hartman*, 8 Bosw., 123; *People v. Tubbs*, 37 N. Y., 586.

The injured member may be shown the jury. *Mulhaddo v. Brooklyn City R. R. Co.*, 30 N. Y., 370.

Declarations of pain, suffering, actions, groans, outcries, expressions of pain and distress at the time of such suffering, may be given in evidence in the injured person's favor, even though after the commencement of the action. *Matteson v. N. Y. C. R. R. Co.*, 35 N. Y., 487; 62 Barb., 364; *Murphy v. N. Y. C. R. R. Co.*, 66 Barb., 125; *Barber v. Merriam*, 11 Allen, 322; *Kent v. Lincoln*, 32 Vt., 591; *Kennard v. Burton*, 25 Me., 39; S. C., 43 Am. Dec., 249; *Phillips v. Kelley*, 29 Ala., 628; *Caldwell v. Murphy*, 11 N. Y., 416; *Werely v. Persons*, 28 N. Y., 344; *Baker v. Griffin*, 10 Bosw., 140; *Brown v. N. Y. C. R. R. Co.*, 32 N. Y., 597; *Gray v. McLaughlin*, 10 Iowa, 279.

When such declarations are evidence, they may be proved by any witness who heard them; they are of greater weight if made to and proved by a medical attendant. *Howe v. Plainfield*, 41 N. H., 135; *Perkins v. Concord &c. R. R. Co.*, 44 N. H., 223.

Where parties may testify themselves, evidence of others, if party is living, should be received with caution. *Reed v. N. Y. C. R. R. Co.*, 45 N. Y., 574.

Statements of past facts are not admissible, and where they are mingled with present complaints are no proof of the truth of the facts stated, *Tilson*

v. Terwilliger, 56 N. Y., 273; *People v. Davis*, 56 N. Y., 95; *People v. Williams*, 3 Park. Cr., 84; *Waldie v. N. Y. C. & H. R. R. Co.*, 61 How. Pr., 350; *Chapin v. Marlborough*, 9 Gray, 244; *Lush v. McDaniel*, 13 Ired. L., 485; *Rogers v. Crain*, 30 Tex., 284.

Expressions of pain and suffering by injured party to physicians when they were examining her and statements as to her health to a neighbor, are admissible. *Matteson v. N. Y. C. R. R. Co.*, 35 N. Y., 487.

Complaints and indications of suffering of injured party on a physical examination requested by opposite party, are admissible. *Quaife v. C. & N. W. Ry. Co.*, 48 Wis., 513; S. C., 33 Am. Rep., 821; or to his attending physician. *Fay v. Harlan*, 123 Mass., 244; S. C., 35 Am. Rep., 372.

The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded. *Barber v. Merriam*, 11 Allen, 324.

Not only the opinion of the expert founded in part upon such data is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestae*. 111. Cent. R. R. Co. v. Sutton, 43 Ill., 438.

Statements of wounded man while wounds were being examined in explanation of character and extent of injury, but not as to instrument or name of person by which inflicted, are admissible in prosecution growing out of conflict in which wound was given. *Denton v. State*, 1 Swan, 279.

Cranch, 290, said: "If the circumstance, that the eye-witness of any fact be dead, should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof as easily obtained. * * * This court is not inclined to extend the exceptions further than they have already been carried." And again, in 1 Wheat., 8, the same learned Judge says: "We have revised our decision in the case of *Queen v. Hopburn*, 7 Cranch, 290, and confirmed it."

The fact which defendant in error seeks to establish by these declarations is not one of reputation, nor of pedigree, nor boundary; therefore none of these exceptions apply.

Examining them under the Light of Dying Declarations.

A declaration made *in extremis*, under the apprehension of approaching dissolution, is admissible in certain cases, but they are criminal cases only. This is a civil action. They are never admitted unless the court is satisfied that the party who made the declarations was under the impression of approaching death, and unless they relate to the cause of his death and are tendered on a criminal charge respecting it. Stark, Ev., 88.

But such is not the case at bar.

There is but one other light under which these declarations can be examined and their admissibility tested; that is, *res gestæ*. Are they *res gestæ*? Stark says *res gestæ* are the surrounding facts of a transaction, and may be submitted to a jury, provided they can be established by competent means sanctioned by the law, and afford any fair presumption or inference as to the question in dispute. And again; it is said that declarations accompanying an act explanatory of that act, are *res gestæ*. They are the surrounding facts—explanatory of an act or showing a motive for acting. But the principal fact must be first established; and until it is established, surrounding facts are not admissible; and certainly exhibiting surrounding facts is not establishing a principal fact.

The learned counsel for the defendant in error cites *Aceson v. Kinnaird*, 6 East, 188, and relies upon it alone as decisive in this case. It is his only authority, and it is submitted that it makes against and not for his case. In that case the issue was, whether the insured was in good health at the time the policy, then in question, was effected on her life by her husband. A few days after the physician examined her and made inquiries of her of her health, she was seen in bed at 11 o'clock in the forenoon; and a witness was called to testify to the fact that she saw the deceased in bed at the time mentioned, and that deceased then said she was not in good health and that she was afraid she would die before the policy could be delivered. The fact that deceased was in bed was established by the witness. This was a material fact to be established upon the issue made in the case, viz.: whether the deceased was in good health at the time; and doubtless the declarations of the deceased were admissible, explaining why she was in bed. Upon an issue as to whether the deceased was well or ill at the time in question, her declarations were admissible; for one's feelings while suffering from any mal-

ady are the true indicators of that malady, and how the deceased in the case cited felt, could only be ascertained by what she said. The case upon which my learned brother relies so confidently, is one of necessity as well as *res gestæ*. The very nature of that case made it necessary to show what the deceased said as to how she felt; and being found sick in bed, her declarations while she was there is a surrounding fact explanatory of the material fact—being found in bed.

The declarations of the deceased in the case at bar, as they show how he felt in the presence of the witnesses, are *res gestæ*, so far they are explanatory of the other facts as they were occurring then. But it is submitted that as evidence of his fall down the stairs, they are not competent. The fact that deceased declared to the defendant in error that he had fallen down the back stairs and hit his head, is not the point in controversy in the case at bar. The controversy between the parties is: did the deceased fall down the stairs in question, and was the fall accidental? The declaration of the deceased made to the defendant in error as she says, several days before he died, is all that we have upon the facts in question. Is that competent and enough? It is not competent to prove the fall. How is it enough to prove the accident?

Messrs. Hughes, Denver & Peck, Elliott Anthony, and L. Janin, for defendant in error:

1. That the evidence in question was proper evidence, is well settled; and Greenleaf in his work on Evidence, Vol. I., sec. 102, p. 132, says that "The representation, by a sick person, of the nature, symptoms and effects of the malady under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but if made to any other person they are not, on that account, to be rejected."

This principle is laid down by all writers on evidence, and is so familiar in practice that the multiplication of authorities on the point is unnecessary. The case of *Aceson v. Kinnaird*, 6 East, 188, is directly in point, and is, we think, decisive of this case.

2. This case was, we think, appealed for the purpose of delay, and if so, then we think that the remarks of the court in *The Douro*, 3 Wall., 565 (70 U. S., XVIII., 168), are particularly applicable.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois. The action was upon a policy of insurance. It insured Arthur H. Mosley against loss of life, or personal injury by any accident within the meaning of the instrument, and was issued to Mrs. Arthur H. Mosley, the wife of the assured, for her benefit. The declaration was in *assumpsit*. The defendant pleaded the general issue, and the cause was tried by a jury. The plaintiff recovered. During the trial, a bill of exceptions was taken by the plaintiff in error, by which it appears that the contest between the parties was upon the question of fact, whether Arthur H. Mosley, the assured, died from the effects of an accidental fall down stairs in the night, or from natural causes.

The defendant in error was called as a wit-

ness in her own behalf, and testified, "That the assured left his bed Wednesday night, the 18th of July, 1886, between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs; * * * she noticed that his voice trembled; he complained of his head, and appeared to be faint and in great pain."

To the admission of all that part of the testimony which relates to the declarations of the assured, about his falling down stairs, and the injuries he received by the fall, the counsel of the defendants objected. The court overruled the objection, and the defendants excepted.

Wm. H. Mosley, son of the assured, testified, in behalf of the plaintiff, "That he slept in the lower part of the building, occupied by his father; that about 12 o'clock of the night before mentioned, he saw his father lying with his head on the counter, and asked him what was the matter; he replied, that he had fallen down the back stairs and hurt himself very badly." The defendants objected to both the question and answer. An exception to their admission followed.

The same witness testified further, "That on the day after the fall, his father said he felt very badly, and that if he attempted to walk across the room, his head became dizzy; on the following day, he said he was a little worse, if anything." The admission of this testimony also was excepted to by the defendants.

This statement presents the questions which we are called upon to consider. They are, whether the court erred in admitting the declarations of the assured, as to his bodily injuries and pains, and whether it was error to admit such declarations, to prove that he had fallen down the stairs.

It is to be remarked, that the declarations of the former class all related to present existing facts at the time they were made.

Those of the latter class were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bedroom; those to his wife, upon his reaching there.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.

In actions for the breach of a promise to marry, such evidence is always received to show the affection of the plaintiff for the defendant while the engagement subsisted, and the state of her feelings after it was broken off; and in actions for criminal conversation, to show the terms upon which the plaintiff and his wife lived together before the cause of action arose. Upon the same ground, the declarations of the party himself are received to prove his condition, ill, pains and symptoms, whether arising

from sickness or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. Upon these points, the leading writers upon the law of evidence, both in this country and in England, are in accord. 1 Greenl. Ev., sec. 103; 1 Phil. Ev., 183; 1 Taylor. Ev., 478; sec. 518.

There is a limitation of this doctrine that must be carefully observed in its application.

Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions, and exclamations, as furnish evidence of "a present existing pain or malady." *Bacon v. Inhab., etc.*, 7 Cush., 586. Examined by the standard of these rules, the testimony to which this exception relates was properly admitted.

The other exception requires a fuller examination.

Was it competent to prove the fall by the declarations of the assured made under the circumstances disclosed in the bill of exceptions?

In *Thompson v. Trevelyan*, Skin., 402, the action was for the battery and wounding of the wife. Lord Chief Justice Holt "allowed, what the wife said immediately upon the hurt received and before that she had time to contrive or devise anything for her own advantage, to be given in evidence." The reporter adds: "*Quod nota*. This was at *nisi prius*, in Middlesex, for wounding the wife of the plaintiff." This case was referred to by Lord Ellenborough with approbation in the case before him of *Aeson v. Ainaid*, 6 East, 191, 197. In that case, Lawrence, Justice, in answer to the objection, that such evidence was hearsay, said: "It is in every day's experience in actions of assault, that what a man has said of himself, to his surgeon, is evidence to show what he has suffered by the assault."

Ree v. Foster, 6 Carr. & P., 325, was an indictment for manslaughter, for killing the deceased by driving a cab over him. A wagoner was called as a witness for the prosecution. He stated that he saw the cab drive by at a very rapid rate, but did not see the accident, and that immediately after, on hearing the deceased groan, he went to him and asked him what was the matter. The counsel for the prisoner objected, that what was said by the deceased, in the absence of the prisoner, could not be received in evidence.

Gurney, Baron, said, that what the deceased said at the instant, as to the cause of the accident, was clearly admissible.

Park, Justice, said, that it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down. Mr. Justice Patterson concurred. The prisoner was convicted.

In *The Commonwealth v. M'Pike*, 3 Cush., 181, the indictment, as in the preceding case, was for manslaughter. The defendant was charged with killing his wife. It appeared that the deceased ran up stairs from her own room, in the night, crying murder, and bleeding. Another woman, into whose room she was admitted, went, at her request, for a physician. A third person, who heard her cries, went for a watch-

man and, on his return, proceeded to the room where she was. He found her on the floor, bleeding profusely. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The Supreme Court of Massachusetts held that the evidence was properly admitted. It was said that the declaration was "of the nature of *res gestæ*," and that the time when it was made was so recent, after the injury was inflicted, as to justify receiving it upon that ground.

It is not easy to distinguish this case and that of *Rez v. Foster*, in principle, from the case before us, as regards the point under consideration.

In *Acson v. Kinnaird*, it was said by Lord Ellenborough, that the declarations were admitted in the case in *Skinner*, because they were a part of the *res gestæ*.

To bring such declarations within this principle, generally, they must be contemporaneous with the main fact to which they relate. But this rule is by no means of universal application. In *Rawson v. Haigh*, 2 Bing., 99, a debtor had left England and gone to Paris, where he remained. The question was, whether his departure from England was an act of bankruptcy, and that depended upon the intent by which he was actuated. To show this intent, a letter written in France, a month after his departure, was received in evidence. Upon full argument, it was held that it was properly received. Baron Park said: "It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying, that a declaration, made a month after the fact, would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole *res gestæ*."

Where a pedler's wagon was struck and the pedler injured by a locomotive, the Supreme Court of Pennsylvania said: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time—in view of the goods strewn along the road by the breaking up of the boxes—and seems to have grown directly out of and immediately after the happening of the fact." The declaration was held to be "a part of the transaction itself." *Hanover R. R. Co. v. Coyle*, 55 Pa. St., 402.

In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. The doctrine of *res gestæ* was considered, by this court, in *Beaver v. Taylor*, 1 Wall., 637 [48 U. S., XVII., 601]. What was said in that case need not be repeated. Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the

principal fact. The *res gestæ* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below.

In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. Appleton, Ev., ch. 11, 12. The weight of this reflection, in reference to the case under consideration, is increased by the fact, that what was said could not be received as "dying declarations," although the person who made them was dead, and hence, could not be called as a witness.

Judgment affirmed.

Mr. Justice Clifford, dissenting:

Questions as to the rules of evidence "are of vast importance to all orders and condition of men" interested therein, as parties in common law suits, as life, liberty, and property depend very largely upon their strict observance, that proper testimony, pertinent to the issue, may not be excluded, and that incompetent and improper testimony may not be received. *Mina, &c., v. Hepburn*, 7 Cranch, 295; *King v. Brisswell*, 8 T. R., 721.

"One of these rules," says *Chief Justice Marshall*, "is that hearsay evidence is, in its own nature, inadmissible. Not only because it supposes that better testimony might be adduced to prove the alleged fact, but on account of its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its color." Experience shows that wrong verdicts are the usual result of wrong rulings in admitting improper testimony, or in rejecting that which was competent and material. Appellate courts, viewing the matter in that light, are, therefore, prompt to correct such errors and to reverse judgments founded on verdicts produced or influenced by such erroneous rulings.

All courts agree, that the introduction of evidence to the jury is governed by certain fixed principles of law, and text writers usually treat the subject under four general heads: (1) That the evidence must correspond with the allegations and be confined to the issue. (2) That the substance of the declaration must be proved to warrant a verdict in favor of the plaintiff. (3) That the burden of proving a proposition or issue lies on the party holding the affirmative. (4) That the best evidence, of which the case in its nature is susceptible, must always be produced. 1 Greenl. Ev., sec. 50.

Founded, as the action is, upon a policy of insurance, it becomes necessary, in order to understand the precise bearing of the rulings embraced in the exceptions, to examine the terms of the contract, and to refer to the exact issue tendered in the declaration. By the terms of

the policy, insurance, for the period of one year, in the sum of \$5,000, was granted by the defendants to the late husband of the plaintiff, against "personal injury caused by any accidents within the meaning of this policy," * * * and such injuries as shall occasion death within three months from the happening thereof, and also against any such personal injury, though not fatal, if the assured was thereby absolutely and totally disabled from the prosecution of his usual employment. After setting out the policy in full, the declaration alleges that the assured, on the 1st of July in the same year, "accidentally fell down a pair of stairs in the City of Chicago, in said county, and was severely injured thereby," and that the assured, within three months after the happening of the said accident, died, and that the death of the assured "was occasioned by said injury and accident."

Defendants appeared and pleaded that they never promised in manner and form, as alleged in the declaration, which presented the direct issue, whether the assured met with the accident and injury described in the declaration, and whether his death was occasioned by "the personal injuries caused" by that accident, as therein alleged. Payment of the sum insured, in case of such personal injury or death occasioned by any accident within the terms of the policy, was to be made to the plaintiff, and she was examined as a witness to support her claim against the defendant Corporation.

Several witnesses "testified as to back stairs being there, leading to the back yard," but "no witness testified that he saw the deceased fall down the steps," and there was no testimony upon the subject, except that given by the plaintiff and the son of the deceased, as recited in the bill of exceptions. She testified, that between twelve and one o'clock (July 18, 1866), he (her husband) got up and went down stairs for the purpose described; that she did not know how long he was gone, but "when he came back, he said he had fallen down the stairs and almost killed himself; that he had hit and hurt the back part of his head in falling down the stairs which led out back."

Objection was duly taken to the testimony of the witness as to the declarations of the husband, but the court overruled the objection, and the defendants then and there excepted.

His son was also examined, and testified that he saw his father, about twelve o'clock that night, lying with his head on the counter, and that "he asked him what was the matter, and he answered that he had fallen down the back stairs and hurt himself very bad." Seasonable objections was also made to the introduction of this testimony, but the court admitted it, and the defendant excepted, as appears by the transcript.

Viewed in the light of the facts, as here stated, which are carefully and accurately drawn from the record, I am clearly of the opinion that the declarations of the deceased, as given in the testimony of those witnesses, were inadmissible, and that the judgment of the circuit court should be reversed.

Mere declarations, made by a third person, not under oath, it is conceded, are hearsay; but the argument is, that the declaration given in evidence in this case may be regarded as part of

the *res gestæ* and, therefore, that the testimony of both witnesses was properly admitted as original evidence. Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in the issue before the court, and if they were made to explain the act, or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts, and as such, are not hearsay, but may be introduced with the principal act which they accompany, and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality. *Enos v. Tuttle*, 3 Conn., 350.

But such declarations cannot properly be received as evidence, unless the principal act which they accompany and to which they relate, is, itself, material to the issue to be submitted to the jury, nor unless the declarations were made at the time the principal act was done, nor unless they were of a character to explain that act, or to unfold its true nature and quality, as they are only admissible as incident to the principal act, and because they are a part of it, and are necessary to explain and define its true character. *Corinth v. Lincoln*, 34 Me., 312; *Noyes v. Ward*, 19 Conn., 269; *Moore v. Meacham*, 10 N. Y., 210; *Osborn v. Robbins*, 37 Barb., 482.

When the inquiry is into the nature and character of a certain transaction, not only what was done, says Mr. Roscoe, but also what was said by those present during the continuance of the transaction, is admissible for the purpose of illustrating its peculiar character and circumstances. *Roscoe, Ev.*, 23.

Undoubtedly, whenever evidence of an act done by a party is admissible, the declarations he made, at the time the act was done, are also admissible, if they were of a character to elucidate and unfold the act, because they derive a degree of credit from the act itself, and do not rest entirely upon a statement not made under oath. *Sessions v. Little*, 9 N. H., 371.

Unless, however, they were made at the time the act was done, or during the continuance of the transaction constituting the principal fact, they are not admissible, as in that state of the case they cannot derive any credit from the principal fact, which alone renders them admissible in evidence.

Verbal and written declarations are admissible, says Mr. Phillips, "when they accompany some act, the nature, object, or motives of which are the subject of inquiry." In such cases, he says, words are receivable as original evidence, on the ground, that what is said, at the time, affords legitimate, if not the best, means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords. *Phil., Ev.*, ed. 1868, 185.

Evidently, the rule as understood by the author of that work, would not admit the declarations, unless they were made at the time the act was done, or during the continuance of the transaction; but the annotator is even more explicit, as he expressly adopts the rule laid down in the leading case, that to be a

part of the *res gesta*, the declarations must have been made at the time of the act done, which they are supposed to characterize; and have been well calculated to unfold the nature and character of the facts which they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. *Enos v. Tuttle*, 3 Conn., 250.

Much of the difficulty in the application of the rule arises from the nature of the principal act, especially in cases where it is continuous, or extends for a considerable time, as in questions of domicile, or of bankruptcy; but there is no difficulty in applying the rule in cases where the principal act is single and well defined as to time, nor is there any well-considered case, which gives any countenance to the admission of such declarations, unless they were made at the time the principal act was done, or, as in the case of a riot, during the continuance of the transactions. *Russell v. Frisbie*, 19 Conn., 209; *Carter v. Beals*, 44 N. H., 412; *Price v. Powell*, 3 N. Y., 323; *Ridley v. Gyde*, 9 Bing., 351.

Equity rules are the same as the rules at common law, as appears by the decision of Chancellor Walworth. In the *Matter of Taylor*, 9 Paige, 617, in which he held, that the declarations of parties, and other attending circumstances, in order to render them admissible as a part of the *res gesta*, must be contemporaneous with the main fact under consideration, and to which they were intended to give character. *Frank v. Coe*, 4 Greene (Ia.), 556.

Suppose the rule to be that such declarations are inadmissible, unless made at the time the principal act was done, still it is contended that the rulings of the court, in admitting the declarations in this case, may be sustained as falling within the rule laid down in the case of *Commonwealth v. M'Pike*, 3 Cush., 184, and the opinion of the majority of the court, as just read, rests chiefly upon that ground. The indictment, in that case, was for manslaughter, and the evidence introduced showed that the deceased, on the morning she received the mortal blow, ran from her room, where her husband, the defendant, was, to a room occupied by the witness, in the same house, crying murder; and when admitted to the room, she said she was killed. Another witness heard the cry of murder, and went for a watchman, and when he returned, he went to the room where the wounded woman was, and, among other things, she said to him that her husband had stabbed her, and told the witness what she wanted done if she died.

Objection was taken to the statement, as to the declaration of the wife, that the defendant had stabbed her, but the court admitted the testimony, and the case was removed to the Supreme Court for revision. Other exceptions were taken to the rulings of the court, but they were all overruled, the court holding that the statement of the wife, as to the cause and manner of the injury, might be "sustained, upon the ground that the testimony was of the nature of the *res gesta*." No authorities are cited in support of the proposition, and the opinion, upon that point, is very brief, and seems to rest mainly upon the closing sentence upon that subject, which is as follows: "In the admission of testimony of this character, much must be left

to the exercise of the sound discretion of the presiding judge."

Prior to that date, all the decisions of that court had been in strict conformity to the rule, that declarations not under oath, in order to be admissible as original evidence, must have been made at the time the principal act was done or committed, as before explained, unless they were admitted as declarations in *articulo mortis*; and every decision made by that court upon that subject, since that case was determined, is equally explicit in prescribing the same rule. Reference will be made to a few of the subsequent cases to establish that proposition.

Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings are considered competent and original evidence in his favor. *Bacon v. Charlton*, 7 Cush., 586. Such evidence, however, say the court, is not to be extended beyond the necessity on which the rule is founded; and they add, that anything in the nature of narration or statement is to be carefully excluded, and the testimony (unless the statement was made by a patient to a medical man) is to be confined strictly to such complaints and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady. Before the year expired, the same question, under a different state of facts, was again presented to that court, and in view of the importance of the questions, and of their frequent occurrence, the court came to the conclusion to consider the subject somewhat more at large than they had theretofore done, and to set forth and illustrate "the principles and tests by which this class of questions must be determined." *Lund v. Tyngsborough*, 9 Cush., 41. They accordingly decided:

1. That the admission of such evidence is not left to the discretion of the presiding judge, as had sometimes been supposed; that its admission is governed by principles of law, which must be applied to particular cases as other principles are applied, in the exercise of a judicial judgment, and that errors of judgment in the case, as in other cases, may be examined and corrected. *Doe v. Wright*, 6 Nev. & Man., 151.

2. That a declaration, if it has its force by itself, as an abstract statement, detached from any particular fact in question, is not admissible in evidence, because it depends for its effect on the credit of the person making it and, therefore, is hearsay.

3. That mere narrative is never admissible, because such statements are detached from any material act which is pertinent to the issue.

4. That whenever the act of the party may be given in evidence, his declarations, made at the time, are also admissible, if they were calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction.

5. That there must be a main or principal fact or transaction, and that such declarations only are admissible as grow out of the principal transaction, serve to illustrate its character, are contemporary with it, and derive some degree of credit from it.

6. That the main act or transaction is not, in every case, necessarily confined to a particular point of time, but whether it is so or not de-

pends solely upon the nature and character of the act or transaction.

Search is made in vain for any decided case, where the principles and tests which regulate and control the admission of such evidence is so satisfactorily stated, and with so much fullness and clearness as in that case. *Meek v. Perry*, 86 Miss., 261.

Narration of the cause and manner of the injury has been carefully excluded since that decision in the courts of that State, even where the statements were made by a patient to his physician, as will be seen by the case of *Chapin v. Marlborough*, 9 Gray, 245, which was decided six years later.

By the statement of the case, it appears that the plaintiff called a physician, and wished him to examine his leg, saying that it gave him great pain, and the physician testified that he said that he had been struck by a horse, on that leg, four or five months before.

Seasonable objection was made to the evidence, but the judge, at the trial, admitted it, and the case was transferred to the Supreme Court, where a new trial was granted. In disposing of the case, the court say, the exception must be sustained, which was to the admission of the plaintiff's statement to his physician, that his leg had been struck by a horse; and the court held that it was a statement of a fact, "and was used as evidence of that fact." It was, therefore, wrongly admitted, which shows to a demonstration that the evidence in this case was also wrongly admitted, because it was admitted and used as evidence to prove that the injury and death of the assured were occasioned by the alleged accident.

Death was occasioned by a stab, in the case of *Commonwealth v. Hackett*, 2 Allen, 189, and it is suggested that the ruling in that case qualifies the doctrine, as laid down in the preceding case, but there is no foundation for the suggestion, as the court say, that the declaration given in evidence was uttered immediately after the homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him, after so brief an interval of time, that the declaration or exclamation of the deceased (I am stabbed) may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted.

Many bodily sensations and ailments are of such a character that they can only be known to the person who experiences them, and, in view of that fact, the Supreme Court of that State decided, in the case of *Barber v. Merriam*, 11 Allen, 822, that the statements of a patient to his physician, as to the character and seat of his ailments, when made for the purpose of receiving medical advice, were admissible in action for a personal injury, but they expressly affirmed the doctrine of the previous decisions, to which reference has been made.

Declarations of a narrative character were again offered in the subsequent case of *Commonwealth v. Dismore*, 12 Allen, 587, and they were again rejected as hearsay evidence; and the leading case of *Lund v. Tyngsborough* was again approved and re-affirmed.

Examined in the light of the decisions made by the Supreme Court of Massachusetts, since

the case of *Commonwealth v. McKee*, I am of the opinion that the rulings of the Circuit Court, in this case, find no support from any reported case in the volumes of the Massachusetts Reports.

Next suggestion is, that those rulings may be sustained upon the authority of the case of *Ree v. Foster*, 9 Carr. & P., 825, and of the case of *Thompson v. Trevanion*, Skin., 402, but those cases are so imperfectly reported that they can hardly be said to be reliable. Grant, however, that the reports of the cases, though meagre, are reliable, still, I am of the opinion that the rules of evidence there adopted are contrary to the modern decisions in both countries. They are both specially noticed by Mr. Roscoe, in his valuable Treatise on the Law of Evidence, and he says, they "are difficult to reconcile with established principles." Both admit the declarations to extend to the particulars of what was said, and though they (the declarations) were both made in close proximity to the event to which they relate, it is very questionable indeed, says the same writer, whether that ground alone is sufficient to render them admissible, *Rosc. Cr. Ev.*, 26.

Both of these cases are also cited by Taylor, in his more recent work upon the Law of Evidence; and yet the rules which he promulgates, as tests to regulate the admission of such evidence, show that the rule adopted in those cases is not good law. His leading tests are as follows:

1. That declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are no proof of the facts themselves, and, therefore, if it be necessary to show the existence of such facts, proof *aliunde* must be laid before the jury. 1 Taylor, *Ev.*, sec. 523.

2. That, although acts by whomsoever done are *res gestæ*, if relevant to the matter in issue, yet, if they be irrelevant, declarations, qualifying or explaining them, will, together with the acts themselves, be rejected. 1 Taylor, *Ev.*, sec. 524.

3. That where an act done is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act, but where the act is, in its own nature, irrelevant to the issue, and where the declaration *per se* cannot be received, no case has yet established the rule, that the union of the two will render them admissible. *Ibid.*, sec. 524; *Redf., Car. & Bail.*, sec. 454.

4. That an act cannot be varied, qualified, or explained by a declaration which amounts to no more than a mere narrative of a past transaction, nor by an isolated conversation, nor by an isolated act done, at a later period. Taylor, *Ev.*, sec. 526; *Nutting v. Page*, 4 Gray, 584.

Condemned by all these tests, it is impossible to admit that the two cases relied on, as supporting the rulings of the circuit court, can be good law, and if not, then those rulings stand unsupported in principle, or by any well considered English or American decision. *Wright v. Tatham*, 5 Cl. & Fin., 770; S. C., 7 Ad. & E., 389.

Obviously, the main fact in the case before the court was the alleged accident, and the bill of exceptions finds that there was no other evi-

dence to prove that material allegation than the testimony of the plaintiff, and the son of the deceased, who knew nothing of what had occurred, except what they were told by the injured party. *Baker v. Griffin*, 10 Bosw., 142.

Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible for that purpose, but they are not admissible to prove a past occurrence, nor to prove that they were occasioned by such an accident as that alleged in the declaration as the foundation of the plaintiff's claim.

Also dissenting, *Mr. Justice Nelson*.

Cited—2 Dill., 155; 23 Minn., 466; 56 N. Y., 102; 30 Hun., 222; 85 N. Y., 88; 22 Am. Rep., 594 (66 Me., 523); 34 Am. Rep., 478 (57 Miss., 474); 36 Am. Rep., 526 (15 W. Va., 628); 39 Am. Rep., 643 (85 N. Y., 88); 41 Am. Rep., 326 (74 Mo., 553); 47 Mo., 244; 57 Mo., 96; 41 Wis., 307; 52 Wis., 358.

UNITED STATES, *Appt.*,

v.

GEORGE W. LANE.

(See S. C., 8 Wall., 185-201.)

Contract for Confederate cotton, illegal—seizure of vessel and cargo.

A contract with a treasury agent to deliver to him cotton which was within the lines of the Confederate forces, was illegal, as well as the license for the enterprise given by the military commander.

The vessel and cargo were properly seized for being engaged in illegal trading with the enemy.

Such seizure furnished no ground for a claim of damages against the government.

[No. 196.]

Argued Nov. 8, 1869. Decided Nov. 29, 1869.

APPEAL from the Court of Claims.

This case arose upon a petition filed in the court below, by the appellee, for damages resulting from the alleged wrongful seizure and detention, by the officers of the United States, of a certain cargo of cotton. The court below found in favor of the petitioner, and entered a decree of \$31,626.40. Whereupon the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty-Gen., and T. L. Dickey, Asst. Atty-Gen., for appellant:

1. The voyage was in violation of law and of the contract alleged, and the contracts found by the court to have been made were illegal; the seizure of the naval officers was proper, and the claimant has, therefore, no just and legal cause of complaint.

Upon an examination of the Act of July 18, 1861; the Act of March 12, 1863; the Treasury Regulations of March 31, 1863; the circular letter of Secretary of Treasury of July 3, 1863; the revised Treasury Regulations of Sep. 11, 1863; the Act of July 2, 1864; the Treasury Regulations of July, 29, 30, 1864; the Treasury Regulations of Sep. 24, 1864; and the quo-

tations from the President's Proclamation of Sep. 24, 1864, it will appear plainly that everywhere, commercial intercourse, with those parts of the insurrectionary States which were within the control of the rebels, was absolutely forbidden from the beginning of the war, unless, indeed, it may be in the Act of July 2, 1864, and the Regulations and President's Proclamation made thereunder. Let us examine these and see if really they make any change in this regard. If it were intended, by that Act and the practice under it, to license such trade, it is not so specifically provided, and is manifested only, if at all, by the want of express words of limitation in the Act. It authorizes the purchase for the United States of any products of States declared in insurrection, at such places therein as shall be designated by the Secretary of the Treasury. It does not say expressly that these provisions relate only to products found within the Federal lines, but is not that the fair construction? Such trade with the public enemy is forbidden without statute, according to the rules of war among all civilized nations; and when that non-intercourse had been so often and so fully proclaimed by all the departments of the government from the beginning of the war, are we to construe these general words as changing this policy? This construction, limiting the provisions of this Act to those parts of the States in insurrection which were for the time within our military lines is strengthened by the fact that the prohibitions of the Act of July 18, 1861, were extended by the 4th section of this Act of July 2, 1864, even to commercial intercourse by and between persons residing or being within the lines of national military occupation, in districts declared in insurrection "with each other." It is strengthened, too, by the fact that section 9 of this Act repeals so much of the Act of July, 1861, as made it lawful for the President to license and permit trade by private citizens in such district, even within the Federal lines, except to supply necessities to loyal persons and to authorize persons within the Federal lines to bring to the loyal States products of their own labor, or of freedmen, etc.

This construction seems to be fortified also by the language of Regulation III., of July 30, 1864, Treasury Regulations, which declares (p. 64): "Commercial intercourse with localities beyond the lines of actual military occupation by the United States forces, is absolutely prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States."

Let it be remembered that this Regulation was adopted after the passage of the Act of July, 1864.

2. The United States never contracted with the claimant that its naval officers would not seize and detain his vessel and cotton, and claimant has, therefore, no cause of action which the Court of Claims can, within its jurisdiction, enforce.

The Court of Claims has no jurisdiction in cases arising out of damage to or destruction of property in the Southern States, taken or destroyed by any part of the army or navy.

To bring the case within the jurisdiction of the court, it is, however, alleged in substance

NOTE.—Parol evidence to explain a judgment by showing the issues litigated and decided, and the grounds of decision. See note to *Miles v. Caldwell*, 60 U.S., XVII., 755.

See 8 WALL.

that the United States made a contract with Lane, in effect that his vessel and cargo should not be interfered with nor detained by any part of the army or navy, in this proposed voyage from Chowan River to Norfolk.

By making a contract on behalf of the United States, through agents having lawful authority to make it, no implied contract arises that the Government of the United States will not exercise its general powers, as a government, through its officers, legislative, judicial, or executive, although such exercise of power may interfere with the execution of the contract.

The agent whose action is relied upon in this case, had no lawful authority to bind the government in the manner alleged.

Mr. T. J. D. Fuller, for appellee:

1. Lane was the undisputed owner of 257 bales of cotton, situated upon the Chowan River, prior to and at the making of the contract.

2. He agreed to sell and the United States to buy this cotton. The price to be paid and the place where it was to be delivered was agreed upon by the contracting parties.

3. About the terms of the contract there is no dispute.

4. The law authorized it; the agents of the United States were fully empowered to contract.

5. If Lane had not been interrupted or hindered in the execution of the contract, this court probably never would have heard of this case.

6. The difficulty, if any exists, arises just at that point of time when the naval authorities, under Admiral Porter interfered and took the cotton from the custody of his rightful and lawful propriety.

7. And the question is: what judgment will the law award upon the facts?

By the terms of the statute authorizing the making of this contract, the United States might deliver to the claimant three fourths of the cotton, or pay him the value of three fourths of the cotton, according to the market price in New York on the day of its delivery.

Now, one fourth of the cotton was the property of the United States, at all events. Connecting this fact with the delivery of the cotton to the agent of the United States on board the steamer, and how does the case stand? If Lane were the owner of the cotton until delivery at Norfolk, who was the owner of the one fourth that belonged to the United States?

The case shows that an agent of the United States was on board *The Philadelphia*, to whom the outward cargo was delivered, and it was not to be given up until a certain amount of cotton was delivered to the same agent. The 257 bales of cotton were placed on board the steamer, weighed, marked and delivered, the cotton became, thereby, the property of the United States; the title vested, and Lane's duty thereafter was that of a mere carrier, to deliver the cotton at Norfolk.

Benj. Sales, 247, and authorities cited, ch. 5. Being taken from him by the United States, Lane was prevented from delivering the cotton at Norfolk, Virginia, by the other party to the contract.

"The law considers an offer to perform and a discharge or hindrance of performance by the opposite party, equivalent to a performance.

Chit. Cont., 274; 1 T. R., 638; 8 East, 448; 1 Wils., 115.

Here being a hindrance by the opposite party, it presents to the court the second aspect of the case—a contract executed.

Lane may, therefore, elect to treat the cotton as delivered at Norfolk and the contract as executed according to its terms in the eye of the law, and is entitled to the value of the three fourths on the day it was taken from him, according to Norfolk prices, or, which is the same, New York prices.

The United States derived all the benefits, or might have done so, by receiving the cotton in Newburn, as if it had been delivered at Norfolk, Virginia, the place of stipulation. If the United States afterwards retained the cotton without making sale of it, and its value depreciated in the market, it was at its own risk and not at Lane's.

8. The voyage was legal and regular in all of its details.

The judgment of the Court of Prize between the United States and Lane on this same subject-matter—the steamer *Philadelphia*—is conclusive upon all the world, and estops the United States from calling in question the legality and regularity of the voyage. It was a judgment of a court of competent and exclusive jurisdiction, and binds all the world.

Mr. Justice Davis delivered the opinion of the court:

The object of this suit is to recover damages against the United States for an alleged breach of contract made by the appellee, in December, 1864, with one Risley, who was at the time the Treasury agent at Norfolk, Virginia, for the purchase of the products of the insurrectionary States. The case, as stated by the Court of Claims, is substantially this: that Risley agreed to purchase, and Lane to sell and deliver within a reasonable time, at Norfolk, a large quantity of cotton represented to be on the Chowan River, in North Carolina, for which payment was to be made at the rate of three fourths the sum per pound that similar grades of cotton were worth in New York, on the day of its delivery in Norfolk. In order to carry out this agreement, Lane, alleging himself to be a resident of Baltimore and a loyal citizen of the United States, purchased a steamer at the cost of \$18,000, and having obtained a military safe-conduct for himself, vessel and crew, to bring out the cotton, proceeded to Chowan River, where he purchased and procured a valuable cargo of cotton, which he would have delivered in a reasonable time at Norfolk, if the naval authorities of the United States had not forcibly seized and detained it. In course of time the property was released and restored to Lane; but he suffered a heavy loss in consequence of this detention, as cotton had declined in value, and when sold did not bring the price he could have got for it if he had been permitted to deliver it at Norfolk.

The United States are asked to make good this loss, caused, as is charged, by the wrongful conduct of its naval officers.

It appears, by the findings of the Court of Claims, that Chowan River in North Carolina, the place where the cotton was purchased, was within the lines held by the insurrectionary

forces, and that the military safe conduct protected as well the return as the outward voyage; for Lane was permitted to take out an outward cargo under the supervision of a person styled in the record a sub-agent of the purchasing agent at Norfolk, whose duty it was to retain possession of the cargo until he should have received from Lane, on board the vessel, three times its value in cotton.

In the view we take of this case it is unnecessary to discuss the question—conceding the contract to be lawful—whether the action of the naval authorities could be a ground of claim for damages for a breach of this contract against the United States, because, in our opinion, the contract was unauthorized, and had no power to bind the government.

It appears, by the findings of the Court of Claims, that Chowan River, in North Carolina, the place where the cotton was purchased, was within the lines held by the insurrectionary forces, and that the military safe-conduct protected as well the return as the outward voyage, for Lane was permitted to take out an outward cargo, under the supervision of a person, styled in the record a sub-agent of the purchasing agent at Norfolk, whose duty it was to retain possession of the cargo until he should have received from Lane, on board the vessel, three times its value in cotton.

At the time this contract purports to have been made, this country was engaged in war with a formidable enemy, and by a universally recognized principle of public law, commercial intercourse between States at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease. If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen. But the rigidity of this rule can be relaxed by the sovereign, and the laws of war so far suspended as to permit trade with the enemy. Each State settles for itself its own policy, and determines whether its true interests are better promoted by granting or withholding licenses to trade with the enemy. It being the rule, therefore, that business intercourse with the enemy is unlawful unless directly sanctioned, the inquiry arises, whether there was any law of Congress in force at the time that sanctioned this transaction.

At an early period in the history of the war, Congress legislated on this subject. By an Act passed on the 18th of July, 1861, all commercial intercourse between citizens of States in insurrection and citizens of the rest of the United States was declared unlawful; but liberty was given to the President, in his discretion, to license trade with the enemy if he thought it would conduce to the public interests to do so. In so far, however, as it was licensed by him, the manner of conducting it was left to be regulated by the Secretary of the Treasury. In the administration of this law, we do not find any regulation prescribed by the Secretary of the Treasury allowing commercial intercourse within the rebel lines. On the contrary, the trade regulations which were issued by him on

See 8 WALL.

the 31st of March, 1863, and the 12th of September of the same year, expressly say that commercial intercourse with those parts of the insurrectionary States within the control of the rebels is absolutely forbidden. Has this policy since then been changed? It certainly has, if this proceeding was authorized; for if Risley in his capacity of treasury agent could lawfully contract with Lane, a citizen of a State not in rebellion, to purchase from him cotton in the country of the public enemy, which he did not own or control, but must procure after he got there, and had the power to assist him in this enterprise, by allowing him to take out a cargo of goods to facilitate the purchase of the cotton and to furnish for his protection a sub-agent and a military safe conduct, then it is clear the door was left open for general trading with the enemy. If one citizen of a State not in insurrection could lawfully obtain from a treasury agent the right to transport goods to a place under the control of the insurgents, where he could exchange them for cotton or other products of the country, and could also have safe-conduct to take his property there, and to bring out the property he should buy, with the promise on the part of the agent to protect and purchase it, so could any other citizen—for in this matter equality must be the rule—and in this way it is easy to see a free commercial intercourse with the enemy would be opened, and a radical change effected in the manner of conducting the war. Was this result contemplated by Congress in the Act of July 2, 1864?

It is contended that the 8th section of this Act, which says that it shall be lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States any products of States declared in insurrection, conferred the power to license trading within the military lines of the enemy.

If this were so, and it was the intention of Congress to allow this trading, providing it was done on government account, why was it not manifested by a specific provision in the law? Why leave such an important change of policy to be inferred from the general words of the Act, and the absence of express words of limitation?

That the Secretary of the Treasury, who, it is natural to suppose, having the administration of the law in his hands, was, before it was passed, consulted about it, did not give this interpretation to it, is very clear; for, within a short time after the passage of the Act, he adopted, with the approval of the President, a new series of rules regulating commercial intercourse, which were intended to supersede all others, and the third rule absolutely prohibits all intercourse beyond our military lines, and declares further, "that no permit will be granted for the transportation of any property to any place under the control of the insurgents."

See Treasury Regulations, and Rules for Commercial Intercourse of July 29, 1864.

It is argued, as the regulations which were issued on the 24th of September following, for the express purpose of enforcing that provision of the Act relating to the purchase for the United States of the products of insurrectionary States, do not, in terms, re-adopt this prohibition against non-intercourse, that therefore it

was abandoned. But this does not follow, for there is nothing in these regulations inconsistent with its continuance, and if not expressly revoked it remained in force. Aside, however, from the construction adopted by the Secretary of the Treasury, we are able to see, by reference to other provisions of the same Act, that Congress did not mean to change, by the 8th section, the non-intercourse policy which had prevailed. By the 4th section of this Act the prohibitions of the Act of July 13th, 1861, were extended even to commercial intercourse by and between persons residing, or being within the lines of national military occupation in districts declared in insurrection, "with each other"; and the 9th section repeals so much of the Act of July, 1861, as made it lawful for the President to license and permit trade by private citizens, in such districts, even within the Federal lines, except to supply the actual wants of the loyal people, and to authorize persons within the Federal lines to bring to the loyal States the products of their own labor, or of freedmen, etc.

The incorporation of these sections in the law is irreconcilable with the idea that Congress intended, notwithstanding these prohibitions, to confer power on the Secretary of the Treasury to allow citizens of loyal States on government account to trade within the actual military lines of the insurgents. If this is not the nature of the power conferred, it is asked what authority did Congress intend to give the Secretary, and how was it to be exercised? There is no difficulty in answering these questions and reaching the true meaning of this particular provision, when we consider the entire Act, and the treasury regulations adopted to carry into effect the 8th section, in connection with the history of the times. The law was designed to remedy existing evils. The mischiefs attending private trading with the enemy, even in those parts of the insurrectionary districts which were for the time within our military lines, had been seriously felt in the conduct of the war, and the best interests of the country required that it should cease. It was deemed important, however, to still maintain some species of commercial intercourse with the insurgents, for it is well known that the Government desired to have, if it did not interfere with military operations, the products of the South, and particularly cotton, brought within our lines. To accomplish this end, and at the same time avoid the complications and embarrassments incidental to private trading, required the inauguration of a new system. This was done by withdrawing from the citizen the privilege of trading with the enemy, and allowing the Secretary of the Treasury, with the approval of the President, to purchase through agents, for the United States, any products of States declared in insurrection. The inquiry is made how could these agents purchase these products if private citizens were denied the right of trading in the insurrectionary districts, whether they happened to be within the National or Confederate military lines? It would not do to let the army be used for this purpose, and the only other way left open was to hold out inducements for the insurgents themselves to bring their products to us.

If they could be induced to do this, we would

obtain their products which we needed, and in the manner of obtaining them, would avoid the evils inseparable from private trading. The inducements for the insurgents to pursue this course were very strong, for besides the liability of having their principal product—cotton—confiscated or destroyed, they were, as is well known, in want of many of the necessities of life. They were substantially told in the Regulations of the Treasury Department, "If you will bring your cotton within our lines, we will not only not seize it, but will buy it from you, and you are at liberty to go to the nearest treasury agent in an insurrectionary district to sell it, or if you prefer, you can leave it under the control of some one who can go to the agent and sell it for you." If this were not enough to accomplish the object, the President of the United States, by way of further inducement, in an executive order of the same date with the Treasury Regulations said to them: "You can purchase such articles of merchandise as you need, not contraband of war, to one third of the aggregate value of the products sold by you, and return with them, and I will guarantee you safe-conduct." Why this limited permission to buy, after the delivery of the products unless the privilege was for the benefit of the insurgents? If private persons, living in the loyal States, could engage in a venture like this of the claimant, they would need, as he did, to make the venture remunerative, to take with them a cargo of goods to exchange for Southern products; but there was no authority for this. The permission of the President is limited to the taking of a return cargo, bought with part of the proceeds of Southern products, previously sold and delivered to a purchasing agent of the Treasury Department. Indeed, so particular is the direction on this subject, that the military officer commanding at the place of sale, was not authorized to permit a person who had sold Southern products to buy merchandise, unless he exhibited to him a certificate of the purchasing agent, setting forth the fact of the purchase and sale, the character and quantity of products, and the aggregate amount paid therefor.

Enough has been said, without pursuing this investigation further, to show there is nothing in the act itself, the Regulations of the Treasury Department, or the order of the President, to justify Risley in dealing in the manner he did with Lane. It follows, therefore, that the voyage itself was illegal, as were the contracts and arrangements by which it was undertaken, and that the vessel and cargo were properly seized for being engaged in illegal trading with the enemy.

Although Risley was not authorized in making any contract with a person occupying the *status* of Lane, still, if he were, he could only do it in the manner and for the purposes pointed out in the Treasury Regulations.

By these regulations the purchasing agent could not act at all until the person desiring to sell Southern products made application, in writing, that he owned or controlled them, stating their kind, quality and location, and then the power of the purchasing agent before the delivery of the products was limited to a stipulation (the form is prescribed) to purchase, and to the giving a certificate that such application was made, and requesting safe-conduct for the party and his property.

There is nothing in the petition, or the findings of the court below, to show that Lane complied with these provisions. On the contrary, it is clear from his own statement that he neither owned nor controlled the cotton when he contracted to sell it, but that, after the contract was made, he procured it within the rebel lines. Neither the law, nor the regulations through which it was administered, were intended to protect a speculation of this sort. The purchasing agent had no authority to negotiate even with any one in relation to the purchase of Southern products, unless at the time of the negotiation he either owned or controlled them. See Regulations for the purchase of products of insurrectionary States on government account, of September 24, 1864, and executive order same date.

The Court of Claims find that no proceedings were taken against the cotton, and that it was restored to the claimant, but that the vessel was libeled at the instance of the United States, in the Supreme Court of the District of Columbia, where a decree, with costs, passed in favor of the claimant. It is argued, and was so ruled by the court below, that this decree concludes the United States. But the inquiry arises: how far are the United States concluded by it? The record of the Admiralty Court is not before us, and we only know from the record in this case that that court refused to render a decree of forfeiture against the vessel, and awarded costs against the United States.

On what ground the court put its decision—whether for want of proof, insufficient allegations, or on the merits of the case—we have no means of determining.

It may well be that the United States could not re-seize the vessel, or take further proceedings against the cotton, and yet be at perfect liberty to litigate the right of the claimant to damages, in a direct proceeding brought against them to test that question.

There is nothing in this record to show that the Supreme Court of this District, in decreeing to the claimant the restoration of his vessel, adjudicated on the question of his right to damages. As that court had the power to award damages—and the record is silent on the subject—it is clear, either that the court refused damages, or that the claimant did not insist on the court considering the question.

The United States are, therefore, not concluded on this point, and the case is relieved of all difficulty.

The judgment of the Court of Claims is reversed, and this cause is remanded to that court, with directions to enter an order dismissing the petition.

Cited—15 Wall., 60; 93 U. S., 612; 1 Dill., 382, 578; 1 Wood, 589; 1 Filipp., 312; 60 N. Y., 170; 1 Am. Rep., 148 (100 Mass., 569).

UNITED STATES

v.

J. SMITH SPEED AND DAVID H. DAVIS;

AND

THE UNITED STATES

v.

ROBERT FLOYD.

(See S. C., 8 Wall., 77-85.)

Contract for army supplies—effect of—damages.
See 8 WALL.

The Secretary of War has power to make a contract for the butchering and curing of meat for the government.

The Secretary of War, through the Commissary-General, may authorize a contract for supplies to be made without a resort to the advertisement for bids and proposals directed by the Army Regulations and the Act of March 2, 1861.

The Commissary-General may approve of the contract by letter.

Where the obligation of plaintiffs requires an expenditure of a large sum in preparation to perform it and a continuous readiness to perform, the law implies a duty of the other party to do whatever is necessary to enable plaintiffs to comply with their promise or covenant.

The measure of damages for breach of the contract is the difference between the cost of doing the work and what claimants were to receive for it.

[Nos. 189, 195.]

Argued Nov. 4, 1869. Decided Nov. 29, 1869.

A PPEALS from the Court of Claims.

These cases arose upon petitions filed in the court below, by the appellees, to recover damages for breach of certain contracts. The court below found in favor of the petitioners, and gave judgment for \$19,720.80, in favor of Speed and Davis, and for \$20,298.80, in favor of Floyd. Whereupon the defendants took appeals to this court.

A further statement appears in the opinion of the court.

Messrs. E. R. Hoar, Atty-Gen., T. L. Dick-ey, Asst. Atty-Gen., E. P. Norton, and A. G. Riddle, for appellant:

1. Pork packing and curing bacon is not a business within the scope of the powers of the Secretary of War or his subordinates. The contract is, therefore, not binding upon the United States.

Act of April 14, 1818, 3 Stat., 426, secs. 6, 7.

The statutes speak in all these cases of purchasing, and nowhere speak of manufacturing. Where Congress has intended that the government shall embark in the business of manufacturing any of the material of war, it has made special provision by law for the same.

II. The contract is not binding upon the United States, because it contains no provision for the termination of the contract, at such time as the Commissary General may direct.

Act, Apr. 14, 1818, 3 Stat., 426, sec. 7; *Gratiot v. U. S.*, 4 How., 81.

III. If, in this contract, the want of the provision for its termination at such time as the Commissary-General shall direct, does not vitiate it, it must be held that the contract will be treated as containing the clause, inasmuch as the law requires that it should contain it.

If the contract is regarded as containing this provision, then there is an end of this case; for in that case, it was no violation of the contract for Symonds, with the approbation of the Commissary-General, to terminate the contract at any time.

IV. This contract is not binding upon the United States, because there was no advertisement for proposals before the contract was made.

Act, Mar. 2, 1861, 12 Stat. at L., 220.

The Court of Claims does not find that any public exigency required the immediate delivery of the article or performance of the service. On the contrary, the very nature of the contract shows that immediate delivery or immediate performance was not contemplated. This is an

important question, arising in a great many cases in the Court of Claims; and that court very much desires the decision of this court on that question.

V. Where a contract is made subject to the approval of the Commissary-General, it is not binding on the United States until it is so approved, after the commissary has full knowledge of all the provisions and defects of the contract. It is not sufficient that he be informed substantially of its terms, as the court found in this case. Does this show that the Commissary-General was informed that this contract contained no clause for its termination at his will? Does it show that he was informed that the contract was made privately, without advertisement for proposals, as required by law and the regulations? Is it to be presumed that he ever would have approved such a contract under such facts, if he had been fully advised? It is respectfully submitted that this contract was not approved by him, and on its face it is not binding until that approval be given.

VI. By the terms of the contract, the United States was not bound to furnish to the claimants any given number of hogs. The true construction of the contract is, that claimants agreed to slaughter the hogs presented by the United States, for the price per hundred pounds specified, up to 50,000 hogs.

VII. Assuming the contract to be valid and binding upon the United States, and that it required the United States to furnish 50,000 hogs, and that it could not be terminated by the Commissary-General without the consent of the claimants; still the facts found do not show a statement of case enabling claimants to have an action for a breach of the contract by the United States.

Though claimants incurred large expenditures in preparations for fulfilling their contract, yet it nowhere appears that they completed the necessary preparation to so fulfill the contract, or that they were ever ready, at any time, to slaughter a single hog. True, they kept all "the hands necessary," but it required other things besides hands. The contract specifies "buildings, pens, tools and water," and it does not appear that any one of these things was provided.

The covenants or undertakings in this contract are clearly mutual and dependent; and before claimants can recover for the breach alleged, they must show a readiness, a willingness, and an offer on their part to perform. Nothing of the kind is shown by this record.

VIII. The rule for the measure of damages is not a correct rule, as applied to the tax found.

Claimants, during the whole season, kept the full complement of hands necessary to slaughter the whole 50,000 hogs, but it does not appear that these hands were kept in idleness, or even unprofitably employed. For aught that appears, these very hands and the other expensive preparations, were, in fact, more profitably employed in slaughtering hogs for other parties, which work could not have been performed if the government contract had not been abandoned. In fact, the abandonment of the contract by the government may have been a source of profit to the claimants, rather than a loss.

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Before the true damages, if any, in this case can be assessed, claimants must show the actual surroundings at the time. Nothing having been shown as a basis to which to apply any rule, the claimants were, in any view of the case, entitled to nominal damages only.

Messrs. Hughes, Dence & Peck, and L. Janin, for appellees:

This was one of those particular and urgent cases where the Secretary of War directed that rations should be procured by purchasing hogs and slaughtering and packing them.

It would be an absurd restraint upon the Secretary of War to prohibit him from feeding the Army in this way. Congress never intended to prevent him from exercising such discretion. The law and the regulations define the usual course of proceeding. This case falls expressly within the exception of the statute.

The evidence details the reasons for pursuing this exceptional course. An attempt had been made to forestall the market and compel the Commissary Department to pay extortionate prices for pork.

We insist that (the contract having been made by a duly authorized officer of the government and approved by the Commissary-General): it must be presumed, until the contrary is shown, that they performed their duty, and that the exigencies of the service were such as to justify their action.

The rule is laid down by this court that—

"Where a particular authority is confided in a public officer, to be exercised in his discretion upon an examination of the facts of which he is the appropriate judge, his decision thereon, in the absence of any controlling provision, is absolutely final."

R. R. Co. v. Stimpson, 14 Pet., 448; *Allen v. Blunt*, 3 Story, 742; *Wilkes v. Dinman*, 7 How., 89; *Martin v. Mott*, 12 Wheat., 19; *Gould v. Hammond*, 1 McAll., 235.

This principle is particularly applicable to the case before the court.

Whether the contract was approved by the Commissary-General, is one of the ultimate facts which, by the rules of this court, should be found by the Court of Claims; and it states as one of its conclusions, that "The letter of the Commissary-General was a virtual approval of the contract."

Where the court below states both the evidence and the conclusion drawn from the evidence, you will disregard the evidence and accept their conclusion as to the ultimate facts.

The findings show that Major Symonds informed the Commissary-General of the terms of the contract, and that officer replied, expressing his satisfaction at what had been done. In the absence of any law or regulation requiring his approval to be manifested in any particular method, this was sufficient.

It was not necessary to the validity of the contract, that it should be approved by the Commissary-General. Major Symonds was fully authorized to make the contract. There was nothing in the statutes or the army regulations, or the special instructions given him, which required the insertion of this clause.

It was not a condition precedent that such approval should be had.

Dixon v. Horvill, 4 Bing., 665; *Richards v.*

75 U. S.

Hayward, 2 M. & G., 574; *Dallman v. King*, 4 Bing. (N. C.), 105.

It would be a fraud for the government, by its authorized officers, to pigeon-hole the contract, then treat it as being in full operation, derive all the benefits desired under it, and, when it became convenient to rid itself of liability, to allege its own breach of duty as a ground for annulling it.

A condition may be waived by consent or by act; and a party who does not insist upon the condition at a time when equity and good conscience demand that he should do so, thereby waives its performance.

Fleming v. Gilbert, 3 Johns., 580; *Smith v. Lynes*, 5 N. Y., 41; *Cole v. Champlain Co.*, 26 Vt., 87; *Dixon v. Hovill*, 4 Bing., 665.

It will always excuse the performance of a condition precedent, that the performance was hindered or waived by the other party.

Camp v. Barker, 21 Vt., 469; *Mayor, etc., of N. Y. v. Butler*, 1 Barb., 388; *Mains v. Haight*, 14 Barb., 77; *Smith v. Gugerty*, 4 Barb., 615; *Marshall v. Craig*, 1 Bibb, 384; *Major v. Hickman*, 2 Bibb, 218; *Jones v. Walker*, 13 B. Mon., 163; *Williams v. Bk. of the U. S.*, 2 Pet., 102; *Nelson, J., in Betts v. Perine*, 14 Wend., 219; 1 Story, Const., 37, sec. 32 a.

Upon the facts shown by the finding of the court, the law presumes that certain damages follow.

If there were any exceptional circumstances in this case, it would devolve upon the defendant to show them. The rule laid down by the court, if erroneous, is an error in favor of the appellant.

Masterson v. Mayor, etc., 7 Hill, 62; *R. R. Co. v. Howard*, 13 How., 344; *Chamberlin v. Scott*, 33 Vt., 80; *Royalton v. Turnpike Co.*, 14 Vt., 311; *Clark v. Mayor, etc.*, 4 N. Y., 338; *Story v. N. Y. & N. H. R. R. Co.*, 6 N. Y., 85; *Durkee v. Mott*, 8 Barb., 423; *Clark v. Mariglia*, 1 Den., 317; *Shannon v. Comstock*, 21 Wend., 457; *Hoy v. Gronoble*, 34 Pa., 9; *Miller v. Mariner's Church*, 7 Me., 51; *Shaw v. Nudd*, 8 Pick., 13; *Swift v. Barnes*, 16 Pick., 196; *Haggin v. Price*, 8 Dana, 48; *Thompson v. Jackson*, 14 B. Mon., 114; *Western v. Sharp*, 14 B. Mon., 177; *Pulm v. R. R. Co.*, 18 Ill., 217; *Christian Co. v. Overholt*, 18 Ill., 223; *George v. R. R. Co.*, 8 Ala., 234; *Cunningham v. Dorsey*, 6 Cal., 19; *Dibol v. Minott*, 9 Ia., 403; *Tait v. Sherman*, 10 Ia., 60; *Hudley v. Bazendale*, 9 Exch., 533.

Mr. Justice Miller delivered the opinion of the court:

The appellees sued in the Court of Claims, on a written contract signed by themselves and by Major Henry C. Symonds, Commissary of Subsistence, on behalf of the United States, by which they agreed, at a fixed price, to slaughter and pack for the government fifty thousand hogs at Louisville. The live hogs, the cooerage, salt and other necessary materials were to be delivered to claimants, and they were to do the work of slaughtering and packing. The government furnished 17,182 hogs, which were killed and packed and this service paid for; and failed to furnish any more. This suit was brought to recover damages for that failure; and the Court of Claims gave judgment in favor of claimants for \$19,720.80.

See 8 WALL.

The counsel for the appellant urges eight separate objections to this judgment, which we must notice in the order they are presented.

1. Pork-packing and curing bacon is not a business within the scope of the powers of the Secretary of War, or his subordinates.

If by this is meant that the War Department has no authority to enter into the business of converting hogs into pork, lard and bacon, for purposes of profit or sale as individuals do, the proposition may be conceded. But, if it is intended to deny to the department this mode of procuring supplies when it may be the only sufficient source of supply for the army, the proposition is not sound. The Commissary Department is in the habit, and always has been, of buying beef cattle and having them slaughtered and delivered to the forces. Is there no power to pay the butchers who kill for their services? That is just what the claimants contracted to do with the hogs which the government had purchased of other parties, and it is for this butchering and curing the meat that the government agreed to pay. The proposition places a construction altogether too narrow on the powers confided to the War Department in procuring subsistence, which in time of war, as this was, must lead to great embarrassment in the movement and support of troops in the field.

2. The contract is not binding, because it contains no provision for terminating it at the discretion of the Commissary General.

This objection is based on Rule 1179 of the Army Regulations of 1863. But that has reference to contracts for the regular and continuous supply of subsistence stores, and not to contracts for services or labor, and it is required because the post or force to be supplied may be suddenly removed or greatly diminished. It has no application to a contract for a certain amount of supplies, neither more nor less, or to do a specific job of work requiring skilled labor. While the Commissary might have insisted on a provision in this contract that he should only be required to pay for packing as many hogs as he chose to furnish, for which he might in that event have been charged a higher price, he did not do so, and cannot have the benefit of it as though he had.

3. This answers also the third point, namely: that the agreement is to be treated as though that provision were in it.

4. That it is not binding on the United States, because there was no advertisement for proposals to contract.

This objection is founded on the Act of March 2, 1861. 12 Stat. at L., 220.

But that statute, while requiring such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance.

It is too well settled to admit or dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise. *Phil. & T. R. R. Co. v. Stimson*, 14 Pet., 448; *Martin v. Mott*, 12

Wheat., 119; *Royal British Bk. v. Turquand*, 6 Ell. & Bl., 327; *MacLae v. Sutherland*, 25 Eng. L. & E., 114; *Ross v. Reed*, 1 Wheat., 483.

5. The contract was not approved by the Commissary-General.

The agreement contains a provision that it is subject to the approval of that officer. The Court of Claims finds that, while no copy of the agreement was presented to the Commissary-General for formal approval, Major Symonds wrote him a letter informing him substantially of its terms, to which he replied, expressing his satisfaction at the progress made; and the court further finds as a conclusion of law that the letter of the Commissary-General was a virtual approval of the contract. We are of opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer; and inasmuch as neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did.

6. That by the terms of the contract the United States were not bound to furnish any given number of hogs.

Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant. But the last article of the agreement seems to be an express promise to furnish all the hogs mentioned in the contract.

7. That plaintiffs have not proved that they were ready and willing to perform.

But the Court of Claims find this readiness, for they say that "claimants incurred large expenditures in preparation for fulfilling their contract, and during the whole season kept the full complement of hands necessary to have slaughtered the whole 50,000 within the customary season."

8. The rule for the measure of damages is not the correct rule as applied to the facts.

What would be the true rule is not pointed out. And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.

The leading case on this subject in this country is *Masterton v. Brooklyn*, 7 Hill, 62, and that fully supports the proposition of the Court of Claims. This opinion also disposes of the case of *The United States v. Robert Floyd*, which is on a contract identical with this; and the judgments in both cases are affirmed.

Cited—80 N. Y., 47 (42 Am. Rep., 28).

THE BALTIMORE & OHIO R. R. COMPANY, Pfg.

THE SUPERVISORS OF MARSHALL COUNTY.

Motion, to dismiss for want of jurisdiction, denied—when cause will not be advanced on the docket.

This court has jurisdiction to determine the question as to whether the circuit court has jurisdiction of the case.

A cause, which does not come within any of the exceptions to the 30th rule, although it involves important interests, will not be advanced on the docket.

[No. 267.]

Argued Dec. 10, 1869. Decided Dec. 13, 1869.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of West Virginia.

On motion to dismiss, etc.

The bill in this case was filed in the court below by the plaintiffs for an injunction against the collection of certain taxes. That court being equally divided in opinion certified the case to this court.

The case is further stated by the court.

Messrs. B. Stanton and D. Lamb, for defendants.

Messrs. J. H. B. Latrobe and J. R. Tucker, for plaintiffs.

Mr. Chief Justice Chase delivered the opinion of the court:

The motion, to dismiss this case for want of jurisdiction, must be denied.

It comes here upon a certificate of division of opinion; and the principal point certified is, whether the circuit court has jurisdiction. It is quite clear that this court has jurisdiction to determine that point.

A motion has also been made to advance the cause upon the docket on the ground that very important interests of the State of West Virginia are involved in the litigation.

The case, however, does not come within any of the exceptions to the 30th rule, which requires that all cases shall be heard when reached in the regular call of the docket, and in the order in which they are entered.

We are obliged, therefore, to deny the motion.

O. B. & O. S. LATHAM, Appls.,

UNITED STATES.

Case not dismissed because appeal not allowed within statutory time, if the prayer for appeal was made within that time.

Where the prayer for the allowance of an appeal was within the statutory time, ninety days, the case will not be dismissed for the reason that the appeal was not allowed within that time.

The order allowing the appeal has relation back to the date of the prayer for allowance, and will be considered as made on that day.

[No. 6.]

Argued Dec. 8, 1869. Decided Dec. 13, 1869.

APPEAL from the Court of Claims.

On motion to dismiss.

The petition in this case was filed in the court below by the appellant, to recover a balance alleged to be due them on a contract, being for the difference in value between a certain sum in coin and in legal tender notes.

The petition having been dismissed, the claimants took an appeal to this court.

The case is stated by the court.

Messrs. E. R. Hoar, Atty. Gen., Thomas H. Talbot, Asst. Atty. Gen., E. P. Norton, and J. J. Weed, for appellees.

Messrs. J. M. Carlisle, J. D. McPherson, and L. S. Chatfield, for appellants.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion to dismiss the appeal from the judgment of the Court of Claims, on the ground that it was not allowed within the ninety days fixed by the statute.

And it appears that the order of allowance was not made within the statutory time. But it also appears, on examination, that the prayer for allowance was within the time, and we have heretofore held that the order allowing the appeal must have relation back to the date of the prayer for allowance, and be considered as made on that day.

The motion must, therefore, be denied.

FRANCIS A. GIBBONS, *Appt.*,

v.

UNITED STATES.

(See S. C., 8 Wall., 269-276.)

Government contract—Court of Claims—jurisdiction of.

Where one had made a contract with Government to deliver to it a certain quantity of oats and, after a delivery of part, tendered the remainder, he may recover in the Court of Claims for any damage which he has sustained for a refusal to receive them.

Where oats had risen in the market, above the contract price at the time of the tender, the presumption is that he was benefited instead of injured by the refusal to accept the oats when offered.

Government is not liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.

The jurisdiction of the Court of Claims is limited to claims founded on contracts, express or implied, with certain unimportant exceptions.

The Court of Claims has no jurisdiction of demands against the Government founded on torts.

[No. 50.]

Argued Nov. 16, 1869. Decided Dec. 13, 1869.

A PPEAL from the Court of Claims.

The petition in this case was filed by the appellant in the court below, to recover various sums alleged to be due him for damages arising out of transactions connected with the breach of a contract for furnishing oats to the United States. The said court having refused to allow one item of the said claim, the claimant took an appeal to this court.

The case is fully stated by the court.

Messrs. Reverdy Johnson and A. L. Merriman, for appellant:

The claimant was not under a continuing ob-

See 8 WALL.

U. S., Book 19.

ligation, and as he had made a reasonable offer which was improperly refused, that put an end to the contract, and he was released from his obligation by the conduct of the Government. In case of the delivery of the article subsequent to the termination of the original contract, such delivery is under a new contract that may be made, and in case no express contract is made as to the price, there would be an implied one on the part of the purchaser, to pay for such articles the market value, at the time and place of delivery, unless there was an agreement to sell at the prices specified in the agreement then at an end.

In this case it is not pretended that any such agreement was made; on the contrary, the plaintiff insisted that the contract was at an end, and the fact that he made the delivery of oats required under a supposed personal arrest and under the threat of withholding the money due to him upon oats previously delivered, rebuts the presumption of a voluntary delivery under the terms of the extinct contract.

The Government cannot take advantage of the many doings of its agents, in fixing the terms of contract.

Messrs. R. Hoar, Atty. Gen., T. L. Dickey, T. H. Talbot, and A. G. Riddle, for appellee:

In refusing to give judgment for this sum or any part thereof, there was no error on the part of the Court of Claims, the conclusion of law stated in the following extract being entirely correct:

"The officers who threatened him, had no authority to compel him to deliver the oats; and the threats used were superserviceable and improper. If he was so unwise as to submit to the unauthorized menaces of the quartermaster, he must take the consequences. Hence, he cannot recover the difference in price between that named in the contract and that ruling in the market after its expiration.

Besides the reason here given for refusing this allowance, is the additional reason, that the facts found leave open to the appellate court, the inference that the whole matter had been voluntarily settled by a payment in full."

U. S. v. Adams (ante, 249).

Accordingly, the case should now be disposed of by a mandate to the Court of Claims, to reverse the judgment in favor of the claimant and dismiss the petition. The appeal being general, brings up for consideration the whole judgment.

Mr. Justice Miller delivered the opinion of the court:

The facts found by the Court of Claims show, that under the original contract between the plaintiff and the United States the plaintiff had delivered part of the 200,000 bushels of oats which he had agreed to deliver and had tendered the remainder, and that the quartermaster to whom they were properly tendered had refused to receive them. If the plaintiff suffered any loss by that refusal, he is entitled to recover for it in this action. But the only items of his account which refer to this part of the transaction were allowed to him by the court, except the claim of \$400 damages for failure to accept the oats, and there is no evidence that he lost anything by this refusal. On the contrary, it appears that oats had risen in the market above

the contract price, so that the presumption is that he was benefited instead of injured by the refusal of the officer to accept the oats when offered.

But after all this had passed and the time for delivering the oats had expired, the quartermaster in charge of the matter demanded of the plaintiff that he should still furnish the quantity of oats necessary, with what had been received, to complete the 200,000 bushels at the price stipulated in the original agreement. The plaintiff objected to this at first, but finally yielded and delivered the remainder of the oats.

Not content, however, with the price fixed by the contract, he now claims that oats had advanced in the market, and were worth, at the time of this latter delivery, 8½ and 12 cents per bushel more than that price, and for the amount of this difference, with some other matters, he asks judgment.

It is very clear that but one contract was ever made in this case, and that the plaintiff was absolved from this by the refusal of the quartermaster to receive the oats when tendered. But, from whatever motive he may afterwards have consented to renew that agreement and proceed to its fulfillment, its terms were the same. If such pressure was brought to bear on him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable. If the plaintiff's consent was voluntary, then the contract to which he assented was binding, and must control the case. The quartermaster treated the contract as still in force, and his demand on the plaintiff was made under that idea. In this he was wrong. But the plaintiff had his option to concur in this view and deliver the balance of the oats, or to refuse to deliver any more.

Though the Court of Claims finds that the plaintiff, when he consented to deliver, had gone to that officer's quarters in company with an orderly, which he considered as an arrest, the court does not find an arrest, nor the use of any force against his person. Nor does the petition of the plaintiff say anything about an arrest, or force, or duress. That he feared the officer might buy the oats in the market and hold back the difference in price from the money due for oats already delivered, does not invalidate the contract which he consented to fulfill to avoid that result. He could still have refused, and the Government would have paid him what it owed him.

The supposition that the Government will not pay its debts, or will not do justice, is not to be indulged. Still less can it be made the foundation for a claim of indemnity against loss incurred by an individual by acting on such a suggestion.

But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.

In the language of *Judge Story*, *Story, Ag.* sec. 819, "It does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." *U. S. v. Kirkpatrick*, 9 Wheat., 720; *Dox v. P. M. Gen.*, 1 Pet., 318; *Conwell v. Voorhees*, 13 Ohio, 528.

The creation by Act of Congress of a court in which the United States may be sued, presents a novel feature in our jurisprudence, though the Act limits such suits to claims founded on contracts, express or implied, with certain unimportant exceptions. But in the exercise of this unaccustomed jurisdiction, the courts are embarrassed by the necessary absence of precedent and settled principles by which the liability of the Government may be determined. In a few adjudged cases where the United States was plaintiff, the defendants have been permitted to assert demands of various kinds by way of set-off, and these cases may afford useful guidance where they are in point. The cases of *U. S. v. Kirkpatrick*, 9 Wheat., 720, and *Dox v. Postmaster-General*, 1 Pet., 318, are of this class, and establish the principle that even in regard to matters connected with the cause of action relied on by the United States, the Government is not responsible for the laches, however gross, of its officers.

The language of the statutes which confer jurisdiction upon the Court of Claims, excludes, by the strongest implication, demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. *Nichols v. U. S.* [*ante*, 122].

In the absence of adjudged cases determining how far the Government may be responsible on an implied *assumpsit* for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases present strong appeals to the courts to indemnify the suffering individual at the expense of the United States.

These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.

Judgment affirmed.

Cited—91 U. S., 308; 93 U. S., 257; 95 U. S., 518; 101 U. S., 346; 106 U. S., 239, 241, 444; 41 Am. Rep., 441 (96 N. C., 51).

A. S. KING, A. BUTLER AND C. THUR-
LOW, *Libts. and Appts.*.

v.

THE PROCEEDS OF THE SALE OF THE
PROPELLER LADY FRANKLIN.

(See S. C., "*The Lady Franklin*," 8 Wall., 325-329.)

*Bill of lading, how far explainable by parol—
given for goods not shipped.*

In so far as a bill of lading is a contract, it cannot be explained by parol evidence.

But if a contract, it is also a receipt, and in that regard it may be explained, especially when it is used as the foundation of a suit between the original parties to it.

The obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the custody of the master.

Where a bill of lading was given by mistake for goods not actually shipped, there can be no lien for non-delivery of the goods, notwithstanding the bill of lading.

[No. 56.]

Argued Nov. 16, 1869. Decided Dec. 13, 1869.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

A libel in admiralty was filed in this case in the District Court of the United States for the Northern District of Illinois, by the appellants, to recover for a certain lost cargo. A decree having been entered for the respondent, the libelants took an appeal to the circuit court, by which the said decree was affirmed. Thereupon the said libelants took a further appeal to this court.

The case is fully stated by the court.

Mr. Robert Rae, for appellants:

The signing of the bills of lading by the authorized agent of the vessel, after delivery of the property into his possession and control, binds the vessel and has the same force and effect as if signed by the master.

Rawls v. Deahler, 8 Keyes, 577; *Dows v. Green*, 24 N. Y., 688; *The Emma Johnson*, 1 Sprague, 527; *Cocoa River St. Co. v. Barclay*, 30 Ala., 120; *Putnam v. Tillotson*, 13 Met., 517.

In the case at bar, the agent always signed the bills of lading, the master never.

The owner of the vessel is estopped—as against the consignee of the bill of lading,

when he has taken it for a valuable consideration upon the faith of the acknowledgments which it contains—to deny the truth of the statements to which he has given credit by the signature of his agent, so far as these statements relate to matters which are or ought to be within his knowledge.

Sears v. Wingate, 3 Allen, 103; *Ward v. Whitney*, 3 Sandf., 899; *Sutton v. Kettell*, 1 Sprague, 309; *The Henry*, 1 Blatchf. & H., 465; *Buller v. The Arrow*, 1 Newb., 59; 1 Pars. Ship. & Adm., 190, and n. 4.

In this case, the consignee advanced on the faith of the bill of lading.

The defendant entrusted Sanderson, the shipper, with the bills of lading after the receipt of the property, and gave him the *indicia* of title. Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

Lickbarrow v. Mason, 2 T. R., 63; *Rawls v. Deahler*, 8 Keyes, 575. This case is directly in point.

In courts of admiralty, like courts of law, parol testimony cannot be received to contradict the terms of a bill of lading. 8 Greenl., sec. 402.

Nor can courts of admiralty exercise chancery powers to reform maritime contracts.

Andrews v. Essex Ins. Co., 3 Mas., 7; *Kynock v. The Ives*, Newb., 205; *The Perseverance*, 1 Blatchf. & H., 389.

When a written contract is attacked on the ground of containing some material mistake, the mistake must be established by strong, irrefragable evidence." One witness on each side, directly contradicting the other, is not in itself sufficient.

Langley v. Brown, 2 Atk., 203; *Henkle v. Ins. Co.*, 1 Ves., 318; *Shelburne v. Inchiquin*, 1 Bro. Ch., 34; Ad. Eq., star p. 171.

The custody and control of the agents of the vessel over the cargo is the foundation of the reciprocal liens of the vessel to the cargo, and cargo to the vessel. *Bulkeley v. Steam Cotton Co.*, 24 How., 898 (65 U. S., XVI., 602).

Messrs. Goodwin, Larned & Towle, for appellee:

The facts in this case negative any liability

NOTE.—*Bill of lading, how far may be varied or explained by parol.*

A bill of lading is a receipt and a contract. So far as it is a receipt, it is open to explanation by parol between the original parties. *The Delaware*, 81 U. S. (14 Wall.), 601; *O'Brien v. Gilchrist*, 34 Me., 554; *Canero v. Welsh*, 1 Pa. Leg. Gaz. R., 121; *Bates v. Todd*, 1 M. & Rob., 108; *The J. W. Brown*, 1 Bias, 76.

As a contract, a bill of lading cannot be altered by parol any more than any other contract. *Barber v. Brace*, 3 Conn., 9; *Wolfe v. Myers*, 3 Sandf., 7.

Parol evidence cannot be received to vary in any manner a bill of lading in its character of a contract. *White v. Van Kirk*, 25 Barb., 16; *C. & C. R. E. Co. v. Pontius*, 19 Ohio St., 221; *Shaw v. Gardner*, 12 Gray, 428; *Cox v. Peterson*, 30 Ala., 608.

An ambiguity in it may be explained by parol. *Barnard v. Kellogg*, 77 U. S. (10 Wall.), 383; *Chouteau v. Leech*, 18 Pa. St., 224; *Rus. St. Nav. Co. v. Silva*, 13 C. B. N. S., 616; *Butler v. The Arron*, Newb., 59.

The receipt in the bill is open to explanation between master and shipper, but master cannot explain it as against a consignee or assignee in good faith who took it for value, relying upon its statements, by denying statements in it which ought to be known by him; nor can owners, where master cannot, when master acted within his authority. It is not within general scope of master's authority

to receipt for goods not received. *Sears v. Wingate*, 3 Allen, 103; *Sutton v. Kettell*, 1 Sprague, 309; *Ward v. Greer*, 8 Watts., 424; *Dickenson v. Seelye*, 13 Barb., 102.

A bill of lading signed by carriers containing such words as "in good order," or "well conditioned," is *prima facie* but not conclusive evidence that goods were at time of delivery in good condition, and throws burden of proof on carrier to show goods were not so when delivered to him. *Tarbox v. Eastern Steamboat Co.*, 50 Me., 830; *The Columbus*, 3 Blatchf., 621; *Ill. R. R. Co. v. Cowles*, 25 Ill., 116; *Hastings v. Pepper*, 11 Pick., 41; *The California*, 2 Sawy., 12; *Price v. Powell*, 3 N. Y., 322; *Nelson v. Woodruff*, 66 U. S., XVII., 97; *English v. Ocean St. Nav. Co.*, 2 Blatchf., 425; *Smith v. N. Y. C. R. R. Co.*, 43 Barb., 225.

If receipt or bill of lading allows forwarding by any carrier, evidence of oral instructions to forward a particular way is not competent against the carrier. *Hinckley v. N. Y. C. R. R. Co.*, 56 N. Y., 429.

A clean bill of lading imports a contract that goods are to be stowed under deck. Under such a bill parol evidence of a contract that they were to be stowed on deck is inadmissible. *Baltimore, etc., St. Co. v. Brown*, 64 Pa. St., 77; *The Delaware*, 81 U. S. (14 Wall.), 576; *The Wellington*, 1 Bias, 279; *The Petona*, Ware, 641. If it stipulates that part may be carried on deck, oral evidence of consent that rest be so

in rem or lien upon the vessel. A maritime contract of affreightment, which shall bind the vessel to the merchandise for the due performance of the contract, commences only with the delivery of the goods on board, or on a lighter or barge belonging to and controlled by the boat, or into the custody of some officer of the boat, to be carried on board. No such delivery of the flour is shown in this case. Courtenay was the warehouseman, and received the flour in store as such. He held it as such warehouseman, like any forwarding merchant, *pro hac vice* the agent of the shippers to forward the merchandise by some of the boats of that line. In fact he had forwarded this flour by The Antelope and Water Witch.

Ang. Car., 2d ed., sec. 129; *The Freeman v. Buckingham*, 18 How., 182 (59 U. S., XV., 841).

The cases cited in Westminster Hall sustain this principle.

Grant v. Norway, 2 Eng. L. & E., 387; *Hubersty v. Ward*, 18 Eng. L. & E., 551; *Coleman v. Riches*, 20 Eng. L. & E., 328.

The same principle is laid down in the subsequent cases.

Vanderwater v. Mills, 19 How., 82 (60 U. S., XV., 554); *Bulkeley v. Cotton Co.*, 24 How., 886 (65 U. S., XVI., 599).

So far as the fact of the receipt of goods or the quantity received is concerned, the bill of lading is in the nature of a receipt; not conclusive between the ship-owner and the shipper, but open to explanation and evidence of the real facts.

Abb. Ship., 7th Am. ed., 324 m; 1 Pars. Mar. L., 137, n. 2, and cases cited; *The Freeman v. Buckingham*, 18 How., 182 (*supra*); 1 Greenl. Ev., sec. 305.

The paper on which the libelants rely, called a bill of lading, is in fact a memorandum receipt given by Courtenay's clerk by mistake. Although not designed in fraud, it was false in fact. No such flour was then in the warehouse, and none was received by the boat. The actual bill of lading of The Lady Franklin did not pretend it.

There is no question of *bona fide* purchase in this case. The facts rebut it. The libel itself claims that Sanderson shipped this flour as the

agent of the libelants. The libelants were then the real shippers.

Mr. Justice Davis delivered the opinion of the court:

The libel in this case alleges that the libelants, in the month of November, 1863, by their agent, Edward Sanderson, caused to be delivered at Milwaukee, to the steamer Lady Franklin, 340 barrels of flour, to be transported to Port Sarnia, on the St. Clair River, for which shipment they received a bill of lading; but that 290 barrels of the flour were never delivered, and as a consequence of this state of things, they claim a maritime lien on the vessel for the value of this flour.

The answer denies that the flour in controversy was ever delivered to the master or shipped on board the steamer.

The facts in the case which raise the questions to be decided are few and not seriously controverted. There was in 1863, a line of steamers engaged in the lake service from Milwaukee to Port Sarnia, and running in connection with the Grand Trunk Railway—of which The Lady Franklin was one; but each boat had separate owners and there was no joint undertaking that any one of the boats should be responsible for the breach of a contract or misconduct of another. This line of steamers had a particular warehouse in Milwaukee, owned by Goodrich, at which they stopped and which was used to receive and store freight for them, of which Courtenay was agent, who also acted as agent for the boats in engaging and shipping freight. The cargo of flour in dispute was received by Courtenay for the libelants, through Sanderson, their agent, with an agreement to ship it for them on one of this line of steamers; and in point of fact, fifty barrels were shipped on The Antelope, one of the line, and received by the libelants. The remaining 290 barrels, for which the lien is claimed on The Lady Franklin, were also shipped on the 7th of November by The Water Witch, another boat in the same line, and consigned to the libelants, but were not received by them because the boat foundered at sea. Notwithstanding these shipments, a clerk in the warehouse, under Courtenay, in the absence of

carried is not admissible. *Sayward v. Stevens*, 3 Gray, 97.

Usage of a particular trade to so carry is competent. *Baxter v. Leland*, 1 Blatchf., 528.

Evidence of an agreement for particularly careful stowage under deck may be competent. *The Star of Hope*, 2 Sawy., 15.

If bill of lading stipulates for the most direct route it cannot be varied by evidence of previous oral agreement allowing deviation. *Stapleton v. King*, 38 Iowa, 28; S. C., 11 Am. Rep., 109.

Bill of lading or receipt does not exclude oral evidence of instructions not inconsistent with it. *Blossom v. Griffin*, 13 N. Y., 589.

Except as against *bona fide* transferee of bill of lading for value, carrier may contradict delivery of goods to him, their description, quantity or condition. *The Freeman v. Buckingham*, 59 U. S., XV., 84; *Dickerson v. Seelye*, 12 Barb., 99; *Sutton v. Kettell*, Sprague, Dec., 307; *Hale v. Milwaukee Dock Co.*, 29 Wis., 482; S. C., 9 Am. Rep., 603; *Backus v. Marengo*, 6 McLean, 487; *Graves v. Harwood*, 9 Barb., 477; *Goodrich v. Norris*, Abb. Adm., 196; *Brown v. Powell*, D. St. Coal Co., L. R., 10; C. P., 532; S. C., 14 Moaks Eng. R., 420; *Farm's & C. B'k v. Champlain Trans. Co.*, 23 Vt., 186; *Knox v. Rives*, 14 Ala., 249; *Tarbox v. Eastern Steamship Co.*, 50 Me., 339; *Price v. Powell*, 8 N. Y., 222; *Ellis v. Willard*, 9 N. Y., 529; *Manning v. Hoover*, Abb. Adm., 188.

Oral agreement as to what was to be done with goods after reaching *terminus* named in bill of lading may be shown. *Balt. & C. Steamship Co. v. Brown*, 54 Pa. St., 77; *Hooper v. Chicago & Nev. R. Co.*, 27 Wis., 81; S. C., 9 Am. Rep., 439.

Bill of lading making no mention of time cannot be varied by oral agreement as to time; but evidence of usage is competent. *Higgins v. U. S. Mail Steamship Co.*, 8 Blatchf., 222; *Cochran v. Retberg*, 3 Esp., 121.

The legal presumption is that the stipulations of a bill of lading or receipt providing against liability from fire or perils of the sea were, in the absence of fraud, concealment or improper practice, known and assented to by the consignor. *Steers v. Liverpool, & C. Steamboat Co.*, 57 N. Y., 1; S. C., 15 Am. Rep., 443; but see 15 Am. Rep., 457, note.

It is a special contract binding on the consignor whether he reads the contract or not. *Belger v. Dinsmore*, 51 N. Y., 166; S. C., 10 Am. Rep., 575; *Huntington v. Dinsmore*, 4 Hun, 55; *Kirkland v. Dinsmore*, 62 N. Y., 171; *Soumet v. Nat'l. Express Co.*, 66 Barb., 224; *Grace v. Adams*, 100 Mass., 505; S. C., 1 Am. Rep., 181; *King v. Woodbridge*, 34 Vt., 571; *Cincinnati, & C. R. Co. v. Pontius*, 19 Ohio St., 221; S. C., 2 Am. Rep., 391; *Simonds v. Paine*, 6 H. & N., 709; *Boorman v. Am. Ex. Co.*, 21 Wis., 152; *Van Toll v. South Eastern Ry. Co.*, 12 C. B. N. S., 75.

Courtenay, in ignorance that the flour had been previously shipped on The Antelope and Water Witch but supposing it still in the warehouse for shipment, by mistake gave to Sanderson the bill of lading attached to the libel.

The attempt made in the prosecution of this libel, to charge this vessel for the non delivery of a cargo, which she never received and, therefore, could not deliver, because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here.

Courtenay was a warehouseman in Milwaukee, and, although he acted as agent for the different steamers of the Grand Trunk line, he did not receive the flour to be sent by one particular steamer in preference to another. His engagement had this meaning, and nothing more: to forward the flour with all practicable expedition, by the first suitable steamer of the line which arrived in port that would carry it. Having actually shipped it in good condition in advance of the arrival of The Franklin in port, by seaworthy steamers, against which nothing is alleged, he discharged his obligations to the libelants. It would be strange, indeed, if the owners of The Franklin were made to suffer, because the common agent of all the boats had, through inadvertence, given a receipt for merchandise not on the boat, or in the warehouse even, but which was then on board other boats, on its way to its destination. The case is not embarrassed by any question of a *bona fide* purchase on the strength of the bill of lading, for the libelants themselves were the real shippers. Such is the claim in the libel, and it is supported by the evidence, for Sanderson swears the flour belonged to the libelants, on its delivery at the warehouse. In so far as a bill of lading is a contract, it cannot be explained by parol; but if a contract, it is also a receipt, and in that regard, it may be explained, especially when it is used as the foundation of a suit between the original parties to it—the shippers of the merchandise, and the owner of the vessel.

The principle is elementary, and needs the citation of no authority to sustain it.

In this case the bill of lading acknowledges the receipt of so much flour, and is *prima facie* evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony.

The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of *The Freeman v. Buckingham*, decided by this court, 18 How., 192 [59 U. S., XV., 345], is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and the court held in that case that there could be no lien, notwithstanding the bill of lading.

The court say, "There was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security."

The judgment of the Circuit Court is affirmed.

Cited—35 Am. Rep., 380 (70 Me., 290).

See 8 WALL

THE UNITED STATES EXPRESS COMPANY, *Piff. in Err.*,

v.

KOUNTZE BROTHERS.

(See S. C., 8 Wall., 342-354.)

Nebraska court—avertment of citizenship—what sufficient—question not raised below—express company liable for robbery—omission to charge jury not error.

On Nebraska being admitted as a State, civil cases of a Federal character and jurisdiction were transferred from the territorial to the circuit court.

An averment that the plaintiffs were a firm of natural persons, associated together for the purpose of carrying on the banking business in Omaha, is equivalent to saying that they had their domicile there.

An averment that the defendant is a foreign corporation formed under and created by the laws of the State of New York, means that the defendant is a citizen of the State of New York.

Where no question is made in the court below in regard to the citizenship of the parties, it cannot be made here.

Where there were two routes for sending goods by express, the one safe and the other hazardous, and yet the Express Company, in defiance of the wishes of the owner of the goods, rejected the safe and adopted the hazardous route and the goods were lost by robbery, the Company is liable.

The mere omission to charge the jury on some one of the points in a case, without any request to the court on the subject, cannot be assigned for error.

[No. 77.]

Argued Dec. 13, 1869. Decided Dec. 13, 1869.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

An action was brought by the defendants in error, in a District Court of the Territory of Nebraska, to recover from defendant as common carriers, the value of certain gold dust. The case was subsequently transferred to the Circuit Court of the United States for the District of Nebraska, in which court judgment was given for the plaintiffs; whereupon the defendant sued out this writ of error.

For a part of its defense in the court below, the defendant relied upon the following special contract, viz:

"United States Express Company, Omaha, N. T., Sept. 29, 1867. Received of Kountze Brothers, one package said to contain gold dust, valued at thirty-five hundred dollars, and marked 'Drexel & Co., Philadelphia, Pennsylvania,' which we undertake to forward to the nearest point of destination reached by this company, only perils of navigation excepted; and it is hereby expressly agreed that said United States Express Company are not to be held liable for any loss or damage, except as forwarders only; not for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof be herein stated, or for any loss or damage by fire; the acts of God or the enemies of the government; the restraints of government mobs, riots, insurrections, or pirates; or from any of the dangers incident to a time of war; nor upon any property or thing unless properly packed and secured for transportation; or upon fragile fabrics, unless so marked upon the

NOTE.—From what liability a contract that a common carrier is not to be responsible for loss or damage, will exonerate. See, note to New Jersey St. Nav. Co. v. Merch. Bk., 47 U. S. (6 How.), 344.

package containing the same; nor upon any fabrics consisting of, or contained in glass.

For the proprietors.

S. B. WOOLWORTH, JR., Agent for Barkalow."

The case is fully stated by the court.

Messrs. Porter, Lourrey, Soren, J. M. Woolworth, and J. Hubley Ashton, for plaintiff in error:

1. The 2d section of the Act of Feb. 22, 1848 (9 Stat. at L., 212), did not authorize the transfer or removal of this case from the court of the Territory of Nebraska, in which it was instituted, to the Circuit Court of the United States for the District of Nebraska.

That section of the Act of 1848 declared that the provisions of the Act of Feb. 22, 1847, shall apply to all cases which may be pending in the Supreme or other Superior Court of any Territory of the United States which may be admitted as a State, at the time of its admission.

The 8th section of the Act of Feb. 22, 1847 (9 Stat. at L., 180), provides that "In all cases of Federal character and jurisdiction commenced in said Territorial Courts (Superior Courts of Territory of Florida and the Court of Appeals of that Territory), after said day (March 8, 1845), and in which judgments and decrees were rendered, or which are claimed to have been since pending therein, the records and proceedings thereof, and the judgments and decrees therein, are hereby transferred to the District Court of the United States for the District of Florida," etc.

There was no authority for the transfer of this case into the Circuit Court of the United States for the District of Nebraska.

The case, if it fell within the provisions at all, went to the district court and not to the circuit court.

We say that the District Court for Douglas County, Nebraska, from which this case seems to have been transferred, was not a "Superior Court" of that Territory, within the meaning of the statutes referred to; and that, therefore, a case pending in it could not be transferred to the Federal Court.

It is doubtful whether any case could be removed from the Territorial Court under this legislation, which was not of a federal jurisdiction in virtue of the subject-matter. It would seem that cases which are within that jurisdiction simply in virtue of the citizenship of the parties, are not within the purview of these statutory provisions.

2. Where a plaintiff claims a right to prosecute a suit in the Circuit Court of the United States, on the ground of the citizenship of the parties, the pleadings must distinctly aver and show that they are citizens of different States, and that one of them is a citizen of the State where the suit is brought; and if he omits to do this, and a judgment is rendered in his favor by the circuit court, this court, on writ of error or appeal, will reverse the judgment for want of jurisdiction in the court below.

Bingham v. Cabot, 8 Dall., 382; *Capron v. Van Noorden*, 2 Cranch, 126; *Montalet v. Murray*, 4 Cranch, 46; *Morgan v. Calender*, 4 Cranch, 870; *Wallen v. Williams*, 7 Cranch, 602; *Sullivan v. Steamboat Co.*, 6 Wheat., 450; *Jackson v. Ashton*, 8 Pet., 148; 10 Pet., 480; *Brown v. Keene*, 8 Pet., 112; *Piquignot v. Pa.*

R. Co., 16 How., 104; *Scott v. Sandford*, 19 How., 401 (60 U. S., XV., 699).

3. This doctrine is equally applicable to cases instituted in state courts, which may be the subjects of removal into the circuit court, on the ground of the citizenship of the parties.

Ward v. Arredondo, 1 Paine, 410.

4. The pleadings do not aver nor show, nor is there any proof in the record that the plaintiffs were citizens of Nebraska; and *non constat* so far as this record discloses the character of the plaintiffs, they were not citizens of New York, where the Corporation defendant was located.

Ins. Co. v. French, 18 How., 405 (59 U. S., XV., 451).

If a party, either plaintiff or defendant, consists of a number of individuals, each one must be competent to sue in the courts of the United States, or jurisdiction cannot be entertained.

Strawbridge v. Curtis, 8 Cranch, 287; *Ward v. Arredondo*, 1 Paine, 410; *Brown v. Keene*, 8 Pet., 112; *Piquignot v. R. R. Co.*, 16 How., 104.

5. The only foundation of jurisdiction was, or could be, the service of process upon defendant's agent in Nebraska. Such jurisdiction is expressly prohibited by the 11th section of the Judiciary Act of 1789, as was distinctly held by *Mr. Justice Nelson*, in two elaborate and well considered opinions in the cases of *Day v. India Rubber Co.*, 1 Blatchf., 628; *Pomerooy v. N. Y. & N. H. R. R. Co.*, 4 Blatchf., 120; *Toland v. Sprague*, 12 Pet., 300; *Piquet v. Swan*, 5 Mas., 85; *Richmond v. Dreyfous*, 1 Sumn., 181.

The circuit court in New York is the only Federal Court which could entertain jurisdiction of this suit.

6. The description of the defendant Corporation as "a foreign Corporation formed under and created by the laws of the State of New York," is not a sufficient or proper description of the defendant to bring it within the jurisdiction of the circuit court.

Marshall v. B. & O. R. R. Co., 16 How., 814; *Ins. Co. v. French*, 18 How., 404 (59 U. S., XV., 451); *Con. Drawbridge Co. v. Shepherd*, 20 How., 227 (61 U. S., XV., 896).

The petition fails to aver that the Corporation defendant has its principal place of business in New York, and is, therefore, defective under the opinion of *Chief Justice Taney*, in the case last cited.

7. The property was delivered, accepted and carried under and subject to the provisions of a special contract, and not under and in pursuance of a general undertaking on the part of the defendant to "transport the property as common carriers."

It was proved that the plaintiffs had very often sent goods by this Express, and always received such receipts.

There can be no doubt at this time that such a receipt, accepted under such circumstances, constitutes an agreement between the Company and the owners of the property, and has the same effect in law as if signed by both parties.

N. J. Steam Nav. Co. v. Merch. Bank, 6 How., 844; *York Company v. Central R. R.*, 3 Wall., 111 (70 U. S., XVIII., 171); *Farnham v. Cam. & Amb. R. R.*, 55 Pa., 59; *Boorman v. Am. Ez. Co.*, 21 Wis., 152.

8. The defendant having been thus shown to have been a special carrier of the property in question, the court should have instructed the jury that the plaintiffs could not recover in this action.

(a) It is a question of law for the court, and not of fact for the jury, whether facts proved or admitted constitute a special contract or not.

Kimball v. R. & B. R. R. Co., 26 Vt., 248.

(b) Whenever a special contract exists, changing the character of a carrier from a common to a private carrier, the latter cannot be declared against as a common carrier, but the action must be on a special contract, or for a breach of duty arising out of such contract; and if the declaration in such case set forth be the general liability of the defendant as a common carrier, the variance is fatal.

Kimball v. R. & B. R. R. Co. (*supra*); *Shaw v. Y. & N. M. Ry. Co.*, 13 A. & E. (N. S.), 347; *Crouch v. L. & N. W. Railroad Co.*, 7 Exch., 705.

The declaration here was upon a supposed general undertaking as common carrier.

9 The court should have instructed the jury that, by the express and unmistakable terms of this contract, there could be no recovery against the defendant beyond \$50, unless it was guilty of gross negligence or misfeasance in regard to this property, and the loss was occasioned thereby.

Doorman v. Jenkins, 2 A. & E., 256; *Shields v. Blackburne*, 1 H. Bl., 158; *Beauchamp v. Povey*, 1 M. & Rob., 38.

The spirit of the later adjudications in those States where the subject has been most carefully considered, is not opposed to any agreement or arrangement between parties to such a transaction, which shall relieve the carrier of property from responsibility for negligence which does not amount to positive misconduct or fraud, misfeasance, malfeasance or gross negligence in respect to the subject committed to his care.

Dorr v. N. J. Steam Nav. Co., 11 N. Y., 485; *Wells v. Steam Nav. Co.*, 8 N. Y., 381; *Wells v. N. Y. C. R. R. Co.*, 24 N. Y., 181; *Smith v. Cent. R. R. Co.*, 24 N. Y., 222; *Bissell v. The Same*, 25 N. Y., 442; *Moore v. Evans*, 14 Barb., 528; *Brown v. Eastern R. R. Co.*, 11 Cush., 97; *Buckland v. Adams Exp. Co.*, 97 Mass., 124; *Kallman v. U. S. Exp. Co.*, 3 Kan., 210; *Prentice v. Decker*, 49 Barb., 21; *Batson v. Donovan*, 4 B. & Ald., 21; *Smith v. Horne*, 8 Taunt., 144; *Garnett v. Willan*, 5 B. & Ald., 53; *Hinton v. Dibbin*, 2 Q. B., 646; *Owen v. Burnett*, 2 Crompt. & M., 353.

Since the Carrier's Act of 1830, and the later Railway and Canal Traffic Act of 1854 (17 and 18 Vic., ch. 81), special contracts, exempting carriers from the consequences even of their "gross negligence," have been supported by the courts.

Carr v. L. & Y. Ry. Co., 14 Eng. L. & E., 340; *McManus v. Sams*, 2 Hurl. & N., 692; *Simons v. Great West. Ry. Co.*, 18 C. B., 805.

10. The issue of fraud having been distinctly raised in the pleadings, the court should have instructed the jury that if they found that the plaintiff had practiced a deception upon the Company in relation to the value of the property, the latter was not responsible for the loss.

See 8 WALL.

The fraud and deception set up in the answer were clearly proved. Property worth over \$4,000 was placed in the care of the Company for transportation, for the agreed rates for \$3,500.

The rule is firmly settled, that the effect of such concealment is to nullify the contract.

Story, Bail., sec. 565; *Batson v. Donovan*, 4 B. & Ald., 21; *Great N. R. Co. v. Shepherd*, 8 Exch., 30; *Orange Co. Bk. v. Brown*, 9 Wend., 85; *Dunlap v. Steamboat Co.*, 98 Mass., 379.

11. The court failed to discriminate between the liability of the Company for the property of which they were informed, and which it may be said they agreed to carry, and for that of which they had no knowledge and which they never agreed to take.

For the latter it incurred clearly and certainly no liability whatever, and the court should have so instructed the jury.

This distinction in case of fraud is clearly expounded by Chief Justice Bigelow, in a late case. *Dunlap v. Steamboat Co.*, 98 Mass., 379; *Belfast & B. and L. & C. Ry. Co. v. Keys*, 8 Jur. (N. S.), 367; 9 H. Lds. Cas., 556; *Brehme v. Adams Exp. Co.*, 25 Md., 335.

Messrs. Redick and Briggs, for defendants in error, made no argument in this court.

Mr. Justice Davis delivered the opinion of the court:

Before proceeding to consider the merits of this controversy, it is necessary to dispose of the point of jurisdiction which is raised by the plaintiff in error, who was defendant in the court below. This cause was commenced in one of the district courts of Nebraska, during its territorial existence, and was transferred after Nebraska became a State, and while the proceedings were *in fieri*, to the Circuit Court of the United States, where it resulted in a judgment for the defendants in error.

It is urged that the circuit court had no jurisdiction over the cause, because there was no authority to transfer it. This depends on the construction of the Acts of Congress relating to the subject.

On the admission of a new State into the Union, it becomes necessary to provide not only for the judgments and decrees of the territorial courts, but also for their unfinished business. In recognition of this necessity Congress, after Florida became a State, passed an Act (9 Stat. at L., 130), providing, among other things, that all cases of federal character and jurisdiction pending in the courts of the Territory be transferred to the District Court of the United States for the District of Florida. The provisions of this Act were made applicable, at the time of its passage, to cases pending in the courts of the late Territory of Michigan, and were afterwards extended (9 Stat. at L., 211, 212) to the courts of the late Territory of Iowa. Congress, in making this provision for the changed condition of Iowa, thought proper in the same Act (9 Stat. at L., 212) to adopt a permanent system on this subject, and extended the provisions of the original and supplementary Acts to cases from all Territories which should afterwards be formed into States.

It is contended, if this cause were transferable at all, it went, under these Acts of Congress, to the district court and not to the circuit

court. This would have been true if Nebraska had not at the time of the transfer occupied a different judicial *status* from that occupied by Florida, Michigan or Iowa, when these laws were passed. These States were not then a part of any one of the judicial circuits, while Nebraska, when this cause was removed, was attached to the eighth circuit. Their district courts had general circuit court powers, while the district court in Nebraska had only the ordinary jurisdiction properly belonging to the district courts of the country. If Nebraska had not at the time of the transfer formed a part of a judicial circuit, her district court would, by virtue of the laws above recited, have been clothed with the general powers of a circuit court, and could have taken cognizance of this cause, and it would, in the purview of these laws, have been rightfully transferable to it. To construe these laws so as to limit the right of transfer to the district court alone, without regard to the powers of that court, would defeat the very object Congress had in view. That object is made plain enough by the legislation relating to this subject. It was, on the admission of a new State, to transfer pending civil cases of a federal character from the territorial courts into the district court, if the State did not form part of a judicial circuit; because in such a case the district court was invested with circuit court powers. But if the State was attached to a circuit, then, as the district court did not possess this jurisdiction, the cause was transferable to the circuit court. To adopt any other construction would render the provisions for the transfer of causes, in case a new State on its admission were attached to a circuit, nugatory.

It is said if cases of a federal character were properly transferable to the circuit court, this was not one of them, because it does not appear that the suit was between citizens of different States. It is true that there is no direct averment to this effect, but it is the necessary consequence of the facts stated in the pleadings, that the parties to the suit were citizens of different States. The averment that the plaintiffs were a firm of natural persons, associated together for the purpose of carrying on the banking business in Omaha, and had been for a period of eighteen months engaged in said business at said place, is equivalent to saying they had their domicile there. In this country people usually live and have their citizenship in the place where they do business. Especially is this true of persons engaged in a business requiring capital, and involving risk, at a point which is remote from the great centers of trade and commerce.

The citizenship of the defendant is clearly enough averred. It is alleged that the United States Express Company, the defendant in the suit, is a foreign corporation formed under and created by the laws of the State of New York. The obvious meaning of this allegation is that the defendant is a citizen of the State of New York. The course of proceeding in the court below shows that the parties to the suit recognized it as being of federal jurisdiction, and it could only be so (as there was no federal question involved), on the ground that the plaintiffs and defendant were citizens of different States. If the parties had thought otherwise, after the

cause reached the circuit court, the point would have been taken, and an effort made at least to test the jurisdictional question. The record shows that nothing of the sort was attempted.

There remains to be considered the merits of this case, so far as they are presented in the bill of exceptions.

The suit is against a common carrier for a failure to deliver a package of gold dust according to agreement. No exception was taken on the trial to the admission or rejection of evidence, and the only subject for review here is the charge given by the court to the jury. The court instructed the jury only on a single point—that of negligence. The jury were told substantially that, although the contract was legally sufficient to restrict the liability of the defendant as a common carrier, yet, if the defendant was guilty of actual negligence, it was responsible. And that it was chargeable with negligence, unless it exercised the care and prudence of a prudent man in his own affairs. The defendant requested the court to charge the jury that it was not liable unless grossly negligent.

To understand what are the rights of the parties to this suit, so far as the court was asked concerning them, it is necessary to see what were the facts proved in the case. It appears that the particular lot of gold-dust, which is the subject of this controversy, was confided to the Express Company for transportation to Philadelphia, on the 29th of September, 1864, and that it was one of a series of shipments of the same kind, running through a period of eighteen months or more. The receipt given for the packages was not different from the ordinary receipts of the Company, and was, doubtless, intended to limit the liability of the Company as common carriers. There were two routes employed by the Express Company to convey their property—one across the State of Iowa, and the other to St. Joseph, Missouri, and thence across that State by the Hannibal Railroad. The latter was the most expeditious route, but the former the safest, as Missouri, although at the time adhering to the Union, was in a disturbed and unsettled condition. The property in dispute was conveyed by the St. Joseph route, and was robbed while in transit across the State by a band of armed men. Under the circumstances in which the country was then placed, no prudent man, in the management of his own affairs, would have sent his property by the Missouri route, if another route were open to him. It seems that the plaintiffs acted on this idea, for one of them testifies that he notified the agent of the Company not to send their gold-dust by the St. Joseph route. If this testimony be true, it is hard to conceive a grosser case of negligence, for here were two routes—the one safe and the other hazardous—and yet the Express Company, in defiance of the wishes of the owner of the property reject the safe and adopt the hazardous route. Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation, whenever practicable. Redfield, Carr., sec. 84. In this case it was practicable to obey the instruction given by the plaintiffs, and the defendant furnishes no excuse for not obeying it.

It is said that the weight of the evidence is against the statement of the plaintiffs, that they directed their goods sent by the Iowa route. Conceding this to be true, it cannot be corrected here. It was a proper matter to be considered by the court below, on a motion for a new trial, but the granting or refusing such motions is not subject to be reviewed in this court.

If the evidence in the case tended to prove the defendant guilty of actual negligence, then the court below were justified in basing upon it an instruction to the jury. That it did tend to prove it is clear, and the charge of the court on the subject correctly stated the law to the jury.

As the court was not asked to instruct the jury on any other point, there is not, as the argument for the plaintiff in error seems to suppose, anything else for this court to review. It is the usual practice for the presiding judge at a *nisi prius* trial, in his charge to the jury, to take up the facts and circumstances in proof, explain their bearing on the controverted points, and declare what are the legal rights of the parties arising out of them. If the charge does not go far enough, it is the privilege of counsel to call the attention of the court to any question that has been omitted, and to request an instruction upon it, which, if not given, can be brought to the notice of this court, if an exception is taken. But the mere omission to charge the jury on some one of the points in a case, when it does not appear that the party feeling himself aggrieved made any request of the court on the subject, cannot be assigned for error.

Judgment affirmed.

Cited—10 Wall., 331; 16 Wall., 516; 17 Wall., 376; 20 Wall., 454; 99 U. S., 196; 4 Dill., 357; 7 Kan., 196; 17 Am. Rep., 726 (47 Ind., 487); 35 Am. Rep., 757 (14 W. Va., 180).

ISAAC KEMPNER, Impleaded with JOHN D. LEVISON, *Appts.*,
v.
CHARLES B. CHURCHILL, LEONARD K. SMITH, LEWIS FREIDLANDER, JULIUS STEITCH AND LEOPOL LITHA-NER.

(See S. C., 8 Wall., 362-370)

Circumstantial evidence—sufficient to prove fraud—inadequate consideration.

Circumstantial evidence of fraud is often of more force than direct testimony.

Mere inadequacy of consideration, unless extremely gross, does not *per se* prove fraud.

What circumstantial evidence and declarations are held sufficient to prove fraud.

[No. 55.]

Argued Nov. 16, 1869. Decided Dec. 13, 1869.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below by the appellees, to declare a certain sale of goods to be fraudulent and to compel the application of said goods to the payment of certain judgments held by the complainants. The bill alleged that the judgment debtor, Levison, had transferred the said goods to the defendant, Kempner, for the purpose of defrauding his creditors, the complainants.

See 8 WALL.

Levison kept a clothing store in Chicago, and had on hand a stock of goods, when he went to New York and bought over \$12,000 worth of new goods at the market prices and brought them to his store; the whole stock cost about \$17,682.85.

He sold the whole to Kempner for fifty-five cents upon the dollar of their original cost, which amounted to \$9,725.56.

The bill was made out at the New York cost prices and receipted at \$17,622.85, instead of the amount actually paid, to wit: \$9,725.56.

The receipts were given on Saturday, the account of stock was made out on Sunday and the goods were removed to a cellar on Monday following. Levison, by a separate answer, admitted the truth of the complainant's allegations.

The whole matter in issue was the good faith of the said sale. The court below found the said sale fraudulent and void. Thereupon the defendant, Kempner, took an appeal to this court.

Messrs. S. A. Goodwin, Larned & Towle, for appellant:

The defendant, Kempner, was a *bona fide* purchaser for cash in open market, without notice of any intended fraud (if such existed), by Levison, the vendor. To maintain the complainant's case, they must affirmatively establish that the sale was fraudulently intended by Levison, and as a fact (in the language of the allegation of the bill), that "The said Isaac Kempner contrived and conspired with the said Levison to cheat and defraud said creditors, (by) having such sale so made, as aforesaid, with the design and purpose of keeping said goods, wares and merchandise, beyond the reach of execution or process of law; and that such sale was, in fact, made for such purpose, to hinder and delay creditors."

This is in accordance with the adjudged cases under the 13 Eliz., ch. 5, which is the basis of our statutes, and of the relief sought.

Ewing v. Runkle, 20 Ill., 448; *Hessing v. McCloskey*, 37 Ill., 342; *Cadogan v. Kennett*, 2 Cowp., 434; *U. S. v. Hooe*, 8 Cranch, 88; *Moore v. Clements*, 6 Wall., 299 (78 U. S., XVIII., 786).

The allegations of the bill are fully denied by Kempner, and the facts and circumstances proved, support his answer.

In this connection the language of the Supreme Court of Illinois, in *Waddams v. Humphrey*, 22 Ill., 663, is instructive.

"No matter how much a man may be indebted, he may sell his property for a fair price or even for a price below the market value, if done honestly with no view to delay, hinder or defraud creditors of their just dues. A debtor may sell his property for a fair price, even if he sells it with the avowed intention of defeating an honest claim, if no lien exists to forbid it." *Hessing v. McCloskey*, 37 Ill., 342.

It was reasonable prudence for Kempner to remove the goods at once into his own possession, after the inventory was made on which he was to pay, for safe keeping and to avoid the high rent of Levison's store. As they were to be paid for only on possession, and to be taken out of town to sell he had no right to keep them a day in that store.

It is said that the inventory was made, and

the trade completed on Sunday. These parties were all Jews, and with them Sunday is always a secular and convenient day for any extra work.

When the circumstances, adduced to show fraud, admit of a natural and probable explanation, consistent with the innocence and good faith of the party charged with the fraud, the presumption is in favor of innocence.

Garrow v. Davis, 10 N. Y. Leg. Obs., 225.

It has become a maxim, as given in *Norton v. Kearney*, 10 Wis., 451.

"Odiosa et inhonesta non sunt in lege præsumentur, et in facto quod se habet ad bonum et malum, magis de bono quam de malo præsumentur, est."

So, in *Townsend v. Stearns*, 32 N. Y., 209, Porter, J., in delivering the judgment of the Court of Appeals, said:

"Deeply as the law abhors fraud and crime, it equally abhors the imputation of either, except upon clear and controlling evidence."

There is here no such inadequacy of price as to raise a presumption of fraud. It was really full and adequate under the circumstances.

Osgood v. Franklin, 2 Johns. Ch., 1; Hill, Trust., 226, top., 152, m, and note 1; Ad. Eq., 247, top, and note 1, 79, m; *Follett v. Rose*, 3 McLean, 832.

In the last case, the court held that "Unless the inadequacy of consideration be so gross as to strike everyone with a presumption of fraud, it is not evidence of unfairness."

The answer of one defendant cannot be read against his co-defendant, in any cases except those of partnership or joint interest.

Christie v. Bishop, 1 Barb. Ch., 105; *Clark's Exrs. v. Van Riemadik*, 9 Cranch, 156; *Pritchard v. Draper*, 1 Russ. & Myl., 200.

More especially cannot such answer be used as an admission by Levison as against Kempner.

"A party who has parted with his right or interest in property, or a chose in action, by an absolute sale or assignment to another person, cannot, by his subsequent admission, affect the right of the purchaser."

Per Walworth, Ch., in *Christie v. Bishop*, supra; *Moore v. Clements*, 6 Wall., 299 (73 U. S., XVIII., 786).

Mr. R. H. Gillet, for appellees:

There is really but one question for this tribunal to determine, and it is one of fact: was the sale of the goods by the parties to it, with the intention of delaying and hindering the creditors of Levison in the collection of their debts?

This fact is abundantly established by the evidence in the record. Separate and distinct facts, all tending to prove the fraudulent intent, are either admitted or proved; when taken together, they conclusively show that the sale was made for the purpose of defrauding Levison's creditors.

Levison was a clothing merchant in Chicago, and had on hand a stock of clothing of the value of about \$6,000.

He went to New York, and about the middle of March, 1866, purchased at market prices, of divers merchants there, and forwarded to Chicago, a new stock, on a credit of four months, amounting to about \$11,700, which was incorporated with his former stock in a store occupied by him.

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Kempner proposed to Levison to purchase his whole stock on hand at fifty-five cents on the dollar, well knowing that this would not produce enough, into several thousand dollars, to pay for his last purchases made in March previous, and sought to alarm him concerning the consequences that would follow, if he failed to accept the offer promptly, or did not allow an immediate change of possession of the goods.

The goods were secretly invoiced on Sunday. Kempner took the key of Levison's store, rapidly hurried the goods away, on Monday morning, to a cellar in a distant building, before they were paid for, instead of being boxed in the usual way, it being pretended that they were to be sent to Omaha.

The goods were invoiced at forty-five cents on the dollar above what Kempner paid, and receipted that much above what they cost him, to mislead Levison's creditors, and to give the former advantages in his expected litigation with them, concerning his purchase.

Mr. Justice Grier delivered the opinion of the court:

The pleadings in this case present no question of law for the decision of the court.

A brief summary of facts eliminated from the voluminous pleadings and evidence, will be all that is necessary to understand the true merits of the case.

The bill alleges that, "John D. Levison, a dry goods merchant in Chicago, had purchased from the complainants and other merchants of New York, dry goods amounting to \$11,700, which he transferred to Chicago; that soon after this, one Isaac Kempner, confederating and colluding with said Levison how to cheat complainant, and to hinder, delay and defraud the creditors of said Levison, proposed to purchase the entire stock of said Levison for a greatly inadequate consideration, to wit: for 55 cents on the dollar."

The bill also set forth that judgment had been obtained by the claimants, and that executions had issued which were returned "*nulla bona*," and it required the parties defendant to answer certain interrogatories. Kempner, in his answer, denied the fraud; Levison, in his, admitted it.

It has been frequently held that fraud ought not to be presumed, but must be proved. But the evidence of it is always circumstantial, and produces conviction in the mind often of more force than direct testimony.

It would be a troublesome, as well as an unprofitable task, to examine all the very astute arguments, founded on 250 pages of testimony contained in the record, to show that the court below have come to a wrong conclusion. It suffices to say that it sufficiently appears that the evidence before the court fully justified their conclusion.

It is true that mere inadequacy of consideration, unless extremely gross, does not *per se* prove fraud. But the direct testimony here confirms the fact that Kempner urged the acceptance of his offer to purchase with arguments such as this: "There is some pretty rough talk in town about you. You had better not delay this matter. You had better let me have the goods and put the money in your pocket, and let the creditors go to the devil."

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The circumstantial evidence amply confirms this direct evidence of fraud.

1. The false receipts given for full value on Saturday.
2. The account of stock made out on Sunday.
3. The removal of the goods into a cellar on Monday.

The defendant's endeavor to prove by experts, that the price given was sufficient, tends only to confirm the correctness of the decree of the circuit court, *which is affirmed, with costs.*

Cited—3 Wood, 646.

THE STEAMER BALTIMORE, THE NEW YORK AND WASHINGTON STEAMSHIP COMPANY, Claimant, Appt.,

JAMES H. ROWLAND AND BENJAMIN WILLIAMS, Owners of the Schooner J. W. WOOLSTON.

(See S. C., "*The Baltimore*," 8 Wall., 377-393.)

Appeal in admiralty causes—facts and law open to revision—owners of vessels, how far liable for collision—damages for—new materials—loss of vessel—loss of freight—repairs—total loss—counsel fees—costs.

Cases of admiralty and maritime jurisdiction cannot be brought to this court for re-examination in any other mode than by appeal.

In admiralty and prize causes, the facts, as well as the law of the case, are open to revision on the appeal.

Owners of ships and vessels are not liable for any loss, damage or injury by collision occasioned without their privity or knowledge beyond the amount of their interest in such ship or vessel and her freight then pending.

The claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention.

Where repairs are practicable, the damages assessed should be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred.

No deduction is to be made for the new materials furnished in the place of the old.

If the vessel is totally lost, the rule of damages is the market value of the vessel at the time of her destruction.

Allowance for freight is made in such a case, reckoning the gross freight less the charges which would necessarily have been incurred in earning the same.

Full value of the vessel and cargo cannot be recovered where the vessel may be raised and the cargo saved.

Damages which might have been reasonably avoided by the exercise of ordinary skill and diligence after the collision, cannot be recovered.

The court cannot award damages for a total loss, where it appears probable that the vessel and cargo may be raised without much expense, and restored to their owners.

Just damages for delay, and single and double costs may be adjudged at the discretion of the court, but counsel fees cannot be allowed since the Act of Feb. 23, 1853.

Nothing can be taxed as costs for services of attorney or counsel, except the costs and fees therein described and enumerated.

[No. 71.]

Argued Nov. 22, 1869. Decided Dec. 13, 1869.

A PPEAL from the Supreme Court of the District of Columbia.

The libel in admiralty was filed in this case

NOTE.—Measure of damages for collision. See note to *Smith v. Condry*, 42 U. S. (1 How.), 23; and note to *The Amiable Nancy*, 16 U. S. (3 Wheat.), 546.

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in the court below, by the appellees, to recover for damages received in a certain collision. A decree having been entered in that court in favor of the libelants, the claimant of *The Baltimore* took an appeal to this court.

The case is fully stated by the court.

Messrs. J. Hubley Ashton, Nath'l Wilson, and J. H. Bradley, for appellants:

The true measure of the damages in this case was the expense of raising and repairing the vessel, so as to make her equal to the value before the collision, and the expense of raising the cargo and the amount of any deterioration which it might have undergone in consequence of the sinking.

1. This principle is expressly determined by this court in the case of *The Catharine v. Dickinson*, 17 How., 170 (58 U. S., XV., 233); *Williamson v. Barrett*, 13 How., 101.

Mr. Justice Grier, in a collision case in the Circuit Court for the Eastern District of Pennsylvania, not yet reported, pertinently and forcibly observed: "This is not the first instance in which I have had to notice that where one vessel has been so unfortunate as to come into collision with another, the parties injured suppose that the insurance doctrine of abandonment will apply to their case, and they may, therefore, increase the damages by their own neglect. The only measure of damages is the amount it would cost to repair the damage, with some allowance for demurrage."

Applegarth, Owner of The Seeing, v. The Harriet Rogers, 1867, Ms. Op.

In that case the district court had allowed the difference between the value of the vessel before the collision, and the amount realized by the owners by a sale of the hull after the collision. The decree was reversed by the circuit court, and the amount which it would have cost to repair the vessel was alone allowed.

The libel alleged a total loss. The answer denied it. There was no evidence before the court on the point, yet the court, without evidence, gave the full damages claimed. This is not all. All the evidence in the case shows that the vessel, probably, and the cargo certainly, might have been raised.

Several witnesses for libelants speak of having seen the masts (recognizing their color) and sails of the schooner above water as late as June, 1864, the collision having occurred in Dec., 1863.

No effort was made by the libelants to raise either vessel or cargo, and no proof given to show that this was impossible, or that the cost would have been greater than their value. The coal could have been taken out without much expense.

The decree should be reversed, and the case remanded for an inquiry as to the actual damages sustained, according to the legal principles heretofore applied by this court.

Messrs. George H. Williams, and W. Y. Fendall, for appellees:

The decree of the judge who heard the cause in the first instance having been affirmed by the full court, at the General Term, and said decree being in favor of libelants, in support thereof, the appellees insist:

That where courts below, in collision causes, concur in opinion, and there is testimony supporting their decision, it will not be reversed here on doubts raised.

The Hypodama, 6 Wall., 223 (73 U. S., XVIII., 796); *Newell v. Norton*, 8 Wall., 267 (70 U. S., XVIII., 278).

That the values placed on the vessel, cargo, etc., were sustained by the proof.

That the allowance for fees to counsel in admiralty was correct.

The Apollon, 9 Wheat., 363; *Canter v. Ins. Co.*, 3 Pet., 307.

(The arguments of the counsel on the merits are not given.)

Mr. Justice Clifford delivered the opinion of the court:

Cases of admiralty and maritime jurisdiction, since the passage of the Act of the 8d of March, 1803, cannot be brought here for re-examination in any other mode than by appeal; and the provision is, "that upon such appeal, a transcript of the libel, answer, depositions, and all other proceedings, of what kind soever in the cause, shall be transmitted to" this court. Prior to that time, the judgments and decrees of the circuit courts in civil actions and suits in equity, whether brought there by original process, or transferred there from the courts of the several States, or from the district courts, could only be removed into this court for revision by writ of error; and the further provision was, that there should be no reversal in this court for any error in fact, which still continues to be the rule of law in respect to all cases brought here from the circuit courts by writs of error.

Power to reverse for error, in fact, any judgment or decree of a circuit court brought here for revision, being absolutely prohibited, it became necessary to prescribe some mode by which the facts in equity suits and in cases of admiralty and maritime jurisdictions should be ascertained and embodied in the record, and it was accordingly provided in the 19th section of the Judiciary Act, that it should be the duty of the circuit courts in such cases to cause the facts on which they founded their sentence or decree fully to appear upon the record in some one of the modes therein described, and while that provision remained in force this court had no more right to re-examine the facts found in such a case than the court possesses in a common law suit where the facts are found by the verdict of a jury. 1 Stat. at L., 84; 2 Stat. at L., 244.

Appeals, however, are now allowed to this court by the amendatory Act, in all such cases where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000, and so much of the 19th section of the Judiciary Act as provided for the finding of the facts in the circuit court, and so much of the 20th section of the same Act as provided that such cases should be removed into this court by writs of error, are repealed.

Viewed in the light of the repealing clause in that Act, and the requirement that the transcript shall embrace the depositions as well as the pleadings and proceeding in the case, it is evident that Congress intended that this court shall hear and determine the whole merits of the controversy. Provision is also made by that Act, that new evidence may be received by this court in admiralty and prize causes, which shows to a demonstration that the facts, as well as the law of the case, are open to revision on the appeal.

Where the appeal involves a question of fact, the burden is on the appellant to show that the decree in the subordinate court is erroneous, but it is a mistake to suppose that this court will not re-examine the whole testimony in the case, as the express requirement of the Act of Congress is, that the Supreme Court shall "hear and determine such appeals," and it is as much the duty of the court to reverse the decree from which the appeal is taken for error of fact, if clearly established, as for error of law.

Appeal was taken in this case from the decree of the Supreme Court of the District affirming the decree of the district court, sitting as a court of admiralty in a case of collision, civil and maritime.

By the transcript, it appears that the owners of the schooner, J.W. Woolston, filed a libel *in rem* against the steamer Baltimore, her engine, machinery, boats, apparel, tackle, and furniture, claiming damages as for a total loss of the schooner and her cargo, consisting of two hundred tons of coal, and also for the loss of the freight on the cargo, and for the loss of the equipment of the schooner.

Bound on a voyage from Philadelphia to the Port of Washington, the schooner, when the collision occurred, was coming up the River Potomac towards her port of destination. Though cloudy, the night was not very dark, and the schooner had a light at her bow, under the jib-boom, and she had two good lookouts properly stationed in the forward part of the vessel. She was steering west-northwest, with all her sails set, and was proceeding safely on her voyage up the river under a good breeze when the lookouts descried the steamer heading in a southeasterly direction and coming down the river, and the charge in the libel is that the steamer, when she was not more than three hundred yards from the schooner, suddenly changed her course, came down on the schooner, and struck her near midships, and caused her to sink in the deepest part of the channel. Due vigilance, it is alleged, was practiced by the schooner to prevent the collision, and that it was occasioned solely by the gross negligence and culpable mismanagement of the steamer.

Pursuant to the warrant issued for the purpose, the steamer was arrested and the claimants appeared and gave a bond for her value in the sum of \$8,350. In their answer they admit that the state of the wind and the weather at the time of the collision is correctly described in the libel, but they allege that the proper course of the schooner in coming up the river was northwest by west half west; that instead of pursuing that course she was heading, when first seen by the steamer, diagonally across the river; that the bell of the steamer was immediately rung and her engine stopped, but that it was too late to avoid the collision; that the collision was wholly occasioned by the fault and carelessness of those in charge of the schooner in attempting to cross the bows of the steamer instead of keeping their course, as they were bound to do by the well known rules of navigation.

I. Testimony was taken on both sides, but the court is not inclined to decide the merits of the controversy, as the clear inference from the certificate of the clerk is, that the whole testi-

mony taken in the district court is not contained in the copy of the record transmitted to this court. Although the record in that behalf is apparently defective and incomplete, still the court deems it proper to determine some of the questions presented for decision, as otherwise it may hereafter become necessary to send the case back a second time.

Directions were given to the commissioner to whom the cause was referred, in the decretal order, to take proof of the value of the schooner, her cargo, furniture and fixtures, at the time she collided with the steamer, and also to inquire into the damage which thereby accrued to the libelants, and the cost of the suit, including an allowance for fees to the counsel of the libelants, and to report the same to the court.

Agreeably to those directions, the commissioner heard the parties and reported that the libelants were entitled to recover \$5,000 for the actual value of the schooner at the time she was sunk, \$1,531.96 for the value of the cargo, \$200 for the value of the furniture and fixtures, \$450 for the loss of freight, and \$100 for profits on the cargo, together with costs of suit, including \$500 as an allowance for fees to the counsel of the libelants.

Exceptions were duly taken by the claimants to the report of the commissioner, setting forth thereto three objections: (1) That the finding as to the value of vessel is erroneous. (2) That the allowance of counsel fees is unauthorized. (3) That the allowance for profits on the cargo is incorrect. Both parties were heard, and the court sustained the third exception, but overruled the first and second, and confirmed the report, striking out the \$100 for profits on the cargo.

II. Suppose the libelants are entitled to recover, still the claimants insist that the rule of damages adopted by the district court is erroneous.

Owners of ships and vessels are not now liable for any loss, damage, or injury by collision occasioned without their privity or knowledge, beyond the amount of their interest in such ship or vessel and her freight then pending.

9 Stat. at L., 685; *The Niagara*, 21 How., 26 [62 U. S., XVI., 47].

Subject to that provision in the Act of Congress, the damages which the owner of the injured vessel is entitled to recover are estimated in the same manner as in other suits of like nature for injuries to personal property, and the owners, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention.

1 Pars. Ship., 598; *M. & P. Ship.*, 411; *The Anne Caroline*, 2 Wall., 588 [69 U. S., XVII., 588]; *Tindall v. Bell*, 11 Mees. & W., 232.

Restitutio in integrum is the leading maxim in such cases, and where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in

insurance cases, be any deduction for the new materials furnished in the place of the old, because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnification is not limited by any contract, but is co-extensive with the amount of damage.

Williamson v. Barrett, 13 How., 110; *The Gaselle*, 2 W. Rob., 281; Sedg. on D. (4th ed.), 541; MacL. Ship., 285.

Such repairs, in consequence of a collision, may enhance the value of the vessel and render her worth more than she was prior to the accident, and in that state of the case the rule in insurance cases is that one third of the value of the new material is deducted, because the new material is more valuable than the old, but the rule is not so where the repairs are required in consequence of a culpable collision. *The Clyde*, Swab., 24; *The Pactolus*, *Ibid.*, 174; *The Catharine*, 17 How., 170 [58 U. S., XV., 233].

Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libelants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction. *The Clyde*, Swab., 23; 1 Pars. Ship., 542; *The Granite State*, 3 Wall. 310 [70 U. S., XVIII., 179]; *The Ann Caroline*, 2 Wall., 588 [69 U. S., XVII., 583]; *The Rebecca*, Bl. & H., 347; *The New Jersey*, Olcott, Adm., 444.

Allowance for freight is made in such a case, reckoning the gross freight less the charges which would necessarily have been incurred in earning the same, and which were saved to the owner by the accident, together with interest on the same from the date of the probable termination of voyage. *The Canada*, Lush., Adm., 586.

Evidence, however, that the injured vessel is sunk is not of itself sufficient to show that the loss was total, nor is it sufficient to justify the master and owner in abandoning the vessel or the cargo unless it appears that the circumstances were such that the vessel could not be raised and saved, or that the cost of raising and repairing her would exceed or equal her value after the repairs were made.

Experience shows that in many cases where the injured vessel is sunk, especially when the disaster happens in rivers or harbors, the vessel may be raised at moderate expense, and that the cargo, if not perishable, may be saved and restored to the shipper, or carried forward to the port of destination; and the rule in such cases is to award such damages only as will compensate the owners for the loss incurred, which is held to include the expense of raising the vessel and putting her in repair, with a proper allowance for the loss of freight and for the damage to the cargo, and for the detention of the vessel during the time necessary to make the repairs and fit the vessel to resume her voyage. *Williamson v. Barrett*, 13 How., 110; *Sturgis v. Clough*, 1 Wall., 272 [68 U. S., XVII., 581].

Justice as well as sound policy forbids that the owner of a vessel sunk by collision should be allowed to recover the full value of the vessel and cargo except in cases where the entire property is lost by the disaster, which is not true in a case where, by reasonable exertions, the

vessel may be raised and the cargo saved by the use of such nautical skill as the owners of vessels usually employ in such emergencies. Owners of vessels seeking redress in such cases must be prepared to show, not only that those in charge of the other vessel were in fault, but that no negligence on their part has increased or aggravated the injury. Damages are awarded in such cases for the injury done to the vessel and cargo by a wrongful act, but if the party suffering the injury to his property will not employ any reasonable measures to stop the progress of the damage, but willfully and obstinately, or through gross negligence, suffers the damage to augment, it is his own folly, and the law will not afford him any redress for such part of the damage as proceeded directly from his own culpable default.

Persons injured in their property by collision are entitled to full indemnity for their loss, but the respondents are not liable for such damages as might have been reasonably avoided by the exercise of ordinary skill and diligence, after the collision, on the part of those in charge of the injured ship. *The Flying Fish*, Bro. & Lush., 448; S. C., 3 Moore, P. C. (N. S.), 86; *The Lotus*, Holt, Adm. R., 188; *The Lena*, *ib.*, 218.

Responsive to these views, the suggestion is, that the libel alleges that the schooner and cargo were sunk in such deep water as to make both a total loss, but the insuperable difficulty in the way of that suggestion is, that the allegation of the libel is expressly denied in the answer, and the libelants failed to introduce any proof to support their allegation. Subsequent to the disaster, several witnesses saw the schooner, and they concur that her masts were some eighteen feet out of water, and that she lay with her stem to the west-northwest, in the exact course in which she was steering when she was sunk by the steamer. Theory of the libelants is, that the vessel and cargo were of no value, but the court cannot adopt that theory in the absence of any proof to warrant the conclusion. *Miller v. Mariner's Church*, 7 Me., 51; *Loker v. Damon*, 17 Pick., 284; *Thompson v. Shattuck*, 2 Met., 615; Sedg. on D. (4th ed.), 105.

Decided cases may be found where it is held that the owner of the injured vessel is not bound to raise the vessel in a case where she was sunk by a collision; but it is clear that the court cannot award damages for a total loss, where it appears probable that the vessel and cargo may be raised without much expense, and restored to their owners. *The Columbus*, 8 W. Rob., 158; *The Eugenia*, 1 Lush., 139; Lowndes, Coll., 148.

III. Due exception was also taken to that part of the report of the commissioner in which he allowed to the libelants the sum of \$500 for counsel fees, but the district court overruled the exception and confirmed the report.

Taxable costs are recognized by the Judiciary Act, in several of its sections, as a part of a judgment or decree in a Federal Court, but it contains no fee bill, nor does it furnish any express authority for any such taxation. Costs have usually been allowed to the prevailing party, as incident to the judgment, since the Statute 6 Edw. I., ch. 1, sec. 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized. *Hathaway v. Roach*,

2 Wood. & M., 68; 2 Tidd, Prac., 945; *The Christina*, 8 Jur., 321; Conkl. Tr., 426; *Laws U. S. Courts*, 255.

Circuit courts, under the Judiciary Act, have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, in the cases described in the 11th section of that Act. 1 Stat. at L., 78.

Cases of Federal cognizance, commenced in a state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, may be removed, under the conditions specified in the 12th section of the Act, into the circuit courts. 1 Stat. at L., 80.

Such courts also may make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States. 1 Stat. at L., 83.

Where the plaintiff or petitioner recovers less than \$500, or the libelant, upon his own appeal, recovers less than \$300, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay costs. Appeals from the decrees of the district court to the circuit court were allowed by that Act, where the matter in dispute exceeded, exclusive of costs, the sum or value of \$800, and the final judgments rendered in the district courts might be re-examined in the circuit court on writ of error, where the matter in dispute exceeded, exclusive of costs, the sum or value of \$50; and a similar provision is made for the re-examination by this court of the final judgments and decrees of the circuit courts, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000.

Just damages for delay and single or double costs may be adjudged to the respondent in error, at the discretion of the court, in all cases where the judgment or decree is affirmed. 1 Stat. at L., 85.

Provision is also made that the district attorney shall receive, as compensation for his services, such fees as shall be taxed therefor in the respective courts, before which the suits or prosecutions shall be, and the Act makes no other provision for his compensation. 1 Stat. at L., 98.

Weighed in the light of these several provisions in the Judiciary Act, the conclusion appears to be clear that Congress intended to allow costs to the prevailing party, as incident to the judgment, as most of the regulations referred to would be meaningless upon any other theory. Concede that to be so, still the inquiries arise; by what rules was the taxation to be regulated, and what were the rates of fees to be allowed; to which inquiries there can be but one answer, unless it be assumed that Congress intended to leave the whole matter to the discretion of the court trying the case which cannot be admitted. Reject that construction, and the only reasonable one which can be adopted is, that the Federal Courts were referred to the regulations upon the subject in the courts of the State, and no doubt is entertained that such was the intention of Congress, as conclusively appears by the terms of the Process Act, which was passed five days after the approval of the Judiciary Act. By that Act the

modes of process and the rates of fees allowed in the Supreme Courts of the States, were expressly adopted as regulations in that behalf, in common law suits, in the district and circuit courts established by the prior Act. Rates of fees, in causes of equity and of admiralty and maritime jurisdiction, were also prescribed by that Act, and they were therein declared to be the same as are and were last allowed by the States, respectively, in the court exercising supreme jurisdiction in such causes. State forms of writs and executions were also adopted by the same Act, and the rates of fees and the forms and modes of process ever after remained the same, except so far as they have been changed by subsequent legislation, or by the rules ordained by the Supreme Court. Temporary though the Act was, still it was of sufficient duration to put the new system in complete operation. 1 Stat. at L., 128, 191.

Subsequent to the passage of that Act, the costs taxed in the circuit and district courts were the same as were allowed at that time in the courts of a State, including such matters as the travel and attendance of the parties, fees for copies of the case, and abstracts for the hearing, compensation for the services of referees, auditors, masters and assessors, and many other matters not embraced in the fee bills, since passed by Congress. *Crosby v. Folger*, 1 Sumn., 514; *Brown v. Stearns*, 18 Mass., 587.

Most of the provisions of that Act were incorporated into the 2d section of the Act of the 8th of May, 1792, but the particular regulation, adopting the State fee bill as the rate of fees in the circuit and district courts, was not reproduced in that section, as that fee bill had already been adopted by the Federal Courts.

Ibid., 275; *Hathaway v. Roach*, 2 Wood. & M., 68; *Honey v. Stevens*, 8 Wood. & M., 17.

Since that time, costs in the circuit and district courts, held in the old States, have been taxed under that regulation as adopted by that Act, except so far as the rates of fees have been changed by subsequent legislation. *Whipple v. Cotton Mfg. Co.*, 8 Story, 84.

Congress, by the Act of the 1st of March, 1793, regulated more specifically the taxation of costs in admiralty proceedings in the district courts. 1 Stat. at L., 332.

Fees of the attorney and counselor were prescribed by the 1st section of the Act. They were a stated fee of \$3 for drawing and exhibiting the libel, claim or answer in each cause; \$3 for drawing interrogatories, and \$3 for all other services in any one cause. \$9 only could be taxed for the services of an attorney or counselor, but the 4th section of the Act provided, that there be allowed and taxed, in the Federal Courts, in favor of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attorney and counselor's fees, except in the district courts, in causes of admiralty and maritime jurisdiction, as are allowed in the Supreme or Superior Courts of the respective States. Passed to continue in force only for the year, and from thence until the end of the next session of Congress thereafter, it was suffered to expire, but it was renewed by the Act of the 31st of March, 1796, and was continued

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in force two years longer, and to the end of the next session of Congress. 1 Stat. at L., 45.

Detailed provision was made by the subsequent Act of the 28th of February, 1799, for compensation to marshals, clerks, district attorneys, jurors, witnesses and criers, but the special provision allowing counsel fees was dropped. *Ibid.*, 624.

Even while it remained in force, it did not authorize such an allowance in a case like the present, as cases of admiralty and maritime jurisdiction in the district courts were expressly excepted from the operation of the provision. Ordinary costs in admiralty suits were doubtless taxed under that Act, as if it was in force long after it had expired, but it never furnished any authority to charge counsel fees in the district courts; but if it did, and if it had not expired, it would be repealed by the present law.

Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compensation shall be allowed.

Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L., 161. They may tax a docket fee of \$20 on a final hearing in admiralty, if the libellant recovers \$50, but if he recovers less than \$50, the docket fee of the proctor shall be but \$10. *The Canton*, 21 Law Rep., 478; *The Liverpool Packet*, 2 Sprague, 37; *The Connestoga*, 2 Wall., Jr., 116.

Reference is made to two cases where counsel fees were allowed, but it is a sufficient answer to those cases to say, that they were decided before the Act of Congress under consideration was passed. They do not, therefore, furnish the rule of decision in the case before us.

Decree reversed.

Cited—11 Wall., 169; 14 Wall., 278, 279; 15 Wall., 230, 453; 19 Wall., 73; 21 Wall., 9; 98 U. S., 306; 97 U. S., 328; 103 U. S., 543; 5 Biss., 191; 10 Blatchf., 538; 2 Sawy., 599; 5 Ben., 205; 6 Ben., 200; 4 Bank. Reg., 77, 181; 6 Bank. Reg., 15; 1 McCrary, 201; 2 McCrary, 168; 4 Cliff., 168.

JAMES BRADLEY, *Pff. in Err.*,

v.

R. S. HUNT AND CAROLINE RHINES,
Administrators of A. S. RHINES, Deceased.

(See S. C., 8 Wall., 398-397.)

Assignee—when may sue in Federal Courts.

When a party claims in the Federal Courts through an assignment of a chose in action, he must show affirmatively that the action might have been sustained by the assignor, if no assignment had been made.

[No. 78.]

Argued Nov. 22, 1869. Decided Dec. 13, 1869.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action of *assumpsit*, brought in the court below by the plaintiff in error, a citizen of the State of Kentucky, against defendants in error, citizens of the State of Pennsylvania, upon a contract of lease. Upon the trial, the court refused to admit the lease in evidence, and judgment having been given for the defendants upon that ruling, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Messrs. A. G. and B. F. Lucas, for plaintiff in error:

There are but two questions presented by this record:

1. Can an action be maintained against the representatives of a deceased copartner, co-obligor, co-promisor, or tenant in common; or is the remedy only against the survivor or survivors?

2. Had the circuit court jurisdiction in this case?

1. The law of Pennsylvania furnishes a rule of decision, as well in the Federal as in the state courts.

It is made so expressly by the 34th section of the Act of Sep. 24, 1789, known as the Judiciary Act. Bright. Dig. Laws of U. S., 792.

It is said that this section of the statute applies to such of the laws of the several States only as affect the construction of contracts, and not to such as affect the remedy.

See *McCluney v. Siltman*, 3 Pet., 277; *McNiel v. Holbrook*, 12 Pet., 84; *Hinde v. Vattier*, 5 Pet., 397; *Massingill v. Downs*, 7 How., 767; also *Nesmith v. Sheldon*, 7 How., 812; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 How., 504; *Greene v. James*, 3 Curt., 189; *Woolsey v. Dodge*, 6 McLean, 150; and *Thompson v. Phillips*, Bald., 246.

What does the law of Pennsylvania provide, and what are the liabilities of the defendant under that law? Act of Assembly April 11, 1848.

The 4th section of that Act provides as follows:

"In any suit or suits which may hereafter be brought against the executors or administrators of a deceased copartner for a debt of the firm, it shall not be necessary to aver on the record or prove on the trial, that the surviving partner or partners, is or are insolvent, to enable the plaintiff to recover.

Purd. Dig., ed. of 1853, p. 633, tit. Partnership; *Miller v. Reed*, 27 Pa., 244; *Brewster v. Sterrett*, 82 Pa., 115.

2. But neither in point of fact nor law was this lease a chose in action.

A lease and the term created by it, so far as the tenants are concerned, constitute a chattel real, and so far as the landlord is concerned, they are but a part of his original estate in the premises leased.

That the instrument in question was a lease, is fully shown by the ruling in the case of *Mitchell v. Com.*, 37 Pa., 187.

Breedon & Co. sold and conveyed the whole of the leased premises to James Bradley, the present plaintiff, in fee.

One of the rights which passed to and became vested in Mr. Bradley by that conveyance, was the right to enforce payment of the rent which had not been previously paid.

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Johnston v. Smith, 3 Pa., 496; *Bk. of Pa. v. Wise*, 3 Watts, 394.

To bring a case within the exception contained in the 11th section of the Judiciary Act of 1789, the suit must not only be founded on a chose in action, but the chose in action must be assignable, and the plaintiff must sue on in virtue of the assignment.

Bullard v. Bell, 1 Mas., 251; *Wood v. Dummer*, 8 Mas., 308.

Wherever the right passes by operation of law, the case does not fall within the exception contained in the 11th section of the Judiciary Act. Hence it is that an executor or administrator is not an assignee within the purview of the Act.

Sere v. Pitot, 6 Cranch, 386; *Mayer v. Foulkrod*, 4 Wash. (C. C.), 349.

The objection to jurisdiction upon the ground of citizenship in actions at law, can only be made by plea in abatement, as is decided in this court in *DeSobry v. Nicholson*, 3 Wall., 420 (70 U. S., XVIII., 263), and the cases there cited.

The want of proper citizenship cannot be raised at the trial upon the merits.

Smith v. Kernochen, 7 How., 216.

Mr. John A. Wills, for defendants in error:

It is admitted by the counsel for the plaintiff in error that, at common law under the laws of Congress and of the State of Pennsylvania prior to the passage, by the latter, of the Act of April 11, 1848, the action could not be maintained in its present form. But it is contended, in effect, that under the provisions of that Act, it may be maintained without any action on his part, because the practice in the courts of the United States is liable to be changed by the legislation of the several States, from time to time.

This we deny, because there is a clear distinction made by the laws of Congress between the rules of decision in trials at common law, and modes of proceeding in suits at common law. In relation to the former, the laws of the several States shall be regarded.

Act, Sep., 1789, sec. 84; 1 Bright. Dig. U. S. L., 792.

But in regard to the latter, they were fixed by the Act of May 8, 1792, sec. 2, "Subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time by rule, to furnish to any circuit or district court concerning the same."

1 Bright. Dig. U. S. L., 793; *Mayer v. Foulkrod*, 4 Wash. (C. C.), 349; *Campbell v. Claudius*, Pet. (C. C.), 464; *Jones v. Vanzants*, 4 McLean, 606; *Beers v. Haughton*, 9 Pet., 359.

The second question discussed relates to the jurisdiction of the court under the provisions of the 11th section of the Judiciary Act of Sep. 24, 1789.

Now, it appears by the declaration, that the lessors and the lessees were all citizens of Pennsylvania.

But it is contended by the plaintiff in error that the lease in this case is not a mere chose in action, and that Bradley is not a mere assignee of the lease, but is also an assignee of the re-

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version, by virtue of his purchase of the land.

This alleged fact is not an element in the case as made in the court below. In the declaration there is no allegation of the purchase, nor was there any offer by the plaintiff to prove the fact on the trial, so far as appears by the bill of exceptions.

The facts showing the want of jurisdiction already fully appeared upon the record. No plea in abatement, therefore, was needed to set up the fact showing this want of jurisdiction, nor proofs to establish them.

The *rationale* of the doctrine of this court on that subject is expounded by Judge Daniel, in *Sheppard v. Graves*, 14 How., U. S., 509, one of the cases cited by the court in *De Sobry v. Nicholson*, 3 Wall., 420 (70 U. S., XVIII., 263), and it fully sustains the principle asserted.

See, also, the cases cited in Curt. Dig. of U. S. Sup. Ct., tit. Jurisdiction, 289, sec. 8; p. 290, sec. 5.

Pleading over could not cure any defect of substance, such as a want of jurisdiction, appearing plainly upon the face of the record.

Steph. Pl., Hearde's ed., marg., p. 147, notes, *y, z, Ib.*, 151.

If, therefore, the court below was right in rejecting the evidence, its action must be approved by this court, although the reasons given by the court below for its action may have been wrong, either in whole or in part.

Sibley v. Foote, 14 How., U. S., 221.

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in this action describes himself in the declaration as a citizen of Kentucky, and the defendants, who are sued as administrators, he declares to be citizens of Pennsylvania. He declares in a special count on its contract of lease, and in two common counts for money had and received by defendants' intestate to plaintiff's use, and for money laid out and expended at his request. The lease, which is set out in the declaration, was made by Burden & Co., described as of Elk County, Pennsylvania, as lessors; and Andrew L. Hines and Hiram Carmen, lessees, and it is alleged that Burden & Co., assigned said lease to plaintiff.

A trial was had before a jury, on the plea of the general issue, on which plaintiff offered in evidence said lease, its execution and assignment being admitted by defendants. The court refused to admit the lease in evidence, and the bill of exceptions taken by plaintiff to this ruling is the single error that we have to consider, the verdict and judgment for defendants being founded on this ruling.

The action of the court is defended here on two grounds, as it was there:

1. Because Hiram Carmen, the partner and survivor of defendants' intestate, could alone be sued, by the law of Pennsylvania.

2. That plaintiff suing as assignee of Burden & Co., who are citizens of Pennsylvania, the Circuit Court for that District could have no jurisdiction of the action.

The first proposition depends for its soundness on the construction to be given to certain statutes of that State, and will not be examined by us, if the ruling of the court is well founded as to the second proposition.

See 5 WALL.

U. S., Book 19.

Section 11 of the Act of 1789, which defines the jurisdiction of the circuit courts as regards citizenship, after declaring that no person shall be sued in any other district than that of which he is an inhabitant, or in which he shall be found at the service of the writ, adds: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

There can be no doubt that the lease sued on here is a chose in action, and the assignors are described in the instrument as residing in the same State with defendants.

Two propositions are relied on as taking this case out of the prohibition of the statute:

1. That the plaintiff having purchased the lands which were the subject of the lease, became entitled thereby to the benefit of the lease, and the assignment was not necessary to enable him to maintain the action.

If he had shown, or offered to show that he had become the owner of the land, the court would probably have permitted him to do so. But as he only offered the lease and the assignment, the court could not admit them on the ground of a purchase of which there was no evidence.

2. Then it is argued that although Breeden & Co. might have been, as the lease shows, citizens of Pennsylvania when the lease was made, this may not have been so when suit was brought; and that, as the plaintiff was a citizen of Kentucky, and the defendants, of Pennsylvania, this makes a *prima facie* case of jurisdiction in the court, which can only be defeated by evidence that the assignors were citizens of the same State with defendants when the suit was brought.

This court has decided the proposition otherwise. In *Turner v. Bank of North America*, 4 Dall., 8, the plaintiff recovered judgment in the circuit court as assignee of Biddle & Co. The only error assigned was, that it did not appear in the record that Biddle & Co. were citizens of a State other than North Carolina, in which district the defendant resided, and where he was sued; and for this cause, the judgment was reversed. The soundness of this decision is recognized in the cases of *Molan v. Torrance*, 9 Wheat., 537, and *Bank of United States v. Moss*, 6 How., 31, and we take the doctrine to be settled, that when a party claims in the Federal Courts through an assignment of a chose in action, he must show affirmatively that the action might have been sustained by the assignor if no assignment had been made.

The case of *De Sobry v. Nicholson*, 3 Wall., 421 [70 U. S., XVIII., 263], relied on by plaintiff's counsel, is not in point. There plaintiff had become possessed of all his partner's interest in the contract sued on without assignment, and none was relied on. The partner not being a necessary party, his citizenship in the same State with defendant did not defeat the jurisdiction.

The judgment of the Circuit Court is affirmed.

Cited—105 U. S., 667.

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BENJAMIN F. MURPHY AND BENJAMIN F. ALLEN, *Pliffs. in Err.*,

v.

DAVID KILLINGER.

(See 8. C., "*Allen v. Killinger*," 8 Wall., 480-488.)

Declarations of person to whom one is sent for information, when evidence—not to prove party's declarations in his own behalf.

Under the rule that where one person is sent to another for information, the declarations of the latter are admissible, it must appear that the person sent was sent upon the business in regard to which the admission was made.

Declarations of the third person, which detail a party's statement of a contract are not admissible, under that rule, in behalf of such party.

Such declarations, made by a party in his own favor in the absence of the other party, are mere hearsay, and are inadmissible in evidence.

Plaintiff cannot, in that way, be permitted to prove what he said to a third party about the matter in controversy.

[No. 44.]

Submitted Nov. 8, 1869. Decided Dec. 13, 1869.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

In this case, an action was brought in the court below by the defendant in error, to recover the value of certain hogs upon an alleged breach of contract. Judgment having been given for the plaintiffs, the defendants sued out this writ of error.

The case is fully stated by the court.

Mr. John N. Jewett, for plaintiff in error:

No authority is required in support of the rule that the declarations or statements of third parties cannot be received in evidence, either for or against the parties in court. Of this character most certainly would be a conversation between the witness and Killinger, called for by the interrogatories. What the witness may have said to Killinger during the interview, might be very different from what he would say under the sanction of an oath.

I recognize the rule laid down by Greenleaf in his *Treatise on the Law of Evidence*, Vol. I., sec. 182—that "The admissions of a third person are also receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter."

Being an exception to the general rule, the party seeking to avail himself of it must bring himself strictly within its provisions and, therefore, before the conversations before referred to could be admissible, it should have been shown that the parties, against whom the admission was offered, had expressly referred the party offering the evidence, to Miles Murphy for information. It was not preceded by any proof that the defendants had expressly referred Killinger to Miles Murphy for information upon any subject; but instead of such proof, the plaintiff's counsel stated as follows: "I shall expect to prove by another witness, that Killinger was sent by B. F. Murphy to Miles Murphy, with reference to these hogs."

The objection to the statement of the counsel here made is two fold.

1. It does not contain any statement of an expectation to prove that Killinger was sent to the witness for information.

2. It does not connect the defendant, Allen, in any way with the sending of Killinger to witness.

There is one other point of objection to this testimony, which may be somewhat technical in its character.

"Question. State whether or not you said to him at that time, your house didn't recognize him in the transaction."

This question was objected to as leading, and also, for the reasons above stated, applicable to the preceding one.

Messrs. S. B. Gookins and J. H. Roberts, for defendant in error:

The counsel has mistaken his point. The principle of his rule is this: when one refers to another for information, he accredits that other to speak for him and, in effect, makes the information given his own. He speaks himself through the mouth of the person referred to. But this is an act. It is part of the *res gesta*. Killinger was sent for money. What was said in doing the errand, was part of the act itself. It characterizes the act, and this is very important. Killinger all the time insisted that Murphy & Allen, and not Murphy & Co., were liable to him; and he for a long time refused to go to Miles Murphy, but consenting, if not willing, to try all expedients, however unpromising, to get his money, he finally went. This act might have turned against him, as Murphy & Allen were endeavoring to do, by showing that he had recognized Murphy & Co. as his debtors instead of themselves, if he was not allowed to show what really did take place; and the language used was much the most important part of the whole transaction, for the purpose of showing its true character.

The form of a question put to a witness is so much a matter of discretion with the court trying the cause, that we do not remember to have seen a judgment reversed in this court simply for the cause here assigned. But it should be remembered that it is the answer and not the question that does the mischief, if any is done.

A leading question is one that may be answered with "yes" or "no." No such answer was given.

Mr. Justice Miller delivered the opinion of the court:

The errors relied on in this case are all presented by the bill of exceptions taken on the trial.

Some objections are made to the charge of the court; but we are of opinion that the exceptions taken to it are not tenable, and as the judgment must be reversed on another ground, it is unnecessary to examine the objections to the charge.

We are of opinion that the court erred in admitting, against the objection of the defendants, the conversation between Miles Murphy and the plaintiff, in which the plaintiff gives his version of his contract with defendant, Allen.

To understand this it is necessary to call attention to the pleadings and the relation of the parties to this conversation.

Plaintiff sues Benjamin F. Murphy and Benjamin F. Allen, as partners in trade, alleging

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NOTE.—Declarations of third persons, referred to, evidence against party. See note to *Clerk v. Russell*, 3 U. S. (3 Dall.), 415; and note to *Leeds v. Marino* 114. Co., 15 U. S. (2 Wheat.), 380.

that he delivered to them at Des Moines, Iowa, seven hundred hogs which they agreed to slaughter and pack at that place and forward to Chicago and sell per account of plaintiff, and pay to him the proceeds of said sale. To this the defendants plead separately. In his second plea, Allen says he did not make said promises in partnership with said B. F. Murphy, but that if any such were made, they were made by Benjamin F. Murphy and others composing the firm of Miles Murphy & Co., of which he was not a member.

B. F. Murphy files a similar plea, saying that if the promises were made by him at all, they were made as a member of the firm of Miles Murphy & Co., of which Allen was not a partner.

The undisputed facts bearing on the evidence in question seem to be these: That B. F. Murphy was a member of the firm of Murphy & Allen, engaged in the business of pork packing at Des Moines, Iowa, and he was also a member of the firm of Miles Murphy & Co., of Chicago, engaged in buying and selling the hog product on commission. The hogs of plaintiff were killed and packed by the firm at Des Moines and forwarded to the firm at Chicago, by whom they were sold, and the money was not paid, either to plaintiffs or to the Des Moines house.

Plaintiffs insists that Allen was a member of the Chicago firm, and responsible for their acts; or, if he was not, that the firm of Murphy & Allen at Des Moines undertook, not only to slaughter and pack his hogs, but to sell them at Chicago and account to him for the proceeds, both of which Allen denies, and so does B. F. Murphy.

Plaintiff, Killinger, defendant, Allen, and Miles Murphy, were all witnesses on the trial.

The plaintiff had an opportunity to give his version of the contract made by Allen with him on behalf of Murphy & Allen, and he did so under oath, and subject to cross-examination. Miles Murphy was the plaintiff's witness, and under oath testified to what he knew. But in the examination of Miles Murphy by the plaintiff's counsel he was asked to detail a conversation which took place between himself and the plaintiff in Indiana, when neither of the defendants were present.

The witness stated, in answer to this, among other things, that he (the witness) knew that the plaintiff had some pork in Chicago, it had been shipped from Des Moines, and that the plaintiff went on to tell him that he had placed it in Mr. Allen's hands, and that it was sent to Chicago, and that he (the plaintiff) was out \$8,000 or \$10,000.

When it is remembered that the only important issue before the jury was, whether Allen's contract with the plaintiff was merely to slaughter and pack for the plaintiff the seven hundred hogs, or whether he had undertaken to forward and sell at Chicago the product of the hogs after they had become converted into pork, the importance of this statement by the plaintiff is obvious. Slaughtering and packing hogs at Des Moines is one business, and buying and selling pork at Chicago, whether on commission or otherwise, is a very different business; and the plaintiff is here permitted to prove what he had told Mr. Murphy about that matter after the controversy had arisen, and when

neither of the defendants were present to deny it, or to explain the matter.

This testimony was objected to when the question was asked and counsel for plaintiff apparently conceding that it was improper as matters stood, said: "I shall expect to prove by another witness that Killinger was sent by B. F. Murphy to Miles Murphy with reference to those hogs, and therefore I suppose the conversation is competent." The court then overruled plaintiff's objection. Plaintiff's counsel again asked witness to state not what Miles Murphy had said in the conversation, but substantially what was said between witness and plaintiff. And this was objected to and the objection overruled.

It does not seem to us that the pledge made here by the plaintiff's counsel (who, when the testimony was objected to, apparently conceded that the question was improper as matters stood), was what was required, to admit such testimony, if we suppose the pledge to have been fully redeemed. The rule invoked by the counsel is, that where one person is sent by another to a third party for information in reference to an uncertain or disputed matter, the person sending is bound by the declarations of the party to whom he was referred, as if they were made by himself.

But, there is here no statement that the counsel expected to show that Killinger had been sent to Miles Murphy for information as to the extent of Killinger's contract with Allen, or even with Allen and B. F. Murphy, or with any reference to that contract. Such a supposition is absurd, as the plaintiff must have known all about that, while Miles Murphy could know very little. And so the declarations brought out by the conversation that are important are not the declarations of Miles Murphy in answer to a request for information, but they are the declarations of the plaintiff made to Murphy.

When the counsel came to fulfill this promise, it is equally clear that B. F. Murphy did not send the plaintiff to Miles Murphy for information, but for money. Killinger was urging B. F. Murphy, in Chicago, to pay him. The firm of Miles Murphy & Co. had failed, and to get rid of Killinger's personal importunities, B. F. Murphy urged him to go and see Miles Murphy, who was then in Indiana, and see if he would not pay him something. This is very clear from Killinger's own statement, being the one relied on by counsel to redeem the pledge to the court.

It seems to us that Killinger's statement to Miles Murphy was mere hearsay, made by the plaintiff in his own favor after the controversy had arisen, in the absence of the defendants, and its introduction cannot be justified under the settled rules of evidence.

But if there ever could have been a justification for such testimony, there can surely be none now. For the plaintiff is permitted now to tell his own story to the jury directly, but under the sanction of an oath, and subject to the test of cross-examination. Shall he also be permitted to prove what he said to a third party about the same matter when he was under no oath, and in no danger of cross-question or contradiction?

For this error the judgment must be reversed and a new trial awarded.

Mr. Justice Nelson, dissenting:

There were two grounds of defense in this case, against the suit of Killinger to recover the proceeds of his pork, sold for him, as charged, at Chicago, by the defendants. One, that the defendants were not partners; the other, that the pork was sold by the house of Miles Murphy & Co., and not by F. Murphy & Allen. There was a balance of some \$8,000 or \$10,000 claimed against the firm of F. Murphy & Allen in the suit.

The house of Miles Murphy & Co. had failed; of course it was important to fix the indebtedness upon this house.

On the trial, Miles Murphy, of the firm of Murphy & Co., was called as a witness for the plaintiff, and asked if the plaintiff had called on him at his residence in Indiana, in reference to the proceeds of this pork, and if so, what conversation occurred between them.

This was objected to on the ground that neither the defendants was present. Thereupon, the counsel stated he expected to prove by another witness that the plaintiff was sent to M. Murphy in reference to the proceeds of the pork by F. Murphy, one of the defendants. The witness testified that the plaintiff called upon him and said that F. Murphy had refused to pay him for his pork or to give him any satisfaction, and had sent him down to witness, to see if he could get any money from him. He told the plaintiff that he had come to a bad place; that his house had failed, and he knew nothing about his matters. He knew the plaintiff had pork at Chicago shipped from Des Moines. The plaintiff answered he had placed the pork in Allen's hands, and it was sent to Chicago, and he was out some \$8,000 or \$10,000.

The witness told the plaintiff the pork came from Des Moines the same as other meats, and that F. Murphy (one of the defendants) had charge of it.

Killinger, the plaintiff, was a witness in the case, and testified that he applied to F. Murphy, at Chicago, for the balance of the pork proceeds, and after declining to make any settlement, he finally sent him to Miles Murphy, to see him about the business, and get, if he could, the money from him. The plaintiff at first declined, saying he had no contract with him or his house, and did not look to them for his money. He was, however, finally persuaded to go; and on finding Miles Murphy, stated his business, and was answered that he had no money, and did not owe him. He, Miles, then stated the contract his house had with F. Murphy & Allen about the pork; that all their firm had to do with it was to receive it at their warehouse, and to charge $2\frac{1}{2}$ per cent. for the service, $1\frac{1}{4}$ for F. Murphy & Allen, and one for themselves.

The question is whether the statement of the plaintiff, in his conversation with Miles Murphy, that he had placed the pork in the hands of Allen, that it was sent to Chicago, and that he was out of pocket some \$8,000 or \$10,000, under the circumstances mentioned, was admissible.

It occurred in a conversation with a person to whom F. Murphy, one of the defendants, had sent the plaintiff to endeavor to obtain from him the proceeds of the pork. Now, this

conversation was competent evidence as against F. Murphy as it respects the business upon which the plaintiff had been sent; he, F. Murphy, had accredited Miles Murphy to speak for him in respect to the transaction, and so far as it might tend to prove the partnership of F. Murphy with Allen competent and pertinent. We agree it was no evidence against Allen, nor does it appear that the court gave it any effect as to him. It is not required that, in proving a partnership, the evidence must be competent as it respects each member of the firm. The proof can be given as bearing separately against each of the parties. Miles Murphy, in response to the mission of the plaintiff, stated that F. Murphy was a partner of Allen, and that the firm had received and sold the pork. As this response was competent testimony against F. Murphy, it was properly admitted. The whole conversation that occurred, or which related to the business about which the plaintiff was sent, was properly allowed. It was no evidence as against Allen, as we have already said, but was as it respected the other defendant. On this ground we cannot agree to the opinion of the court.

Mr. Justice Davis concurs in this opinion.

JOSEPH W. PARISH, GEORGE C. HADLEY AND WILLIAM L. HINE, *Appts.*,

UNITED STATES.

(See S. C., 8 Wall., 489-491.)

Party, after signing contract, is concluded by it—offer to deliver, necessary, to recover damages for refusal to receive.

If a party to a contract had any objections to the provisions of a contract he signed, he should have refused to make it. Having made it and executed it, his mouth is closed against any denial that it superseded all previous arrangements.

To recover damages for a refusal to receive property, one must show that he had the property on hand and an offer to deliver.

[No. 80.]

Submitted Nov. 23, 1869. Decided Dec. 13, 1869.

A PPEAL from the Court of Claims. The petition in this case was filed in the court below by the appellants, to recover for an alleged breach of contract. The court having dismissed the bill, the plaintiff took an appeal to this court.

The case is fully stated by the court.

Mr. A. L. Merriman, for appellant:

This act of approval having been made, there was no power on the part of the Secretary of War to change or alter it.

The contract having been made, it was not within the power of either party to annul the same, without the consent of the other. Therefore, when the Secretary of War annulled the first contract without the consent of plaintiff, a cause of action accrued for such breach.

The execution of one and a different contract, is no waiver of the breach of another and prior contract, unless it is so agreed at the time. In this case the plaintiffs, upon executing the second contract, expressly protested against the wrong attempted upon them by the annulling of the

first contract, and at the time stated that they should seek redress for the same. Under such a state of facts there could be no waiver, either express or implied, of their rights under the first contract.

Mr. E. R. Hoar, Atty-Gen., and T. L. Dick-ey, Asst. Atty-Gen., for appellee:

The source of authority to bind the United States in such a contract, is the head of the War Department.

See *U. S. v. Adams* (ante, 249).

Now, the only contract executed by the authority of the Secretary of War, with these appellants, did not include New Orleans as one of the places to be supplied with ice. This also was the only contract executed and delivered by any representative of the United States to the appellants.

The case finds that the Secretary of War directed this second contract to be executed in lieu of the first, which was done.

The court below did not find that the appellants have suffered any loss from the injury alleged, so that there has been proved no damage which would authorize a judgment to be ordered by this court in favor of the claimants.

Mr. Justice Field delivered the opinion of the court:

This case comes before us on appeal from the Court of Claims, the facts as found by the court may be briefly stated as follows:

On the 4th of December, 1863, D. L. Magruder, the Surgeon and Medical Purveyor of the Military Department of the West, acting under instruction of the Surgeon-General of the United States, gave notice that proposals would be received at his office in Louisville, Kentucky, until the 20th of that month, for furnishing ice to all the general hospitals of the United States at the west, including the Division of the Mississippi and the Department of the Gulf, in such quantities as might be required for the use of the sick and wounded, during the year 1864. Under this notice, Parish & Co., the claimants, submitted proposals which were accepted, and on the 18th of the same month a contract was prepared and signed by them and Magruder, by which they were to furnish ice for twenty different places, one of which was New Orleans. It was understood between the parties that this contract was not to be binding until it should receive the approval of the Surgeon-General, to whom it was forwarded. It received such approval, and was then dispatched by mail to Magruder; but before reaching him, the approval was reconsidered, and the contract, by order of the Secretary of War, was recalled, and the draft of another contract prepared in its place. After this draft had reached Magruder, he was directed by the Secretary to erase from it the name of New Orleans, as one of the places which was to be supplied with ice, and have it executed in lieu of the contract originally proposed; and this was done. The claimants then executed the instrument, but in doing so they protested against the alteration; stating, however, that they would lay all the facts before the officials at Washington and seek from them redress. But, notwithstanding this protest, they treated the contract thus made as the only one binding upon them, and carried out their obligations under it. They did not de-

liver, nor offer to deliver, any ice at New Orleans.

Upon the facts found by the Court of Claims, it is difficult to perceive upon what ground the contractors can urge any claim for damages against the government. The contract with New Orleans erased, superseded all other proposed contracts. No other had any validity. The action of Magruder, until the approval of the Secretary of War, was merely initiatory to a contract. He could not bind the United States in any way.

If the claimants had any objections to the provisions of the contract they signed, they should have refused to make it. Having made it, and executed it, their mouths are closed against any denial that it superseded all previous arrangements.

The case of *Gilbert v. U. S.*, decided at the December Term, 1867, but not as yet reported, is one much stronger than this [ante, 308]. There it was insisted that the Act of Congress, under which the secretary acted in making a contract with Gilbert & Secor, was itself an acceptance of certain proposals presented by them, and that, taken in connection with the proposals, it constituted a contract binding on the government. The secretary made with the parties a contract requiring, in one particular, different kind of materials from those originally proposed; but this court held that the parties were bound by the contract signed, and could not claim any compensation for the difference in value between the materials used and those proposed.

But, independent of any consideration respecting the character of the contract, it nowhere appears that the claimants suffered any damages from the supposed injury alleged. They did not offer to deliver any ice at New Orleans, and it is not shown that they secured any for such delivery, or, if they secured any, that they were unable to part with it at prices as remunerative as those they might have obtained at New Orleans.

The appeal is frivolous, and the decrees of the court below is affirmed.

WILLIAM ALDRICH, MARTIN B. MED-BURY, H. H. SMITH, JOHN W. MED-BURY AND JAMES F. ALDRICH, *Plffs.*
in Err.,
v.

THE ÆTNA INSURANCE COMPANY.

(See S. C., 8 Wall., 491-497.)

Objection to writ of error—jurisdiction—allowance of writ—appearance waives error—recording mortgage.

It is no objection to a writ of error under the 25th section of the Judiciary Act, that the judgment was rendered on a voluntary submission without suit, under the Code of Procedure of a State.

Where the question was, whether the mortgage of a vessel duly recorded under an Act of Congress, gave a better lien upon it than the subsequent attachment issued out of a court of a State, the case is within this section.

NOTE.—Appearance cures defects in service of process, and its non-service, except want of jurisdiction of subject-matter. See note to *Knox v. Summers*, 7 U. S. (3 Cranch), 496.

See 8 WALL.

The objection, that the writ of error was allowed by the Chief Judge of the Court of Appeals of the State of New York, which writ was addressed to the Superior Court of Buffalo, where the record was, is untenable, as the judgment was, in fact, rendered in the Court of Appeals.

The appearance by the defendant in error waived the irregularity, that the citation was not signed by the judge who allowed the writ of error.

The recording of the mortgage in the collector's office under the Act of Congress, protects the interest of the mortgagee against subsequent purchasers or mortgagees by its own force, irrespective of any state law on the subject.

[No. 31.]

Submitted Oct. 19, 1869. Decided Dec. 13, 1869.

IN ERROR to the Superior Court of Buffalo for the District of New York.

The history and facts of the case fully appear in the opinion of the court.

Mr. Robert Rae, for appellants:

The power of Congress comprehends navigation within the limits of every State in the Union, so far as that navigation may be in any manner connected with commerce with foreign nations or among the several States.

The full power to regulate a particular subject implies the whole power and leaves no *residuum*. A grant of the whole is incompatible with the existence of a right in another to any part of it.

Gibbons v. Ogden, 9 Wheat., 1; *Steamship Co. v. Port Wardens*, 6 Wall., 32 (73 U. S., XVIII., 750); *Steamship Co. v. Joliffe*, 2 Wall., 459 (69 U. S., XVII., 807); *Gilman v. Phila.*, 3 Wall., 713 (70 U. S., XVIII., 96).

The Act of Congress makes a bill of sale or mortgage valid, upon complying with its recording laws. It is said the State of Illinois requires something more; but when Congress has the power to regulate a given thing, that power is not concurrent, but exclusive; and although the State may legislate upon the same object for different purposes within its power, yet in the exercise of this power by Congress, by virtue of the Constitution, if there should arise any conflict, the federal power must prevail and furnish the rule.

The law of Illinois in reference to chattel mortgages as construed by its courts, produces no such conflict with the Act of Congress as the decision of the Court of Appeals would infer.

In *Fontaine v. Beers*, 19 Ala., 722, the whole question was reviewed, and it was held that the Statute of that State, which was similar to the Statute of Illinois, did not apply to a vessel engaged in foreign commerce. The same was held in the case of *Steamboat Co. v. Conner*, 8 Rich., 335; *Robinson v. Rice*, 3 Mich., 235; *The Martha Washington*, 25 Law Rep., 22; *Veazie v. Somerby*, 5 Allen, 280; *Sinnott v. Davenport*, 22 How., 227 (63 U. S., XVI., 243); *Potter v. Irish*, 10 Gray, 416.

Messrs. John Ganson and Bartley & Stanton, for appellee:

This court has not jurisdiction to review the judgment in question, under the 25th section of the Judiciary Act of 1789.

1. Because it is not a judgment in a suit, within the signification of that word as used in the Act of 1789. *Lang v. Ropke*, 1 Duer, 701.

There is nothing appearing on the face of the record, which shows that the validity or

construction of any law of the United States necessarily came in question in the decision of the state courts. This must appear to give this court jurisdiction. If the state court might have decided as it did without deciding any question relative to the Act of Congress, then this court has not jurisdiction of this case.

Ocean Ins. Co. v. Polleys, 13 Pet., 157; *Walker v. Villavaso*, 6 Wall., 124 (73 U. S., XVIII., 858); *Rector v. Ashley*, 6 Wall., 143 (73 U. S., XVIII., 738); *R. R. Co. v. Rock*, 4 Wall., 177 (71 U. S., XVIII., 381).

By the common law the mortgage was void. It was void under the Statute of Illinois. If the court so held, although erroneously, it would not give this court jurisdiction to re-examine the decision.

Rector v. Ashley (*supra*): *Hoyt v. Sheldon*, 1 Black, 518 (66 U. S., XVII., 65); *Farney v. Toule*, 1 Black, 850 (66 U. S., XVII., 216).

The writ of error was allowed by the Chief Judge of the Court of Appeals; whereas, the writ is addressed to the Superior Court of Buffalo, in which latter court the final judgment was entered and the record filed.

The writ is tested Nov. 16, 1867, which was not in term time. The citation was signed May 4, 1867. The bond was approved by a district judge Feb. 28, 1867. Citation was not served until Nov. 18, 1867. It is believed that the term of December, 1866, had not expired when the citation was signed. It had not expired when the bond was approved. Thirty days did not intervene between the service of citation and return day. For these various reasons, the writ was ineffectual.

Palmer v. Downer (*ante*, 99); Act of 1789, sec. 25; *Carroll v. Dorsey*, 20 How., 204 (61 U. S., XV., 808); *Ins. Co. v. Mordecai*, 21 How., 195 (62 U. S., XVI., 94); *Agricultural Co. v. Pierce Co.*, 6 Wall., 246 (73 U. S., XVIII., 789).

The validity and effect of the conveyance of personal property, is to be determined by the law of the place where it is made. By the laws of Illinois, where this mortgage was executed, where the property at the time was and where the mortgagor was domiciled and where the contract was to be performed, this mortgage never had any validity or effect against the rights of third persons.

The Act of Congress has no bearing upon the question. The Act does not declare, nor was such its object, what is a legal bill of sale or mortgage of the vessel. It merely, for the protection of *bona fide* purchasers, etc., requires that conveyances of vessels shall be recorded in the manner specified in the Act, leaving other requisites to the validity of the conveyance as between parties to it and as against the rights and interests of third persons, to be determined by the laws of the jurisdiction where made. It is simply a registry or recording Act.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Superior Court of Buffalo, in the State of New York.

The suit by the Insurance Company against Aldrich and others, was commenced by an agreed statement of facts in the court below, under the 372d section of the Code of Procedure of the State.

The case is this: the defendants sold and conveyed the schooner *Stella*, on the 4th February, 1856, at Chicago, to Benj. F. Jacobs, and on the same day took back a mortgage of the vessel to secure the payment of \$6,000 of the purchase money. The mortgage is in due form and was recorded in the office of the collector at the Port of Chicago, where the vessel was permanently enrolled, and where one of her owners resided. The purchase money was payable in sums of \$500 and of \$1,000, extending through the years 1856, 1857, and to March, 1858. Jacobs, the purchaser, who resided in Chicago, immediately took possession of the vessel, which was in port, and employed her on the lakes until attached in Buffalo by the plaintiff, on the 11th of December, 1856, for a debt against him. At the time of the execution of the mortgage, there was a statute of the State of Illinois, which enacted that "No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to and remain with the mortgagees, or the said mortgage be acknowledged and recorded, as hereinafter directed."

This mortgage had been neither acknowledged nor recorded, according to the requirements of this statute. The question of difference in the foregoing facts was submitted to the Superior Court in Buffalo, as follows:

The plaintiff claimed that the mortgage of the defendants could not be set up as against the attachment; that it was void as against it; and that he was entitled to a judgment declaring the lien of the attachment paramount to that of the mortgage.

The defendants claimed the converse of these propositions. There is a stipulation in the statement of facts, that in case the decision shall be in favor of plaintiff, a judgment be rendered against the defendants for the sum of \$4.75 and interest; but if in favor of the defendants, then a judgment against plaintiff for costs.

The court at a General Term at Buffalo, rendered a judgment in favor of the plaintiff. The cause was removed to the Court of Appeals, where the judgment was affirmed, and the proceedings remitted to the Superior Court at Buffalo, in which the judgment of affirmance was entered of record. The case is now before us on writ or error.

An objection is taken to the writ of error under the 25th section of the Judiciary Act, on the ground that the judgment is not rendered in a suit within the words of this section, but was rendered on a voluntary submission without suit, containing a statement of facts agreed on by the parties, under the 372d section of the Code of Procedure in New York.

The 372d section of the Code provides:

"Parties to a question of difference, which might be the subject of a civil action, may without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceeding in good faith to determine the rights of the parties. The court shall there-

See 8 WALL.

upon hear and determine the case, at a General Term, and render judgment thereon, as if an action were depending."

The 374th section provides "That the judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to an appeal in like manner."

We are of opinion that this objection is untenable. The Code simply provides for the institution of the suit or action by the voluntary agreement of the parties, and without any compulsory process or compulsory proceeding of any kind against the defendant. The court are to hear and determine the case at a general term, and render judgment thereon as if an action were depending; and the submission can be made only to a court which would have had jurisdiction of the case if a suit had been brought. Cases from the State of Louisiana not unfrequently come up here from the state courts, where the proceedings have been instituted substantially as in the present case.

It is also objected that it does not appear on the face of the record the validity of a statute or law of the United States, or of the statute of a State as repugnant to such law, or that the construction of any statute of the United States was drawn in question.

This we think a clear misapprehension of the material question involved in the case. That question was, whether the mortgage of the vessel to the defendants, duly recorded under an Act of Congress in the collector's office, gave a better lien upon it than the subsequent attachment issued out of the Superior Court of Buffalo in favor of the plaintiff. The construction of this Act of Congress, and its force and effect, as it respected the mortgage security under which the defendants claimed a right or title paramount to that of the attachment creditor, was necessarily in question, and must have been passed upon by the court; and as its decision was against this right, the very case is made provided for in this section.

A further objection is taken that the writ of error was allowed by the Chief Judge of the Court of Appeals of the State of New York, which writ is addressed to the Superior Court of Buffalo, where the record is, and who was not authorized to allow it. 25th sec. Judiciary Act.

The answer to this objection is, that the allowance of the writ is well enough, as the judgment was in fact rendered in the Court of Appeals.

It is objected also that the citation was not signed by the judge who allowed the writ of error. 25th sec. Judiciary Act.

The answer is that the appearance by the defendant in error waived the irregularity.

As to the merits. We are of opinion the question involved was decided in the case of *White's Bank v. Smith* [ante, 211]. That was a question between two mortgages on the vessel, duly recorded in the collector's office—the first on the 12th June, 1863, in the collector's office at the Port of Buffalo; the second in the collector's office at the Port of Sandusky, on the 17th June, 1865.

The law existing in New York at the time of the execution of the first mortgage was as stringent as that of the State of Illinois in the

present case in respect to the filing of personal mortgages at a designated office, when the possession of the property does not accompany the mortgage. White's Bank, the first mortgagee, had complied with the law in New York and filed his mortgage, but had omitted to refile it at the end of the year, which was required in order to preserve the lien.

Now, the argument in the case was, that, inasmuch as the filing of the first mortgage according to the state law was essential to protect the lien as against subsequent purchasers or mortgagees, the omission to refile it left the vessel free and subject to the lien of the second mortgage. It was upon this idea the case was disposed of at the circuit, and the proceeds of the vessel, after discharging some prior liens for seamen's wages decreed to Smith, the second mortgagee. And this was a proper disposition, upon the assumption that the state statute governed the lien; for, although Smith had not filed his mortgage according to the Statute of Ohio, this omission did not affect the question between him and White's Bank, but only as it respected subsequent purchasers or mortgagees.

A different view was taken of the case when it came before this court. It was held that the recording of the first mortgage in the collector's office under the Act of Congress protected the interest of the mortgagee against subsequent purchasers or mortgagees by its own force, irrespective of any state law on the subject, and hence the decree below was reversed, and the proceeds directed to be delivered over to the first mortgagee. The court regarded the law as a registration Act, which excluded all state legislation in respect to the same subject; and looking at the nature and character of the species of property Congress was dealing with we entertained no doubt as to its power to pass this law. It was said in the opinion in that case, "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubts but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction."

As a registry Act there can be no doubt upon the recording of the mortgage; the fact that it is not accompanied by the possession of the vessel affords no ground of impeachment of the transaction, as the record is regarded as satisfactorily accounting for the non-delivery of the possession. This is the law as it respects the recording or filing of personal mortgages under state statute. 2 Kent, Com., 531, *note*.

The protection, however, goes no further, as the consideration of the instrument may be impeached for fraud or for any other vice or infirmity in the original contract or transaction.

The judgment of the court below is reversed, and the cause remanded to it, etc.

Cited—21 Wall., 578; 3 Sawy., 409; 7 Sawy., 186, 187; 14 Blatchf., 193, 194; 3 Wood, 587; 8 Ben., 578; 7 Biss., 240; 61 N. Y., 76; 19 O. St., 484.

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JAMES C. KENNEDY, as Receiver of the
MERCHANTS' NATIONAL BANK OF WASHINGTON CITY, *Appl.*,

v.

PATRICK GIBSON, JOHN S. BARRY
LAWRENCE P. BAYNE, SUE E.
HOUGH, OSCAR KING AND THE NATIONAL MECHANICS' BANK OF BALTIMORE ET AL.

(See S. C., 8 Wall., 498-507.)

Action by receiver of national bank—attorney in—personal liability of stockholders—comptroller decides necessity of action—when suit in equity is proper—necessary parties—suit in Federal Courts—citizenship of receivers.

A defendant cannot object that an action by the receiver of a National Bank is not brought by the Attorney of the United States, but by his own attorney.

It is for the Comptroller of the Currency to decide when it is necessary to institute proceedings against the stockholders, to enforce their personal liability, and how much shall be collected.

His determination is conclusive, and the stockholders cannot question it in the litigation that may ensue.

This action on his part is indispensable, and must be distinctly averred in all such cases.

The liability of the stockholders is several, and not joint. The limit of their liability is the par of the stock held by each one.

Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required the proceeding may be in equity.

In such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court until the full amount of the liability is exhausted.

It is no objection that there are other stockholders beyond the jurisdiction of the court, who cannot for that reason be made co-defendants.

The receiver represents both the creditors and the association; and when he sues in his own name it is not necessary to make either a party to the suit.

Such suits may be brought by the associations in the courts of the United States, notwithstanding the omission of the word "by" in the 57th section of the Act of 1864.

Receivers may sue in the courts of the United States by virtue of the Act, without reference to the locality of their personal citizenship.

[No. 47.]

Argued Nov. 11, 1869. Decided Dec. 13, 1869.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The bill in this case was filed in the court below by the plaintiff in error, as a receiver of a bank, to recover from the defendants, as stockholders, for a deficiency in the assets. The court entered a decree dismissing the bill. Whereupon the plaintiff sued out this writ of error.

Messrs. R. J. Brent and R. T. Merrick, for appellant:

1. It will be maintained by us that the receiver in this case had authority to bring this suit in his own name, for the protection of the interests of all parties.

It will not be disputed by us that if a receiver is appointed by a court, he must ordinarily obtain an order of the court authorizing him to sue.

Edw. Rec., 185; Sm. Rec., 165; *Merritt v. Lyon*, 6 Wend., 410.

But here the receiver is a statutory officer

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nominated by the comptroller, and, when qualified to act, is clothed with ample powers under the law.

By the 50th section he is required, under the direction of the comptroller, to "Take possession of the books, records and assets of every description, collect all dues, debts and claims, etc., and, upon the order of the court, may sell and compound all bad debts, and on a like order, may sell all the real and personal property, etc., on such terms as the court shall direct.

So far he must act by the order of the court.

But then it is further declared that "The receiver may, if necessary to pay the debts of the Association, enforce the individual liability of the stockholders, provided for by the 12th section, and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, etc., and also make report of all his acts and proceedings to the comptroller." 13 Stat. at L., 114.

We submit that, under this section, the receiver may, in his own name and without the order of the court or comptroller, enforce the 12th section against stockholders, and it is his duty to do so. So far as the supervision of the comptroller may be involved, the presumption is that the receiver is acting always under his authority, unless the contrary appears.

How can the receiver, if it be necessary to pay the debts, "enforce the individual liability of the stockholders," unless he is competent to bring a suit in his own name for that purpose, in which he may show the condition of the association and the necessity and extent of the liability?

Story v. Furman, 25 N. Y., 219.

This was a national Bank, and its directors could no longer act nor bring suit after all its books, assets and affairs were taken from them.

Bk. of Poughkeepsie v. Ibbotson, 24 Wend., 479; and *Story v. Furman*, 25 N. Y., 225.

It results, either that the receiver is to sue whenever suit may be necessary, or that as many receivers should be appointed as there were States in which suit must be brought. If the court had the appointment of the receiver, he could not sue extraterritorially, as decided in *Booth v. Clark*, 17 How., 322 (58 U. S., XV., 164).

Contribution *pro rata* among the stockholders for the purpose of making good the deficiency of assets to pay the debts, is a matter peculiarly of equitable jurisdiction.

Briggs v. Penniman, 8 Cow., 395; 1 Cas. Ch., 204.

Nor is it any objection to this contribution, that some of the stockholders are non-residents.

All the authorities recognize this as a general rule.

3 Story, Eq. Jur., secs. 15, 26; 2 Mad. Ch. Pr., 222; Dan. Ch. Pl. & Pr., 329; *Wiser v. Blachly*, 1 Johns. Ch., 437; *Hadley v. Russell*, 40 N. H., 109.

But to this general rule there are some exceptions. Where persons interested are out of the jurisdiction of the court, and it is so stated in the bill and admitted by the defendants' answer or proved, it is not necessary to make them parties.

See 8 WALL.

2 Mad. Ch. Pr., 219; *Elmendorf v. Taylor*, 10 Wheat., 167; *Mallow v. Hinde*, 12 Wheat., 198; Dan. Ch. Pl. & Pr., 238; Story, Eq. Pl., sec. 78.

It will be said that this suit is untenable, because it is not shown that the comptroller has stated a preliminary account showing the deficiency of assets, and this was the chief ground upon which the judge below sustained the demurrer. Such an objection is at variance with the 50th section of the Currency Act of June 3, 1864.

The comptroller's authority is only to arise after the receiver "collects, pays over and reports."

It will be said that this suit should have been brought by the district attorney, under the 50th section of the Currency Act.

The section referred to is directory only and addressed to the Executive Department of the Government or the receiver, and can in no way affect the jurisdiction of the court.

Messrs. I. Nevitt Steele and Thomas Donaldson, for appellees:

1. The suit should have been brought by the District Attorney of the United States.

Section 56 of the Act of June 3, 1864, provides that "All suits and proceedings arising out of the provisions of that Act, in which the United States or its officers or agents shall be parties, shall be conducted by the District Attorneys of the several districts under the supervision of the Solicitor of the Treasury."

2. Assuming, for the sake of argument, that no mode of administering the assets and distributing the proceeds had been provided by the law, a suit in equity would be a proper mode.

The question arises: who are necessary parties?

(a) The general principle is, that to such a suit in equity the creditors must be parties, and the corporation and all its stockholders defendants.

(b) It must be "necessary" to proceed against the stockholders on the personal liability clause, and that must appear on the face of the bill; not by general averment, but by the statement of the legal facts showing the necessity. What those facts are, appear from the law. There must have been administration of the assets and a deficiency so ascertained, according to the requirements of the 50th section of the Act. At the very least, the *ex parte* proof required by the Act must have been made.

The law itself has established the *quo modo* of ascertaining the value of the assets and of the amount of the debt.

Reciprocity Bk., 22 N. Y., 9; *Crease v. Babcock*, 10 Met., 525; *Grew v. Breed*, 10 Met., 569; *Hollister Bk.*, 23 N. Y., 510; Const. N. Y., art. 8, sec. 7 (1849).

Nor does the demurrer have the effect of admitting the general averments of the bill, which are mere inferences; but it only admits the facts themselves set forth from which the inferences are drawn. And if the facts legally necessary, in order to entitle the complainant to relief, are not stated, the demurrer is good. Story, Eq. Pl., secs. 446, 452.

But, in fact, there is neither jurisdiction nor power in the circuit court to have an account stated under this law; nor can such a suit in

equity as the present be brought to enforce the individual liability of stockholders.

Under the law, the receiver collects the assets, sells the property, etc., and pays over to the Treasurer of the United States, and the Comptroller of the Currency receives the approval of the claims, decides on the dividends and pays them to the claimant. Thus it is not the duty of the receiver to ascertain the claims, nor has he the means of ascertaining them; and neither the claimants nor the comptroller are before the court.

V. The complainant has no standing in a court of equity, because the powers of a court of law are sufficient.

None of the reasons for, and none of the advantages of, the equity proceeding can exist in this case. Story, Eq. Pl., sec. 472.

The complainant has stated himself out of the equity court by his averment that the balance of indebtedness of the bank, after applying the assets, exceeds the whole amount of his capital stock. It follows, of course, that the sum due by each stockholder is fixed, and no account is necessary. Story, Eq. Pl., sec. 479.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity, from the decree of the Circuit Court of the United States for the District of Maryland. The bill was filed by the appellant. For the purposes of the points necessary to be considered, the case may be briefly stated. The appellant has been duly appointed receiver of the Merchants' Bank of Washington City, under the 50th section of the Act of June 8d, 1864, and brings this bill to charge the defendants, who are alleged to be stockholders of the Bank, with the personal liability prescribed by the 12th section of the Act. The facts necessary to warrant the appointment of a receiver are sufficiently set forth. It is averred that he "has already ascertained that the assets and credits of the Association are wholly insufficient to pay its debts and liabilities, and that it will be necessary to the complete and entire administration of the trust reposed in him, that recourse shall be had to the personal liability imposed upon the stockholders;" that two thousand shares of the capital stock, amounting to \$200,000, were issued by the Bank to its stockholders: that it will be necessary to collect from them this amount, to make good the deficiency in the means to meet the balance of the indebtedness of the Bank, which will remain after the application of all the available assets, to the discharge of its liabilities, and, that "after such application is made, a balance of indebtedness will remain due, largely exceeding the said sum of \$200,000." The stockholders, besides the defendants, are named, and it is alleged that a part of them reside in the District of Columbia, and one of them in the State of New York. The prayer of the bill is, that an account may be taken, and that each of the defendants shall be decreed to pay to the receiver his *pro rata* share of the indebtedness of the Bank, which may remain, after applying to the liabilities all its effects, as required by the Act before mentioned, and for general relief. The bill is signed by the special counsel of the receiver. The name of the Attorney of the United States

does not appear in the case. The defendants demurred. Our opinion will cover all the points brought to our attention by their counsel in the argument, without particularly stating them.

The receiver is the agent of the United States, and according to the 56th section of the Act (18 Stat., at L., 116), this suit should have been conducted by their attorney. But this provision is merely directory. The question which arises is between the United States and its officers. The rights of the defendants are in no wise concerned, and they cannot be heard to make the objection, that this duty of the local law officer of the government has been devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law.

The 50th section of the Act provides, that the receiver, under the direction of the Comptroller of the Currency, shall take possession of the books and assets of every description, of the association, collect all the debts and claims belonging to it, and may—proceeding in the manner prescribed—sell, or compound bad and doubtful debts, and sell all its real and personal property; "and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." He is required to pay all the moneys he may realize, to the Treasurer of the United States, subject to the order of the comptroller, and to report to the comptroller all his proceedings. The comptroller is required to give notice to all persons having claims against the association to present and prove them; and after making provision for refunding to the United States "any deficiency in redeeming the notes of such association, as mentioned in this Act," to make a ratable dividend of the moneys paid over to him by the receiver, "on all claims which have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." He is to make further dividends, from time to time, as the means shall come into his hands, "on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the stockholders of such association, or their legal representatives."

The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. *Wheat*

the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise, in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants.

The claims of creditors may be proved before the comptroller, or established by suit against the Association. Creditors must seek their remedy through the comptroller in the mode prescribed by the statute; they cannot proceed directly in their own names against the stockholders or debtors of the Bank. The receiver is the statutory assignee of the Association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the Association, and when he sues in his own name it is not necessary to make either a party to the suit.

The 59th section of the Act of February 25th, 1863, provides that all suits by or against such associations may be brought in the proper courts of the United States or of the State. The 57th section of the Act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding Act. In the latter, the word "by" in respect to such suits is dropped. The omission was, doubtless, accidental. It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued. The difference in the language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the Act of 1864. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits against the associations, there is none

for suits by them, in any court. *Theriat v. Hart*, 2 Hill, 381, note.

The 59th section directs "that all suits and proceedings arising out of the provisions of this Act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury." Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the Act, without reference to the locality of their personal citizenship. *U. S. v. Babbitt*, 1 Black, 61 [66 U. S. , XVII., 96].

The bill in the case before us contains no averment of any action by the comptroller touching the personal liability of the stockholders.

The demurrer of the defendants was, therefore, properly sustained, and the decree of the Circuit Court is affirmed.

Cited—14 Wall., 398, 401; 17 Wall., 21, 22; 91 U. S., 59; 94 U. S., 677, 681; 103 U. S., 426; 103 U. S., 776; 104 U. S., 463; 2 Abb. U. S., 234, 241; 3 Biss., 48; 5 Biss., 506; 8 Blatchf., 138, 145; 11 Blatchf., 113, 114, 119; 9 Bank. Reg., 123; 13 Bank. Reg., 228; 18 Bank. Reg., 468; 1 Flipp., 451, 573; 1 Hughes, 380, 384, 385; 8 Ben., 332, 362; 4 Cliff., 548; 1 McCrary, 10; 5 Dill., 416; 88 N. Y., 58; 24 Am. Rep., 98 (49 Vt.); 37 Am. Rep., 510 (81 N. Y., 388); 41 Am. Rep., 437 (27 Kan., 707).

F. MANDELBAUM AND A. KLAUBER,
Ptfs. in Err.,

v.

THE PEOPLE OF THE UNITED STATES
IN THE TERRITORY OF NEVADA.

(See S. C., 8 Wall., 310-314.)

Answer, what cannot be struck out.

Court cannot strike out of answer, on motion, that which constitutes a good defense, on which the defendant may chiefly rely.

[No. 1, Dec. Term, 1866.]

Argued Jan. 24, 1867. Decided Dec. 13, 1869.

IN ERROR to the Supreme Court of the Territory of Nevada.

This case arose upon an action in the District Court of the Second Judicial District of the Territory of Nevada, by the defendants in error, for the collection of certain taxes. Judgment having been given for the plaintiff therein, the defendants took an appeal to the Supreme Court of the Territory, where the said judgment was affirmed. Thereupon the said defendants sued out this writ of error.

The case is fully stated by the court.

Messrs. W. S. Cox, Nath'l Wilson, and D. A. Burr, for plaintiffs in error:

The striking out of the principal part of defendants' answer was erroneous.

The proceeding was *ex parte*, without notice to the other side and unwarranted by any principle of law.

But it was erroneous principally because the answer set forth a valid defense. Section 22 of the Act of 1861 authorizes the assessor, after the first Monday of August, to assess property which shall not be on the regular list. This refers to property in existence and taxable, but omitted from the regular list from ac-

cident or other similar cause. It does not apply to property newly acquired and newly brought into the county after the regular assessment has been made. Still less does it apply to property which is the product or proceeds of that already assessed and taxed; otherwise parties would be subject to double tax. Yet the answer in the case averred, as to the property charged, that it was all the yield, product or proceeds of property and business heretofore regularly assessed and paid for, and was also acquired, made, manufactured or realized after the regular assessment of all the defendants' property was made and the taxes paid on it.

The act of striking out the answer was equivalent to a judgment on demurrer for the answer in favor of the plaintiffs, and was erroneous if the defense was valid.

(No counsel appeared in this court for defendants in error.)

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Nevada.

The suit was brought by the Territory against Mandlebaum and Klauber, in a district court, to recover an amount of a tax upon goods in a store in Carson City, of the assessed value of \$70,000; twenty tons of hay at \$800; goods in a store at Kinkead & Harrington's at \$6,500; timber for barn at \$600; and one hundred tons of hay in Mr. Ormsby's storehouse at \$4,000; the property of defendants; the whole amounting to \$81,000. The different kinds of tax and the amount of the assessment are specified.

In an amended complaint it is declared that the tax was assessed between the first Monday of August, 1862, and the last Saturday in October, of the same year; that the property had not been assessed in the regular list of assessments; and that it was entered in the tax list of the county under the head of subsequent assessments.

The answer of the defendants sets forth that the property described in the complaint was fraudulently and wrongfully assessed, and was not subject to taxation for the year 1862, because they say that the hay so described was a part of a growing crop for the year, produced from their rancho in Douglas County, and was not cut or removed from this county until after the first Monday in August of that year, and long after they had been duly assessed for all their taxable property in this county, including said rancho which was taxed at a valuation of between \$9,000 and \$10,000, and which taxes had been fully paid.

That, of the said extra amount of goods, some \$7,000 or \$8,000 in value constituted their stock of goods at Genoa, in Douglas County, and was included in the assessment and payment of taxes in that county, and which had been brought and added to their stock in their store in Ormsby County. That the remainder of said amount of goods mentioned in the complaint was not the property of the defendant, nor was the same within the County of Ormsby until long after they were assessed and taxed and the taxes paid in said county.

That said extra goods were purchased from the proceeds of their business houses in the Counties of Ormsby and Douglas, the sale of

their goods and other property, and the proceeds of their business generally, all of which had been assessed in said counties, and the taxes paid for the year 1862, long before the making of the pretended assessments in the complaint.

That the timbers and lumber for a barn were not the property of the defendant until after the assessment and taxes paid for the year 1862, and were obtained in the course of their business after this assessment.

The answer was verified under oath.

The next step in the cause, as appears from the record, is, that on the motion of the plaintiff the court struck out so much of the answer as had no relation to the payment of taxes on the \$7,000 or \$8,000 of property described in the complaint, and which is alleged in the answer to have been taxed in Douglas County. This, in effect, struck out the defense set up to all the property assessed and taxed as charged in the complaint, except the item above specified. The issue left was then tried by the court, which held that the defendant had proved payment of a tax on \$5,800 worth of property, and gave judgment in favor of the tax to the amount of \$1,522, and costs of suit. To all of the above, the defendants' counsel excepts.

The findings of the court are as follows: it finds the following facts: that the allegations in the complaint are true; also that, as to the property assessed as set forth in the complaint, the defendants were assessed in Douglas County for the sum of \$5,800, on property in the year 1862, and paid taxes on the same, for which they are entitled to a credit.

The case was then carried to the Supreme Court of the Territory, where the judgment was affirmed.

By the Statutes of the Territory of 29th November, 1862, the regular or annual assessment of taxes is made between the first Monday in March and the first Monday of August in each year; and the tax list is to be completed on or before the last named day, to which the assessor annexes his warrant, and delivers the same, with a map of the tax, to the clerk of the Board of Commissioners.

It is also provided in the same Act, that the assessor at any time subsequent to the first Monday of August and prior to the last Saturday in October, may assess any property which shall not be on the regular list, and he shall enter such assessment in a separate portion of the tax list under the head of "Subsequent Assessments."

It will be seen by this reference to the law that the assessor is only authorized to make subsequent assessments upon the property of a citizen or inhabitant, which was subject to taxation at a regular or annual assessment, and had escaped the tax from mistake, or otherwise, and which is a very common provision in every system of taxation. And if this was the question presented to the court below, upon the pleadings or proofs, there could be no doubt as to the correctness of the decision. But the question presented by the answer was not one of this description, but of double taxation; for, if the facts were true as set forth, the property had been taxed either at the regular assessment, or had been purchased or procured by the defendants after this assessment; and, therefore, not the subject of a subsequent tax within the

meaning of the statute. On this ground the answer presented a perfect defense to the action.

The court below, however, on motion of the plaintiff, struck out this defense—as to all the property except one item of \$7,000 or \$8,000 in value, which stood in the answer in the same category with all the rest of the property. This singular mode of meeting a legal defense set up in the pleadings has not been explained by any counsel representing the plaintiff; and in the absence of such explanation, we can only apply to it the usual and customary principles governing pleadings in like cases, and hold that it was an error which entitled the party aggrieved to a reversal of the judgment.

If any authority was needed for so obvious a proposition, we refer to the case of *Hosey v. Buchanan*, 16 Pet., 215.

The court there say that it would be as novel as it would seem to be unjust to strike out of the answer, on motion of the plaintiff, that which constitutes a good defense, and on which the defendant may chiefly rely.

Judgment reversed and remitted to court below.

Cited—16 Wall., 165; 93 U. S., 16.

JOSIAH MORRIS, Agent and Claimant for
the BANK OF LOUISIANA, *Appt.*,

v.

UNITED STATES.

(See S. C., "*Morris's Cotton*," 8 Wall., 507-512.)

Seizures on land, how prosecuted—proper judgment, where court below had no jurisdiction—writ of restitution.

Where the seizure was made on land, within the 9th section of the Judiciary Act, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

All seizures on land must be prosecuted as other common law suits, and can only be removed into this court by writ of error.

Where the court below has no jurisdiction of the case, this court will direct the cause to be dismissed if the judgment was for the defendant or claimant.

But if the judgment was for the plaintiff or libellant, this court will reverse the judgment and direct the proceedings to be dismissed; or it will remand the cause with directions to allow the pleadings to be amended and to grant a new trial.

Where the fund has been distributed, this court will also direct that a writ of restitution issue to cause the fund to be restored to the registry of the court.

[No. 52.]

Argued Nov. 16, 1869. Decided Dec. 13, 1869.

APPEAL from the District Court of the United States for the Middle District of Alabama.

This case arose upon an information filed in the court below by the United States District Attorney to secure the condemnation of certain cotton, under the Acts of Aug. 6, 1861 (12 Stat. at L., 319); July 13, 1861 (12 Stat. at L., 255); July 17, 1862 (12 Stat. at L., 589).

Upon the hearing, the court rendered judgment declaring the property forfeited to the United States. Whereupon the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. W. P. Chilton and P. Phillips, for appellant:

See 8 WALL.

A valid and subsisting seizure at the time of filing the information was indispensable, to give the court jurisdiction.

Morris v. U. S. (*ante*, 281).

The only seizure alleged to have been made in this case, was under an order of seizure issued by the clerk of the United States District Court at the instance of the District Attorney, after he had filed his information or libel.

The answer is responsive to the allegations of the libel of information as to the fact of seizure of the cotton, and this puts the *onus* of proving a seizure on the libellant. The seizure is a jurisdictional fact, without which the court has no jurisdiction.

The libellant, not only failed to prove that there had been a seizure, but objected to the proof offered to be made by the claimant, showing that no actual seizure was made.

The record shows that the claimant demanded a jury trial and that the court denied him this privilege, and that he duly excepted to the ruling of the court. This was clearly erroneous as decided by this court.

Armstrong's Foundry, 6 Wall., 766 (78 U. S., XVIII., 882); *The Union Ins. Co.*, 6 Wall., 759 (78 U., XVIII., 879); *The Sarah*, 8 Wheat., 394.

This court, as in the case of *Morris v. U. S.*, *supra*, should dismiss the proceeding and order restitution.

Messrs. E. R. Hoar, Atty. Gen., and W. A. Field, Asst. Atty. Gen., for appellees:

If this court can do anything more than dismiss the appeal, it can only order the decree reversed as irregular, the pleadings reformed, and a new trial had according to the course of the common law.

Union Ins. Co. v. U. S. (*supra*); *Armstrong's Foundry* (*supra*); *St. Louis Street Foundry*, 6 Wall., 770 (78 U. S., XVIII., 884).

It cannot now be known what the issues will be when the pleadings are reformed.

Morris v. U. S. (*supra*), was a suit of a species not authorized by the statutes, and not a suit in which a cause of action was defectively set forth, or one in which the trial was irregular and not according to law.

Mr. Justice Clifford delivered the opinion of the court:

Forfeiture of the property seized in this case is claimed in the libel of information, as amended, upon several distinct grounds, of which the following are the most material:

(1) Because the owner purchased the cotton of an inhabitant of a State or district in insurrection, as lawfully declared by the President in his Proclamation to that effect, and in violation of the provision which prohibited "all commercial intercourse between such States or districts" so long as such hostilities should continue. 12 Stat. at L., 257.

(2) Because the property was owned by a person who knowingly used or employed, or consented to the use or employment of the same, in aiding, abetting or promoting said insurrection and resistance to the laws. 12 Stat. at L., 319.

(3) Because the owner of the property, being engaged in armed rebellion against the United States, or in aiding or abetting such rebellion, at the time when the President issued his Proclamation upon the subject, did

not, within sixty days thereafter, cease to aid, countenance and abet such rebellion, and return to his allegiance. 12 Stat. at L., 591.

Process of monition issued, and the Marshal, on the 11th of May, 1866, seized one hundred and fifty-four bales of cotton, as appears by his return. Appearance was entered by the claimant on the 9th of June following, as the agent of the Bank, and he alleges in behalf of the Bank that none of the material allegations of the libel of information are true. On the contrary, he alleges that the cotton was purchased by the Bank, and was held by their agent as their property until the same was attached by a creditor of the bank, and that the Bank had ample authority to transport the funds with which the cotton was purchased, into that district, and he utterly denies that the purchase was made in violation of any Act of Congress, or of any commercial regulations of the United States. Many other defenses are set up in the answer, but in the view taken of the case, it is not important to enter further into those details.

Testimony was taken in the case, and, on the 20th of December, 1866, a decree was entered in the district court that the cotton seized be forfeited to the United States for the value thereof, estimated at \$25,069.70, together with costs, against the stipulators and claimants. Dissatisfied with the decree, the claimants appealed to this court.

By the findings of the court it appears—(1) That the cotton was grown on a plantation in the State of Alabama, and that it was purchased by the agent of the Bank of Louisiana during the period when both of those States were in rebellion against the United States. (2) That the agent of the Bank, in going from Louisiana to Alabama, passed through our military lines, and that he purchased the cotton in the latter State for the Bank, and with the funds which he transported through our military lines. (3) That neither the agent nor the Bank had any license or permit from the President to trade or hold any commercial intercourse in that State or district, and that his acts in trading for, and making the purchase of the cotton, were contrary to the Act of Congress prohibiting all such trade and commercial intercourse.

None of these matters, however, can be re-examined in this court, as the district court had no jurisdiction of the cause in admiralty to render any decree upon the merits. Where the seizure is made on navigable waters, within the 9th section of the Judiciary Act, the case belongs to the instance side of the district court; but where the seizure was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury. *Confiscation Cases*, 7 Wall., 462 [ante, 199]; *Armstrong's Foundry*, 6 Wall., 769 [73 U. S., XVIII., 884].

Seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burden, are exclusively cognizable in the district courts, subject to appeal, as provided by law; but all seizures on land or on waters not navigable, and all suits instituted to recover penalties and forfeitures incurred, except for seizures on navigable waters, must be prosecuted as other common law suits, and can only be removed into this court by writ of error. *Union Ins. Co. v. U. S.*, 6 Wall., 765 [73 U. S., XVIII., 482

882]; *U. S. v. Hart*, 6 Wall., 772 [78 U. S., XVIII., 914].

Want of jurisdiction in the court below, however, does not prevent this court from assuming jurisdiction on appeal for the purpose of reversing the decree rendered by that court, and of vacating any unwarranted proceedings of that court, which necessarily stand in the way of a new trial there, in a case where, in the judgment of this court, a new trial ought to be granted. Where the court below has no jurisdiction of the case, in any form of proceeding, the course of this court is to direct the cause to be dismissed, if the judgment or decree was for the defendant or claimant, but if the judgment or decree was for the plaintiff or libellant, the court here will reserve the judgment or decree, and remand the cause, with directions to the court below to dismiss the proceeding.

Unless the practice were as explained, great injustice would be done in all cases where the judgment or decree was in favor of the party who instituted the suit, as he would obtain the full benefit of a judgment or decree, rendered by a court in his favor, which had no jurisdiction to hear and determine the controversy. Hence, this court will, in all such cases, reverse the judgment or decree, and direct the proceedings to be dismissed, or remand the cause, with directions to allow the pleadings to be amended, and to grant a new trial, according to law. But the fund in this case, having been distributed, a new trial would be useless, unless the fund is restored to the registry of the court, where it was deposited before the decree of distribution was executed. Although the district court has no jurisdiction in such a case, still, this court has full jurisdiction on appeal to reverse the action of that court, and to dismiss the proceedings; or, in a case where a new trial is required, to remand the cause, and give directions to that effect, and also, to direct that a writ of restitution issue to the proper parties, to cause the fund to be restored to the registry of the court, from which it was erroneously withdrawn.

Decree reversed, and the cause remanded, with directions to allow the pleadings to be amended, and to grant a new trial, and issue a writ of restitution, in conformity to the opinion of the court.

Cited—23 Wall., 162; 98 U. S., 376, 377; 11 Bank. Reg., 105; 5 Hughes, 439.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE VEAZIE BANK, Plffs.,

v.

JEREMIAH FENNO, Collector of Internal Revenue.

(See S. C., 8 Wall., 533-556.)

Direct taxes, what are—tax on bank circulation is not—such tax is constitutional—courts cannot prescribe limitations on Legislature—nor the extent of taxation.

Direct taxes are limited to taxes on land and apportionments, and taxes on polls or capitation taxes. The power to tax without apportionment extends to all other objects; such taxes must be laid and collected by the rule of uniformity.

A tax on bank circulation is not a direct tax in the sense of the Constitution.

A tax on bank circulation is not a tax on the franchise of the bank, but upon property created or contracts made and issued under the franchise. The judicial cannot prescribe to the Legislative Department of the Government, limitations upon the exercise of its acknowledged powers.

If a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority.

The Act of Congress of July 13, 1866, imposing a tax on the circulation of state banks, is constitutional.

[No. 30.]

Argued Oct. 18, 1869. Decided Dec. 13, 1869.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Maine.

This is an action of *assumpsit*, brought by the plaintiffs in the court below, upon an agreed statement of facts, to recover a certain tax paid with penalty and costs, under protest. The judges of that court, being divided in opinion, certified the case to this court.

The case is further stated by the court.

Messrs. Caleb Cushing, Reverdy Johnson, and W. W. Boyce, for plaintiff:

The tax in this case is a direct one, and not being laid according to the rule of apportionment, is unconstitutional. The only case ever before the Supreme Court involving this question, is *Hilton v. U. S.*, 3 Dall., 171.

The only point really adjudicated by the court in that case was, that a tax on carriages was not a direct tax.

The court concedes that there may be one other direct tax in addition to the capitation tax, viz.: the land tax.

We think it is obvious that this great question of what are direct taxes, was very crudely considered in that case.

We submit that the tax in this case is a duty, in the sense of the Constitution; and being a duty, it must be laid by the rule of uniformity.

Const., art. I, sec. 8.

We insist that, to comply with the rule of uniformity, this tax of ten per cent. imposed by the Act of July 13, 1866, sec. 9, imposed on the circulation of state banks, should have been extended to the circulation of national banks.

Gilman v. Sheboygan, 2 Black, 510 (67 U. S., XVII., 305); *Knowlton v. Rock Co.*, 9 Wis., 410; *Zanesville v. Richards*, 5 Ohio St., 589. See, further, to the same effect, *Atty Gen. v. Plank R. Co.*, 11 Wis., 42; *Exch. Bk. v. Hines*, 3 Ohio St., 1.

We insist, further, that the tax excepted to in this case is unconstitutional on the following ground:

It is not a tax imposed for the sake of revenue. Its excessive character, which is made evident by reference to the tax imposed on the circulation of the national banks already cited, proves that the true purpose of this tax is to destroy the state banks.

If Congress, by discriminating taxation, can destroy the state banks, it can equally, in the same manner, destroy the railroad system of the States.

If it be determined in this case, as it must necessarily be if the tax in this case is sustained, that the taxing power of Congress is

unlimited, and cannot in any instance be inquired into by this court, then Congress is supreme to legislate without any limitations, provided it is done in the form of levying a tax.

This principle of the intention with which an act is done being the test of its illegality, is a familiar principle of common law. As illustration, take the case of a vessel fitted out in supposed violation of our neutrality laws.

Why may not the same principle of decision be applied in this case?

The Acts of Congress cited in this brief lead the mind with absolute certainty to the conclusion that the tax in this case was laid, not for revenue purposes, but to destroy the state banks. This conclusion being thus obtained, how can the constitutionality of this tax be sustained, unless the court is prepared to hold that a law of Congress abolishing the state banks, pure and simple, is constitutional? It is a maxim of the law, that a party cannot do that indirectly which he cannot do directly. A familiar illustration of this is furnished by the decisions on the usury laws.

2 Saund., Pl. & Ev., tit. Usury, p. 895; 3 Toml. L. Dict., tit. Usury, 711.

That the court will look beyond the Act, and test its constitutionality by the journals of the body that passed it, is held by the following cases:

State v. McBride, 4 Mo., 303; *People v. Campbell*, 3 Gilm. (Ill.), 466; *People v. Purdy*, 2 Hill, 81.

The tax in this case is for the purpose of destroying a franchise. This is confiscating private property for public use without compensation. In this point of view, the tax in this case is unconstitutional.

The National Government cannot tax the agencies of the State Governments.

Cooley, Const. Lim., 483; *Fifield v. Close*, 15 Mich., 509; *Warren v. Paul*, 22 Ind., 276; *Jones v. Estate of Keap*, 19 Wis., 369; *Union Bk. v. Hill*, 3 Cold. (Tenn.), 325.

Mr. E. R. Hoar, *Atty. Gen.*, for defendant:

I. The tax in question is not a direct tax within the meaning of the Constitution of the United States.

Stats. 1865 and 1866, ch. 184, sec. 9, clause 2d; 14 Stat. at L., 146, Const. U. S., art. 1, sec. 2; sec. 9, clause 4; *Hylton v. U. S.*, 3 Dall., 171; *Pac. Ins. Co. v. Soule* (ante, 95).

It is not a tax capable of being apportioned among the States according to numbers. 1 Story, Const., 2d. ed., 677.

II. It is an excise or duty upon a branch of business or the mode of carrying on business, of the same description by all corporations of the same character. Const. U. S., art. I, sec. 8, clause 1; *Society for Savings v. Coite*, 6 Wall., 594 (73 U. S., XVIII., 897).

III. Congress would have the constitutional right to prohibit what it thus undertakes to tax; and whatever it may prohibit (not *malum in se*), it may regulate or permit upon condition.

IV. If Congress has the power to tax, the degree of taxation is not to be regarded by this court, but is within the discretion of Congress, the motives of which cannot be inquired into within the scope of its constitutional function.

McCulloch v. Md., 4 Wheat., 316; *Ex parte McCordle* (ante 284); *Pac. Ins. Co. v. Soule* (ante, 95).

V. The power to tax includes the power to

make taxation burdensome or even destructive to particular branches of business.

McCulloch v. Md. (supra), 316; 1 Story, Const., bk. 8, ch. 14.

VI. The uniformity required in taxation is not violated by an exception made on public grounds, the exception being in itself uniform in all the States.

See, also, *Nathan v. La.*, 8 How., 73; *Licenses Tax cases*, 5 Wall., 462 (72 U. S., XVIII., 497).

Mr. Chief Justice Chase delivered the opinion of the court:

The necessity of adequate provision for the financial exigencies created by the late rebellion, suggested to the Administrative and Legislative Departments of the Government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in Legislative Acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion the circulating medium consisted almost entirely of bank-notes issued by numerous independent corporations variously organized under state legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently with little skill, prudence and integrity. The Acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the National Government, of anything except gold and silver, and the laws of the States requiring the redemption of bank-notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no national currency except coin; there was no general (see the Act of December 27, 1864, to suppress small notes in the District of Columbia, 10 Stat., 599) regulation of any other by national legislation; and no national taxation was imposed in any form on the state bank circulation.

The first Act authorizing the emission of notes by the Treasury Department for circulation was that of July 17, 1861. 12 Stat. at L., 359. The notes issued under this Act were treasury notes, payable on demand in coin. The amount authorized by it was \$50,000,000, and was increased by the Act of February 12, 1862 (12 Stat. at L., 338), to \$60,000,000.

On the 31st of December, 1861, the state banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and, for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th of February, 1862, 12 Stat. at L., 345, a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The Act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to

be payable on demand, to the amount of \$150,000,000; and this amount was increased by subsequent Acts to \$450,000,000, of which \$50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to their withdrawal from circulation. Act of July 11, 1862, 12 Stat. at L., 532; Act of March 3, 1863, 12 Stat. at L., 710. These notes, until after the close of the war, were always convertible into, or receivable at par for bonds payable in coin, and bearing coin interest, at a rate not less than five per cent., and the Acts by which they were authorized, declared them to be lawful money and a legal tender.

This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the Act authorizing national banking associations (12 Stat. at L., 670), was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this Act a tax of two per cent. annually was imposed on the circulation of the associations authorized by it. Soon after, by the Act of March 8, 1863, 12 Stat. at L., 710, a similar but lighter tax of one per cent. annually was imposed on the circulation of state banks in certain proportions to their capital, and of two per cent. on the excess; and the tax on the national associations was reduced to the same rates.

Both Acts also imposed taxes on capital and deposits, which need not be noticed here.

At a later date, by the Act of June 3, 1864 (12 Stat. at L., 111), which was substituted for the Act of February 25th, 1863, authorizing national banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the States; and a few days afterwards, by the Act of June 30, 1864, 12 Stat. at L., 277, to provide ways and means for the support of the government, the tax on the circulation of the state banks was also continued at the same annual rate of one per cent., as before, but payment was required in monthly installments of one twelfth of one per cent., with monthly reports from each state bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by Congress in that direction was by the Act of July 17, 1862, 12 Stat. at L., 592, prohibiting the issue and circulation of notes under one dollar by any person or corporation. The Act just referred to was the next, and it was followed some months later by the Act of March 8d, 1865, amendatory to the prior Internal Revenue Acts, the 6th section of which provides, "that every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of the notes of any state bank, or state banking association, paid out by them after the first day of July, 1866." 13 Stat. at L., 484.

The same provision was re-enacted, with a

more extended application, on the 18th of July, 1866, in these words: "Every national banking association, state bank, or state banking association, shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue." 14 Stat. at L., 146.

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the state banks; but that when the country had been sufficiently furnished with a national currency by the issues of United States notes and of national bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent., imposed on state banks or national banks paying out the notes of individuals or state banks used for circulation, is repugnant to the Constitution of the United States.

It is presented by a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of Maine, in a suit brought by the President, Directors and Company of the Vezie Bank against Jeremiah Fenno, Collector of Internal Revenue, for the recovery of the tax, penalty and costs paid by the Bank to the collector under protest and to avoid restraint.

The Vezie Bank is a Corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the Act was collected, were issued under this authority. There is nothing in the case, showing that the Bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The case was presented to the circuit court upon an agreed statement of facts; and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three questions, the first of which is this:

"Whether the second clause of the 9th section of the Act of Congress of the 18th of July, 1866, under which the tax in this case was levied and collected, is a valid and constitutional law."

The other two questions differ from this in form only, and need not be recited.

In support of the position that the Act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is that the Act imposing the tax impairs a franchise granted by the State, and

that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined.

The difficulty of defining with accuracy the terms used in the clause of the Constitution which confers the power of taxation upon Congress, was felt in the Convention which framed that instrument, and has always been experienced by courts when called upon to determine their meaning.

The general intent of the Constitution, however, seems plain. The General Government, administered by the Congress of the Confederation, had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property. And nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.

This purpose is apparent, also, from the terms in which the taxing power is granted. The power is "To lay and collect taxes, duties, imposts and excises, to pay and provide for the common defense and general welfare of the United States." More comprehensive words could not have been used. Exports only are by another provision excluded from its application.

There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would, undoubtedly, be an abuse of the power if so exercised as to impair the separate existence and independent self-government (*County of Lane v. Oregon*, 73 [ante, 103], of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.

And there are directions as to the mode of exercising the power. If Congress sees fit to impose a capitation, or other direct tax, it must be laid in proportion to the census; if Congress determines to impose duties, imposts, and excises, they must be uniform throughout the United States. These are not strictly limitations of power. They are rules prescribing the mode in which it shall be exercised. It still extends to every object of taxation, except exports, and may be applied to every object of taxation to which it extends, in such measure as Congress may determine.

The comprehensiveness of the power thus given to Congress, may serve to explain, at least, the absence of any attempt by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred. The definition of particular words, therefore, became unimportant.

It may be said, indeed, that this observation, however just in its application to the general grant of power, cannot be applied to the rules by which different descriptions of taxes are directed to be laid and collected.

Direct taxes must be laid and collected by the

rule of apportionment; duties, imposts and excises must be laid and collected under the rule of uniformity.

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words "direct taxes" in the Constitution.

We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

It is, as we think, distinctly shown in every Act of Congress on the subject.

In each of these Acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the Act, fixing its total sum.

In 1798, when the first direct tax was imposed, the total amount was fixed at \$2,000,000 (Act of July 14, 1798, 1 U. S. Stat. at L., 597); in 1813, the amount of the second direct tax was fixed at \$3,000,000 (Act of August 2, 1813, 3 Stat. at L., 53); in 1815, the amount of the third at \$6,000,000, and it was made an annual tax (Act of Jan. 9, 1815, 3 Stat. at L., 164); in 1816, the provision making the tax annual was repealed by the repeal of the 1st section of the Act of 1815, and the total amount was fixed for that year at \$3,000,000 (Act of March 5, 1816, 3 Stat. at L., 255). No other direct tax was imposed until 1861, when a direct tax of \$20,000,000 was laid and made annual (Act of August 5, 1861, 12 Stat. at L., 294); but the provision making it annual was suspended, and no tax, except that first laid was ever apportioned. In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798 (Act of July 9, 1798, 1 Stat. at L., 586), 1813 (Act of July 22, 1813, 3 Stat. at L., 26), 1815 (3 Stat. at L., 166), 1816 (3 Stat. at L., 255), were lands, improvements, dwelling houses, and slaves; and in 1861, lands, improvements and dwelling-houses only. Under the Act of 1798, slaves were assessed at fifty cents on each; under the other Acts, according to valuation by assessors.

This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves

must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were by the laws of some, if not most of the States, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the Acts after 1798, becomes highly probable, when it is considered, that in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves; for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed.

The fact, then, that slaves were valued, under the Acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purpose to taxation, as realty.

It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes.

And this construction is entitled to great consideration, especially in the absence of anything averse to it in the discussions of the Convention which framed, and of the Conventions which ratified the Constitution.

What does appear in those discussions, on the contrary, supports the construction. Mr. Madison, says Mr. King, asked what was the precise meaning of direct taxation, and no one answered. On another day, when the question of proportioning representation to taxation, and both to the white and three fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax, there would be no difficulty;" and, speaking doubtless of direct taxation, he went on to observe: "The sum allotted to a State may be levied without difficulty, according to the plan used in the State for raising its own supplies." All this, doubtless, shows uncertainty as to the true meaning of the term direct tax; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised their principal supplies.

This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*.

During the February Term, 1796, the constitutionality of the Act of 1794, imposing a duty on carriages, came under consideration in the case of *Hylton v. U. S.*, 3 Dall., 171. Suit was brought by the United States against Daniel Hylton, to recover the penalty imposed

by the Act for not returning and paying-in duty on a number of carriages, for the conveyance of persons, kept by the defendant for his own use. The law did not provide for the apportionment of the tax, and if it was a direct tax, the law was confessedly unwarranted by the Constitution. The only question in the case, therefore, was, whether or not the tax was a direct tax.

The case was one of great expectation, and a general interest was felt in its determination. It was argued, in support of the tax, by Lee, Attorney-General, and Hamilton, recently Secretary of the Treasury; in opposition to the tax, by Campbell, Attorney for the Virginia District, and Ingersoll, Attorney-General of Pennsylvania.

Of the justices who then filled this bench Ellsworth, Paterson and Wilson had been members, and the conspicuous members, of the Constitutional Convention, and each of the three had taken part in the discussions relating to direct taxation. Ellsworth, the *Chief Justice*, sworn into office that morning, not having heard the whole argument, declined taking part in the decision. Cushing, senior *Associate Justice*, having been prevented, by indisposition, from attending to the argument, also refrained from expressing an opinion. The other judges delivered their opinions in succession, the youngest in commission delivering the first, and the oldest the last.

They all held that the tax on carriages was not a direct tax, within the meaning of the Constitution. Chase, *Justice*, was inclined to think that the direct taxes contemplated by the Constitution are only two: a capitation or poll tax, and a tax on land. He doubted whether a tax by a general assessment of personal property can be included within the term "direct tax." Paterson, who had taken a leading part in the Constitutional Convention, went more fully into the sense in which the words, giving the power of taxation, were used by that body. In the course of this examination he said:

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears from the practice of some of the States to have been considered as a direct tax. Whether it be so, under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal—I will not say the only—objects that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land." *Hylton v. U. S.*, 3 Dall., 177.

Iredell, delivering his opinion at length, concurred generally in the views of *Justices* Chase and Paterson. Wilson had expressed his opinion to the same general effect, when giving the decision upon the circuit, and did not now repeat them. Neither *Chief Justice* Ellsworth nor *Justice* Cushing expressed any dissent; and it cannot be supposed, if in a case so important, See 8 WALL.

their judgments had differed from those announced, that an opportunity would not have been given them by an order for re-argument to participate in the decision.

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words "direct taxes," as used in the Constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Soule v. Pacific Ins. Co.*, [ante, 95], held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State Government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the Bank, but property created, or contracts made and issued under the franchise, or power to issue bank-bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as

to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we can-

not doubt the constitutionality of the tax under consideration.

The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered affirmatively.

Mr. Justice Nelson, dissenting:

I am unable to concur in the opinion of a majority of the court in this case.

The Veazie Bank was incorporated by the Legislature of the State of Maine, in 1848, with a capital of \$200,000, and was invested with the customary powers of a banking institution; and, among others, the power of receiving deposits, discounting paper, and issuing notes or bills for circulation. The constitutional authority of the State to create these institutions, and to invest them with full banking powers, is hardly denied. But it may be useful to recur for a few moments to the source of this authority.

The 10th Amendment to the Constitution is as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." On looking into the Constitution, it will be found that there is no clause or provision which either expressly or by reasonable implication, delegates this power to the Federal Government, which originally belonged to the States, nor which prohibits it to them. In the discussions on the subject of the creation of the first Bank of the United States, in the first Congress, and in the Cabinet of Washington, in 1790 and 1791, no question was made as to the constitutionality of the state banks. The only doubt that existed, and which divided the opinion of the most eminent statesmen of the day, many of whom had just largely participated in the formation of the Constitution, the government under which they were then engaged in organizing, was, whether or not Congress possessed a concurrent power to incorporate a banking institution of the United States.

Mr. Hamilton, in his celebrated report on a national bank to the House of Representatives, discusses at some length the question, whether or not it would be expedient to substitute the Bank of North America, located in Philadelphia, and which had accepted a charter from the Legislature of Pennsylvania, in the place of organizing a new bank. And, although he finally came to the conclusion to organize a new one, there is not a suggestion or intimation as to the illegality or unconstitutionality of this state bank.

The Act incorporating this bank, passed February 25th, 1791, prohibited the establishment of any other by Congress, during its charter, but said nothing as to the state banks. A like prohibition is contained in the Act incorporating the Bank of the United States of 1816. The constitutionality of a bank incorporated by Congress was first settled by the judgment of this court in *McCulloch v. The State of Maryland*, 4 Wheat., p. 316, in 1819. In that case both the counsel and the court recognize the legality and constitutionality of banks incorporated by the States.

The constitutionality of the Bank of the United States was again discussed, and decided in the case of *Osborn v. United States Bank*, 9 Wheat., 738. And, in connection with this,

was argued and decided a point in the case of *The United States Bank v. The Planters' Bank of Georgia*, which was common to both cases. The question was, whether the Circuit Courts of the United States had jurisdiction of a suit, brought by the United States Bank against the Planters' Bank of Georgia, incorporated by that State, and in which the State was a stockholder. 9 Wheat., 804, 904.

The court held in both cases that it had. Since the adoption of the Constitution, down to the present Act of Congress, and the case now before us, the question in Congress and in the courts has been; not whether the state banks were constitutional institutions, but whether Congress had the power conferred on it by the States, to establish a national bank. As we have said, that question was closed by the judgment of this court in *McCulloch v. The State of Maryland*. At the time of the adoption of the Constitution, there were four state banks in existence and in operation—one in each of the States of Pennsylvania, New York, Massachusetts and Maryland. The one in Philadelphia had been originally chartered by the Confederation, but subsequently took a charter under the State of Pennsylvania. The framers of the Constitution were, therefore, familiar with these state banks, and the circulation of their paper as money; and were also familiar with the practice of the States, that were so common, to issue bills of credit, which were bills issued by the State, exclusively on its own credit, and intended to circulate as currency, redeemable at a future day. They guarded the people against the evils of this practice of the State Governments by the provision in the 10th section of the first article, "that no State shall" "emit bills of credit," and, in the same section, guard against any abuse of paper money of the state banks in the following words: "nor make anything but gold and silver coin a tender in payment of debts." As bills of credit were thus entirely abolished, the paper money of the state banks was the only currency or circulating medium to which this prohibition could have had any application, and was the only currency, except gold and silver, left to the States. The prohibition took from this paper all coercive circulation, and left it to stand alone upon the credit of the banks.

It was no longer an irredeemable currency, as the banks were under obligation, including, frequently, that of its stockholders, to redeem their paper in circulation, in gold or silver, at the counter. The state banks were left in this condition by the Constitution, untouched by any other provision. As a consequence, they were gradually established in most or all of the States, and had not been encroached upon or legislated against, or in any other way interfered with, by Acts of Congress, for more than three quarters of a century—from 1787 to 1864.

But, in addition to the above recognition of the state banks, the question of their constitutionality came directly before this court in the case of *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Pet., 257.

The case was most elaborately discussed, both by counsel and the court. The court, after the fullest consideration, held that the States possessed the power to grant charters to state banks; that the power was incident to sovereign-

ty; and that there was no limitation in the Federal Constitution on its exercise by the States. The court observed that the Bank of North America and of Massachusetts, and some others, were in operation at the time of the adoption of the Constitution, and that it could not be supposed the notes of these banks were intended to be inhibited by that instrument, or, that they were considered as bills of credit within its meaning. All the judges concurred in this judgment, except *Mr. Justice Story*. The decision in this case was affirmed in *Woodruff v. Trapnall*, 10 How., 205; in *Darrington v. The Bank of Alabama*, 18 How., 12; and in *Curran v. State of Arkansas*, 15 How., 817.

Chancellor Kent observes, that *Mr. Justice Story*, in his *Commentaries on the Constitution*, Vol. 3, p. 19, seems to be of opinion that independent of the long continued practice, from the time of the adoption of the Constitution, the States would not, upon a sound construction of the Constitution, if the question was *res integra*, be authorized to incorporate banks with a power to circulate bank paper as currency, inasmuch as they are expressly prohibited from coining money. He cites the opinions of *Mr. Webster*, of the Senate of the United States, and of *Mr. Dexter*, formerly Secretary of War, on the same side. But the *Chancellor* observes, that the equal, if not the greater, authority of *Mr. Hamilton*, the earliest Secretary of the Treasury, may be cited in support of a different opinion; and the contemporary sense and uniform practice of the nation are decisive of the question. He further observes, the prohibition (of bills of credit) does not extend to bills emitted by individuals, singly or collectively, whether associated under a private agreement for banking purposes, as was the case with the Bank of New York, prior to its earliest charter, which was in the winter of 1791, or acting under a charter of incorporation, so long as the State lends not its credit, or obligation, or coercion to sustain the circulation.

In the case of *Briscoe v. The Bank of the Commonwealth of Kentucky*, he observes, that this question was put at rest by the opinion of the court, that there was no limitation in the Constitution on the power of the States to incorporate banks, and their notes were not intended nor were considered as bills of credit. 1 Kent, Com., p. 409, note A, 10th ed.

The constitutional power of the States, being thus established by incontrovertible authority, to create state banking institutions, the next question is, whether or not the tax in question can be upheld, consistently with the enjoyment of this power.

The Act of Congress, July 18th, 1866 (14 Stat. at L., 146, sec. 9), declares, that the state banks shall pay ten per centum on the amount of their notes, or the notes of any person, or other state bank, used for circulation, and paid out by them after the 1st of August, 1866. In addition to this tax, there is also a tax of five per centum per annum, upon all dividends to stockholders (13 Stat. at L., 283, sec. 120), besides a duty of one twenty-fourth of one per centum, monthly, upon all deposits, and the same monthly duty upon the capital of the bank. 13 Stat. at L., 277, sec. 110. This makes an aggregate of some sixteen per cent. imposed annually upon these banks. It will be observed,

the tax of ten per centum upon the bills in circulation is not a tax on the property of the institutions. The bills in circulation are not the property, but the debts of the bank, and, in their account of debits and credits, are placed to the debit side. Certainly, no government has yet made the discovery of taxing both sides of this account, debit and credit, as the property of a taxable person or corporation. If both these items could be made available for this purpose, a heavy national debt need not create any very great alarm, neither as it respects its pressure on the industry of the country, for the time being, or of its possible duration. There is nothing in the debts of a bank to distinguish them in this respect from the debts of individuals or persons. The discounted paper received for the notes in circulation is the property of the bank, and is taxed as such, as is the property of individuals received for their notes that may be outstanding.

The imposition upon the banks cannot be upheld as a tax upon property; neither could it have been so intended. It is simply a mode by which the powers or faculties of the States, to incorporate banks, are subjected to taxation, and which, if maintainable, may annihilate those powers.

No person questions the authority of Congress to tax the property of the banks, and of all other corporate bodies of a State, the same as that of individuals. They are artificial bodies, representing the associated pecuniary means of real persons, which constitute their business capital, and the property thus invested is open and subject to taxation, with all the property, real and personal, of the State. A tax upon this property, and which, by the Constitution, is to be uniform, affords full scope to the taxing power of the Federal Government, and is consistent with the power of the States to create the banks and, in our judgment, is the only subject of taxation, by this government, to which these institutions are liable.

As we have seen, in the fore part of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; and it follows that the Constitution itself protects them, or should protect them, from any encroachment upon this right. As to the powers thus reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to governments is not new in this court. The bonds of the Federal Government have been held to be exempt from state taxation. Why? Because they were issued under the power in the Constitution to borrow money, and the tax would be a tax upon this power; and, as there can be no limitation to the extent of the tax, the power to borrow might be destroyed. So, in the instance of the United States notes, or legal tenders, as they are called, issued under a constructive power to issue bills of credit, as no express power is given in the Constitution, they are exempt from state taxation for a like reason as in the case of government bonds; and, we learn from the opinion of the court in this case, that one step further is taken, and that is, that the notes of the national banks are to be regarded as bills of credit, issued indirectly by the gov-

ernment; and it follows, of course, from this, that the banks used as instruments to issue and put in circulation these notes, are also exempt. We are not complaining of this. Our purpose is to show how important it is to the proper protection of the reserved rights of the States, that these powers and prerogatives should be exempt from Federal taxation, and how fatal to their existence if permitted. And, also, that even if this tax could be regarded as one upon property, still, under the decisions above referred to, it would be a tax upon the powers and faculties of the States to create these banks and, therefore, unconstitutional.

It is true that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporations, such as railroads, turnpikes, manufacturing companies, and others.

This taxation of the powers and faculties of the state governments, which are essential to their sovereignty, and to the efficient and independent management and administration of their internal affairs, is, for the first time, advanced as an attribute of Federal authority. It finds no support or countenance in the early history of the government, or in the opinions of the illustrious statesmen who founded it. These statesmen scrupulously abstained from any encroachment upon the reserved rights of the States; and, within these limits, sustained and supported them as sovereign States.

We say nothing as to the purpose of this heavy tax of some sixteen per centum upon the banks, ten of which we cannot but regard as imposed upon the power of the States to create them. Indeed, the purpose is scarcely concealed, in the opinion of the court, namely: to encourage the national banks. It is sufficient to add, that the burden of the tax, while it has encouraged these banks, has proved fatal to those of the States; and, if we are at liberty to judge of the purpose of an act, from the consequences that have followed, it is not, perhaps, going too far to say that these consequences were intended.

I am instructed to say that *Mr. Justice Davis* concurs in this opinion.

Cited—8 Wall., 636; 11 Wall., 127; 12 Wall., 543, 575; 17 Wall., 334; 23 Wall., 348; 101 U. S., 5; 103 U. S., 599; 5 Sawy., 583; 5 Bank. Reg., 245; 3 Cliff., 349; 16 Minn., 140; 76 Ill., 574; 10 Am. Rep., 759 (23 Ohio, 504); 20 Am. Rep., 686 (32 Mich., 406); 32 Am. Rep., 778 (47 Wis., 580).

THE UNITED STATES *ex rel. THOMAS BUTZ, Plff. in Err.*,

v.

THE MAYOR AND ALDERMEN OF THE CITY OF MUSCATINE.

(See S. C., 8 Wall., 575-587.)

Municipal corporation, when must levy tax to pay judgment—construction of statute—mandamus—state decisions—when followed—not in construction of contracts—nor as to process of Federal Courts.

NOTE.—State decisions govern U. S. Courts as to State statutes and as to rule of property. See note to *Clark v. Graham*, 19 U. S. (6 Wheat.), 557.

State laws and decisions govern U. S. Courts as to title and transfer of real estate by grant or devise. See note to *Elmenoff v. Taylor*, 23 U. S. (10 Wheat.),

The Statute of Iowa, that the City of Muscatine shall levy a tax of only one per cent. a year, does not excuse such City from levying a tax to pay a judgment against it, so long as the State Code provides for the levying of such tax.

In the construction of a statute, what is clearly implied is as effectual as what is expressed.

The writ of *mandamus* is the appropriate remedy to enforce the levying of such tax under the 26th section of the Judiciary Act.

This court determines for itself the construction and effect of any statute of a State brought under review, without reference to the previous adjudications of the highest court of the State upon the subject.

Where the settled decisions in relation to a statute local in its character, have become rules of property, this court will follow such adjudications.

Remedies are within the protection of the Constitution of the United States, and any state law which substantially impairs them, is prohibited by that instrument.

This court construes all contracts brought before it for consideration; and in doing so its action is independent of that of the state courts, which may have exercised their judgment upon the same subject.

It is the province of this court to decide all questions relating to the subject of the process of the United States courts.

[Mr. Justice FIELD did not sit in this cause.]

[No. 93.]

Argued Nov. 30, 1869. Decided Dec. 20, 1869.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The relator, Butz, sued out a writ of *mandamus* in the court below, to compel the levy and execution of certain taxes to satisfy a certain judgment. Upon a demurrer to the defendants' answer, a decree was entered dismissing the writ. Whereupon the plaintiff sued out this writ of error.

The case is fully stated by the court.

Mr. James Grant, for plaintiff in error:

Demurrer is based on the following provisions

of the Iowa Code of 1851, re-enacted under the Code of 1860:

"Public buildings owned by the State or any county, city, school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purposes for which any such corporation is organized, are exempt from execution. The property of a private citizen can, in no case, be levied upon to pay the debt of a civil corporation."

Code of 1860, sec. 3274 (1895 of the Code of 1851).

"In case no property is found on which to levy, which is not exempted except by the last section, a tax must be levied as early as practicable, sufficient to pay off the judgment, with interest and costs.

Sec. 3275 (1896, Code of 1851).

"A failure on the part of the officer of the corporation to comply with the requirements of the last section, renders them personally responsible for the debt.

Sec. 3276 (1897, Code of 1851).

Another cause of demurrer denies the position assumed by the defendants:

That the Corporation, having the necessary use, for current expenses, debts to be created, etc., of all the revenues which it is authorized to raise by the city charter, can appropriate them for such purposes, and thus evade the effect of the plaintiff's judgment and executions.

But the defendants not only say that they are not bound to levy and collect the tax under the execution, in excess of their ordinary power of taxation, but that, if they wish to use all the taxes they can levy under the city charter, they can create new debts and apply their taxes to these new debts.

152; and note to Jackson v. Chew, 25 U. S. (12 Wheat.), 153.

In what instances United States Courts do not follow state decisions.

United States Courts do not follow decisions of state courts, as to general principles of commercial law. Swift v. Tyson, 41 U. S. (16 Pet.), 1; Carpenter v. Prov. W. Ins. Co., 41 U. S. (16 Pet.), 495; Reimdyk v. Kane, 1 Gall., 371; Austin v. Miller, 5 McLean, 153; Robinson v. Com. Ins. Co., 3 Sumn., 220.

"The questions under consideration" (construction of contract of insurance) are questions of general commercial law, which is by no means local in its character, or regulated by any local policy or customs. * * * We are bound to interpret this instrument according to our own opinion * * *; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment. Carpenter v. Prov. W. Ins. Co., 41 U. S. (16 Pet.), 495.

A state statute cannot deprive a citizen of another State of a right of action on a bill of exchange on protest and notice of non-acceptance, though bill is not due, when suit is brought in U. S. Court though in the State where the indorser sued resides. Watson v. Tarpley, 59 U. S. (18 How.), 517, XV., 510.

The general principles in regard to bills of exchange as negotiable instruments, as to rights and liabilities by commercial law, govern U. S. Courts rather than local state statutes. Goodman v. Simmonds, 61 U. S., 343.

It is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State which the Federal Courts adopt as rules for their own judgments. Olcott v. Supervisors, 83 U. S. (16 Wall.), 678.

Federal Courts must regard the laws of the several States and their construction by the state courts, but they are not bound by the decisions of those courts upon questions of general commercial law. Oates v. Nat'l Bk., 100 U. S. (10 Otto), 239.

See 8 WALL.

The general principles of commercial law have also been applied to bonds, and the Federal Courts held not bound by state decisions in regard to them. Cromwell v. County of Sac, 96 U. S. (6 Otto), 51; Pine Grove v. Talcott, 86 U. S. (19 Wall.), 666; Murray v. Lardner, 89 U. S., 110, XVII., 857.

Federal Courts are governed in commercial and maritime cases by the general and not by local law. Williams v. Suffolk Ins. Co., 2 Sumn., 270; Gloucester Ins. Co. v. Younger, 2 Curt., 322; Bragg v. Myer, McAll., 408; Mut. S. Ins. Co. v. The George, Olcott, 89; Robinson v. Com. I. S. Co., 2 Sumn., 220; The Chusan, 2 Story, C. C., 455.

Rules of decision established by the Supreme Court for its own government and that of subordinate courts are unaffected by state legislation. Noonan v. Braley, 67 U. S. (3 Black), 469, XVII., 278.

Statute of a State can have no influence on a question of set-off in a suit by the government against one of its officers. U. S. v. Prentice, 6 McLean, 66.

Federal Courts cannot follow the decisions of the state courts upon the construction of a state statute, if so doing will involve an infringement of the Constitution of the United States. Rowan v. Runnels, 48 U. S. (5 How.), 134; B'k of Ohio v. Knoop, 57 U. S. (16 How.), 399; Jefferson Branch B'k v. Skelly, 66 U. S., 436, XVII., 173.

Effect of Mass. Statute prohibiting work on Sunday on rights of parties in a collision case, is not a question of construction, but of its application, and the district court must follow decisions of U. S. Supreme Court, not of state tribunals. Sawyer v. Oakman, 1 Low., 134.

Decisions of state courts not resting upon construction of statutes of the State, but asserting general principles independent of statute, are not obligatory upon U. S. Courts in similar cases arising within the State. Town of Venioe v. Murdock, 92 U. S., 494.

As to general principles Federal Court follows its own views. What shall constitute jurisdiction in a court is a general principle of law. Mohr v. Manierre, 7 Biss., 419.

On this question there is an apparent conflict in the decisions of the Iowa Supreme Court.

Coy v. Lyons, 17 Iowa, 1; *Porter v. Thompson*, 22 Iowa, 391.

The opinion in 17 Iowa is correct law and, being made on general principles, would be adopted by this court even if reversed by the Iowa Supreme Court, because the decision in 17 Iowa "is one of a general character and not arising under local law."

Proc. Inst. for Saving v. Mass., 6 Wall., 611 (78 U. S., XVIII., 907).

But we shall be told that the state decisions must control this court. Not so, for in the case in this court last cited, with numerous other cases, and particularly the case of *Bank v. Skelly*, 1 Black, 443 (66 U. S., XVII., 177), this court held: "Where it is called upon to interpret contracts, though made in the forms of law or by the instrumentality of the State's authorized functionaries, in conformity with state legislations, it does not follow state decisions."

Bryan v. U. S., 1 Black, 143 (66 U. S., XVII., 185); *Von Hoffman v. Quincy*, 4 Wall., 585 (71 U. S., XVIII., 408).

(No counsel appeared in this court for defendant in error.)

Mr. Justice Swayne delivered the opinion of the court:

This case is brought before us by a writ of error to the Circuit Court of the United States for the District of Iowa.

The case as presented in the record is as follows: upon the petition of the relator an alternative writ of *mandamus* was issued to the defendants in error, wherein it was set forth that it had been represented to the court that the relator, on the 16th of May, 1867, recovered a judgment against the City of Muscatine for the sum of \$57,615.10, with interest at the rate of seven per cent. per annum, upon which judgment an execution had been issued and returned "no property found"; that the business of the corporation was managed by the Mayor and Aldermen, whose duty it was to cause its taxes to be levied and collected, and to provide for the payment of all judgments recovered against it; that this judgment was for interest on certain bonds executed by the City in 1854; that it was the duty of the Mayor and Aldermen to provide for the payment of the interest as it fell due; that it was their duty to levy and collect taxes and pay such judgments when recovered; that a demand had been made on the Mayor and Aldermen to levy and collect the taxes necessary to pay this judgment, interest, and costs; that they had refused and denied their authority to do so; that the City has no property liable to execution; that by the laws of Iowa when the debt was created and when the judgment was recovered, the public property of the City and the private property of its citizens were exempt from levy and sale to pay this debt and judgment, but that it was made the duty, of the Mayor and Aldermen, as early, as practicable after it was recovered, to levy a tax sufficient to pay the judgment, with interest and costs; that they had refused to perform that duty, and that the relator was without other adequate remedy at law.

The Mayor and Aldermen were, therefore, commanded forthwith to levy a sufficient tax

on the taxable property of the City—for the year 1867—to pay the judgment, interest, and costs, and to pay them, or to appear and show cause why they refuse to do so.

The defendants in their return set forth:

(1) A denial of the duties alleged to rest upon them.

(2) That under the laws of Iowa they are not permitted to levy or collect a tax exceeding in amount one per cent. upon the taxable property of the City for all purposes in any one year; that this amount has been levied for the year 1867; that a part of it has been collected and a part is delinquent; that the entire amount collected has been expended for the necessary current and incidental expenses of the City, and that the entire amount levied and collected for the year 1868 will be needed for the same purposes for that year, and that those expenses are a paramount lien upon the fund.

Other matters are set forth in the return which it is not necessary particularly to mention.

The plaintiffs demurred to the return. The court overruled the demurrer. The plaintiffs elected to abide by it, and judgment was entered against them.

By the Statute of Iowa of 22d of January, 1852, entitled "An Act to Amend the Charter of the City of Muscatine," approved February 1, 1851, it was enacted that an assessor should be appointed, whose duty it should be "to make an assessment of the property of the City subject to taxation, and upon whose assessment the council may levy a tax of not exceeding one per cent. upon the value in any one year." This statute was in force when the writ was issued and when the return was made. If there were no other statutory provisions bearing on the subject it would be conclusive in support of the judgment rendered by the court below.

The Code of 1860, chapter 110, title "Execution," declares as follows: "Sec. 3274. Public buildings owned by the State, or any county, city, school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation."

"Sec. 3275. In case no property is found on which to levy, or which is not exempted by the last section, or if, after judgment, the creditor elect not to issue execution against such corporation, he is entitled to the amount of his judgment and costs in the ordinary evidences of indebtedness issued by that corporation; and, if the debtor corporation issues no scrip or evidence of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs."

"Sec. 3276. A failure on the part of the officers of the corporation to comply with the requirements of the last section, renders them personally responsible for the debt."

These regulations were contained in the Code of 1851, and have been in force ever since. They were re-enacted in the Code of 1860, and have a controlling effect upon the determination of this case. The limitation in the Act of 1852, touching the exercise of the power of taxation by the City Council, applies to the ordi-

nary course of their municipal action. Whenever that action is voluntary, and there is no debt evidenced by a judgment against the City, to be provided for, one per cent. is the maximum of the tax they are authorized to impose. But when a judgment has been recovered, the case is within the regulations of the Code. Those provisions are then brought into activity, and operate with full force, until the judgment, interest and costs are satisfied. The limitation in the Act of 1852 has no application in such cases, and imposes no check, if larger taxation be necessary. The contingency is one not contemplated, and not provided for by the Act of 1852. If the Legislature had intended to qualify the requirement prescribed by the Code, it is to be presumed it would have done so, in language as clear as that which it has employed to express the duty to be performed. It leaves no room for doubt or construction. Nothing can be more simple and direct than the terms in which the levy of a sufficient tax is enjoined. The extent of the necessity is the only limitation, express or implied, in the Code of the amount to be levied. We cannot interpolate a restriction by importing it from another Act which has no necessary relation to the class of cases for which the Code intended to provide. When the judgment is recovered the duty arises, and it can be satisfied only by paying the debt, interest and costs, in the manner prescribed. The source whence the means are to be drawn is decreed, and full power is given to collect them.

There is no difficulty as to authority to levy a tax of the requisite amount, whatever it may be. Section 3276 of the Code declares, that a failure on the part of the officers of the Corporation to perform the duty enjoined, shall render them "personally responsible for the debt."

In the construction of a statute, what is clearly implied is as effectual as what is expressed. *U. S. v. Babbitt*, 1 Black, 61 [66 U. S., XVII., 96].

The minutest details could not have made the meaning and effect of these provisions clearer than they are. The limitation in the Act of 1852 is confined to the City of Muscatine. The regulations of the Code are general in their terms, and apply to all the municipal corporations mentioned in section 3274.

If these views be not correct, the position of the judgment creditor is a singular one. All the corporate property of the debtor is exempt by law from execution. The tax of one per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus nor the prospect of a surplus which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. The creditor is wholly dependent for payment upon the bounty and the option of the debtor. Until the debtor chooses to pay, the creditor can get nothing. The usual relations of debtor and creditor are reversed, and the judgment, though solemnly rendered, is as barren of results as if it had no existence. Such are the effects which must necessarily follow from the theory, if maintained, of the defendants in error. Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law mak-

ing power of so enlightened a State to produce, by its action, such a condition of things in its jurisprudence.

The writ of *mandamus* is the appropriate remedy, and the relator is entitled to the benefit of it.

There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part, by blindly following the footsteps of others and substituting their judgment for our own.

Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence.

The defendants in error have not submitted any brief or argument. We have had no assistance from them in this way. But it has been suggested in their behalf that we are concluded by the more limited interpretation of the provisions of the Code which have been given to them by the Supreme Court of the State.

To this we think there are several answers:

I. In all the cases brought here under the 25th section of the Judiciary Act this court has never hesitated to determine for itself the construction and effect of any statute of a State, brought under review, without reference to the previous adjudications of the highest court of the State upon the subject. In the opinion delivered in the case of the *Jefferson Branch of the State Bank of Ohio v. Shelly*, 1 Black, 436 [66 U. S., XVII., 178], it was well asked of what value would the appellate power of this court be to the party aggrieved, if such were not the rule. In that case and in all the other cases brought here, involving the same question, an Act of the Legislature of Ohio was pronounced invalid and the judgments of the Supreme Court of the State were reversed. Cases may be brought here from the circuit court of such a character that it is necessary to the right administration of justice that we should proceed upon the same principle in deciding them. Indeed, questions which are identical, may be brought here in both ways. Under such circumstances it will hardly be insisted that state adjudications are to control in one case and not in the other. Our duty depends upon the questions involved, and not upon the channel through which the case comes before us. Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it always has done, follow such adjudications. The cases of a different character, involving state statutes, in which the adjudications of the courts of the States in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organization to the present.

II. It is set forth in the writ that the judgment was recovered upon bonds issued by the City in 1854. This not being denied by the return, according to the settled law of pleading, is admitted. The Act of 1852 and the provisions of the Code were in force at that time, and entered into and formed a part of the contract of the parties. They prescribed one of the remedies to which the bond holders were entitled in the event of default by the City. It has been uniformly held by this court that such remedies are within the protection of the Constitution of the United States, and that any state law which substantially impairs them is as much prohibited by that instrument as legislation which impairs otherwise the obligation of the contract. *Bronson v. Kinzie*, 1 How., 311; *McCracken v. Hayward*, 2 How., 608. If the remedy be taken away the contract is in effect annulled. Nothing is left of it, of any value to the party whose rights are thus invaded. This subject was fully considered in *Von Hoffman v. The City of Quincy*, 4 Wall., 585 [71 U. S., XVIII., 403]. It was there held that laws for the collection of the requisite taxes, existing when the bonds were issued, subsequently repealed, still subsisted for the purposes of the contract, and that a writ of *mandamus* might issue from the circuit court to enforce them. Here the remedy is taken away; not by a subsequent repeal, but by subsequent judicial decisions. The effect upon the contract is the same as if the provisions of the Code had been repealed. This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the state courts, which may have exercised their judgment upon the same subject. *Swift v. Tyson*, 16 Pet., 19. This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State does not affect the legal result. *Jefferson Br. St. Bk. v. Skelly*, 1 Black, 436 [66 U. S., XVII., 173]. We are of the opinion that under the statutes of Iowa, in force when the contract was made, the relator is entitled to the remedy he asks, and that this right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than the other. We cannot in any other way give effect to the contract of the parties as we understand it. This contract was entered into in 1854. The earliest of the adjudications to which we have referred was made in 1862. If the construction ultimately given to the statute had preceded the issuing of the bonds, and become the settled law of the State before that time, the case, as regards this point, would have presented a different aspect.

3. The case involves the process of the courts of the United States. It is peculiarly the province of this court to decide all questions relating to that subject. *Riggs v. Johnson Co.*, 6 Wall., 166 [73 U. S., XVIII., 768].

The judgment is reversed and the cause will be remanded to the court below, with instructions to sustain the demurrer, and to proceed in conformity with this opinion.

Mr. Justice Miller, dissenting:

In the case of *Leffingwell v. Warren*, 2 Black, 599 [67 U. S., XVII., 261], this court, speaking by my learned brother who has just read its opinion, declared that "The construction given to a state statute by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text;" and it was further said that "if the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute and reverse its former decision, this court will follow the latest settled adjudications." This was announced as the doctrine of this court on a full review of numerous reported cases.

When at the succeeding term of the court the first of a series of suits based on bonds issued by municipalities in Iowa came before us, it was found that such bonds could not be sustained consistently with that doctrine. Accordingly the court, by the same learned member, in the case of *Gelpcke v. Dubuque*, 1 Wall., 175 [68 U. S., XVII., 520], delivered its opinion declaring that, in cases of contracts, it would not follow the latter decisions of the state courts construing their own constitution where the consequence would be to declare such contracts void, if there had been prior decisions that they were valid. And as late as the last term, in the case of *Lee County v. Rogers* [ante, 160], the court, speaking by *Mr. Justice Nelson*, distinctly recognizes the existence of those prior decisions of the state courts, under which the bonds were taken by the holders, as the ground on which the subsequent decisions of the same court are disregarded.

The opinion of the court in the present case, delivered by the same learned judge who, on its behalf, in *Leffingwell v. Warren*, declared that this court would follow the latest settled adjudication of the state courts, and in *Gelpcke v. Dubuque* only claimed to modify that doctrine so far as to hold contracts valid which had the support of some prior decisions of the state courts, now holds, in a matter which does not involve the validity of contracts, but a construction of state statutes on the amount of tax which may be levied under them, that the repeated decisions of the state courts on that subject, in which courts there have never been any contrary decisions, will be disregarded entirely, and that this court will give to such statutes a construction directly opposed to that by which the state courts are governed.

It is an entire and unqualified overthrow of the rule imposed by Congress and uniformly acted on by this court up to the year 1863, that the decisions of the state courts must govern this court in the construction of state statutes.

There is not here even the excuse that the decisions concern the validity of a contract, for the contract is admitted, and the bond holder has his judgment in the circuit court based on the contract.

But it relates to the question of what taxes are authorized to be levied by state statutes; a question it would seem of all others most proper to be determined by the state courts.

Nor is there any pretense that the statute as construed by the state court impairs the obligation of a contract, because the limitation of the amount of taxes which might be levied by

the City of Muscatine existed long before the bonds were issued which are sought to be enforced by this proceeding, and this limitation was a part of the very statute under which those bonds were claimed to be issued, namely: the charter of the City of Muscatine. It was under this very charter, with this express limitation of the taxing power, that this court held these bonds to be valid. *Meyer v. Muscatine*, 1 Wall., 884 (68 U. S., XVII., 564).

The provision of the Code of 1851, which required the officers of municipalities to levy the taxes necessary to pay judgments against them, was in existence when the charter of Muscatine was created, which limited the taxing power of its authorities to one per cent. per annum. The later law must repeal the former if they are inconsistent. But they are not so. It is only necessary to hold that persons giving credit to the City, with a knowledge of this limit to its taxing powers, must do so on the condition of waiting until that amount of tax will pay them, or until the Legislature shall remove the restriction; and that within that limit the Code gives them a right to compel the exercise of the taxing power to pay the debt so created. Such has been the reasonable construction given to the Code by the courts of Iowa for many years and by the Circuit Court of the United States for that district for several years past, and never contradicted by any court until the present time.

These frequent dissents in this class of subjects are as distasteful to me as they can be to anyone else. But when I am compelled, as I was last spring, by the decisions of this court, to enter an order to commit to jail at one time over a hundred of the best citizens of Iowa, for obeying as they thought their oath of office required them to do, an injunction issued by a competent court of their own State, founded, as these gentlemen conscientiously believed, on the true interpretation of their own statute, an injunction which, in my own private judgment, they were legally bound to obey, I must be excused if, when sitting here, I give expression to convictions which my duty compels me to disregard in the circuit court.

I am authorized to say that the *Chief Justice* concurs in this opinion.

Cited—9 Wall., 414; 18 Wall., 82; 19 Wall., 678; 94 U. S., 642; 98 U. S., 397; 99 U. S., 628; 100 U. S., 532; 103 U. S., 484; 107 U. S., 34, 541; 10 Bank. Reg., 228; 2 Abb., U. S., 60, 1 Wood, 444; 2 Wood, 641; 1 Dill, 135, 138; 528, 568; 2 Dill., 536, 358; 5 Dill., 285, 323; 1 McCrary, 370; 1 Flipp., 130; 9 Kan., 698; 36 Am. Rep., 647 (80 N. Y., 447); 86 N. J. L., 276; 25 Wis., 164.

UNITED STATES, *ex rel.* HENRY AMY, *Plff.*
in Err.,
v.

THE MAYOR AND ALDERMAN OF THE
CITY OF BURLINGTON;

AND

UNITED STATES, *ex rel.* EDWARD H.
LEARNED, *Plff. in Err.*,
v.

SAME.

Butz v. Muscatine, ante., 490, followed.

These cases are the same substantially as *Butz v. Muscatine*, ante., 480, and are decided the same way.

See 8 WALL.

[No. 495.]

Argued Nov. 30, 1869. Decided Jan 24, 1870.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

Each of these cases was begun by writ of *mandamus* in the court below, and the subsequent proceedings therein were in each case the same as in the preceding case of *Butz v. Muscatine*. The same arguments of counsel were presented in these cases as in the former one, to which reference is made for an abstract of the same.

Mr. James Grant, for plaintiffs in error.

No counsel appeared in this court for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

Upon examination, these cases are found to be substantially the same with the case of *The United States, on the relation of Thomas Butz, v. The City of Muscatine* [ante., 490], No 98, heretofore, decided by this court at the present term. Our opinion is the same as in that case. The judgment in each of these cases is, therefore, reversed, and the cause remanded to the court below for further proceedings, in conformity to the views of this court, as expressed in the case referred to.

THE HOME OF THE FRIENDLESS, *Plff.*
in Err.,

v.

EDWARD S. ROUSE, Collector of the Revenue of St. Louis County, Missouri.

(See S. C., 8 Wall., 430-436.)

Clause in charter exempting from taxation is a contract—tax impairs its obligation—consideration—State may exempt from taxation.

The clause in the charter for the Home of the Friendless, that "The property of the Corporation shall be exempt from taxation," is a contract between the State and the corporators.

Any attempt by the State to tax the property impairs the obligation of the contract, and cannot be allowed.

A consideration is not necessary in order to uphold the contract. It is as much the duty of the court to uphold and sustain it as if it were a contract between private persons.

A State may, by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently.

[No. 82.]

Argued Nov. 23, 1869. Decided Dec. 20, 1869.

IN ERROR to the Supreme Court of the State of Missouri.

A petition in this case was filed in the Circuit Court of St. Louis County, State of Missouri, by the plaintiff in error, praying that the defendant, a collector of revenue, be enjoined from collecting certain taxes. The charter of the plaintiff corporation contained the provision that "All property of said Corporation shall be exempt from taxation, and the 6th, 7th

NOTE.—What laws are void as impairing the obligation of contracts. Vested rights; constitutionality of laws, or of repeal, or modification of statute. See note to *Fletcher v. Peck*, 10 U. S. (6 Cranch), 87.

and 8th sections of the 1st article of the Act concerning corporations, approved March 19, 1845, shall not apply to this Corporation." The preamble to said charter also expressly stated that it was granted "for the purpose of encouraging said undertaking and enabling the party to engage therein, more fully and effectually to accomplish their laudable purpose," to afford relief to destitute and suffering females."

The said charter was granted by a public Act of Missouri, approved Feb. 8, 1853. The Constitution of Missouri, adopted in 1865, prohibited the Legislature from entering into a contract which should exempt the property of an individual from taxation.

A decree having been entered in favor of the plaintiff for a perpetual injunction, the defendants sued out a writ of error to the Supreme Court of Missouri. That court entered judgment reversing the decree and dismissing the petition. Thereupon the plaintiff sued out this writ of error.

The case is further stated by the court.

Messrs. B. R. Curtis, and H. Hitchcock, for plaintiff in error:

I. The charter contains, not only an explicit promise on the part of the State, that whatever property should be owned by this charity should not be taxed, but what is very unusual, if not unprecedented, it contains an assurance that the legislative power should not thereafter be used to interfere with this franchise.

The 1st section of the charter contains these words: "All property of said Corporation shall be exempt from taxation; and the 6th, 7th and 8th sections of the 1st article of the Act Concerning Corporations, approved March 19, 1845, shall not apply to this Corporation." The 7th section thus referred to provided that the charter of every corporation that shall thereafter be granted by the Legislature, should be subject to alteration, suspension and repeal at the discretion of the Legislature; and that discretionary authority, it is declared, shall not exist as to this Corporation.

II. The charter in express terms, hold out to the benevolent persons to whom it is addressed, that if they will take upon themselves the burden of organizing this Corporation, of making themselves and soliciting from others, donations and grants, and of administering its affairs, for the relief of the suffering female poor of the City of St. Louis, the funds thus obtained, devoted and held, shall not be diminished by taxation.

III. There was no provision then existing in the Constitution of the State, restraining the Legislature from entering into such a contract; and the qualified prohibition contained in the present Constitution shows, if it were necessary that its absence left the Legislature free to act in the manner, it did act.

IV. That the Legislature had power to make this contract, and that when made and accepted it became one of the franchises of this Corporation of which it could not be deprived, is too well settled to require a citation of numerous authorities. They are collected in Cooley, Con. Lim., 279.

V. To suppose that any consideration beyond the public objects for which this Corporation was created was necessary as a basis of a contract, is a mistake. The consideration is found

in the nature of those objects, the acceptance of the charter and the consequent implied undertaking to use its franchises in the way and for the purposes in which they were granted.

This has been the settled law of this court since the case of *Dartmouth Coll. v. Woodward*, 4 Wheat., 518.

See op. of Mr. Justice Davis in *The Binghamton Bridge*, 8 Wall., 73 (70 U. S., XVIII., 142); *Bank v. Skelly*, 1 Black, 436 (66 U. S., XVII., 173).

The case of the University seems not distinguishable from the other case.

Messrs. M. Blair and F. A. Dick, for defendant in error:

I. The Legislature in 1853, for the mere consideration that this Institution should be established, with no obligations or duties imposed upon it, had no power to promise that the State of Missouri should never have the legal authority to impose a tax upon any property which the Seminary might acquire, and at the same time confer upon it power to acquire an unlimited amount of property. The State may accept a bonus in place of a tax, or may fix upon a given rate of taxation, and thus, for a consideration, bargain away the power to levy taxes in the usual way. But this charter makes no such contract.

Rector of Christ Church v. Phila. Co., 24 How., 800 (65 U. S., XVI., 602); *Presbyterian Church v. City of N. Y.*, 5 Cow., 542, cited in 10 How., 585; *East Hartford v. Hartford Bridge Co.*, 10 How., 511; *Commonwealth v. Bird*, 12 Mass., 443, cited in 24 How., 300; *Bk. v. Billings*, 4 Pet., 561.

II. The Legislature has not, by said Acts of 1853 and 1857, declared its intention to bind the State never to impose any such tax. The language used does not expressly say that the State forever is to be bound, and the law will not imply such meaning.

C. R. Bridge v. Warren Bridge, 11 Pet., 420; Op. by Taney, Ch. J., p. 526; Op. by Story, J., p. 583; *Rector of Christ Church v. Phila.* (supra); *Bk. v. Billings* (supra); *Butler v. Pa.*, 10 How., 402.

III. The rule of construction applicable to laws relied upon as contracts, granting to corporations special advantages to the detriment of the public is, that they shall be construed strictly against the corporation.

C. R. Bridge v. Warren Bridge, 11 Pet., 420; *Bk. v. Billings* (supra); *Bentley v. Knowles*, 4 Pet., 152; *The Binghamton Bridge*, 8 Wall., 51 (70 U. S., XVIII., 137).

IV. There is no consideration stated in the law for the release from taxation. The establishment of this Institution by the trustees was the consideration which made the grant of the charter binding upon the State, and the contract to that extent is beyond the control of the State, as a contracting party. *Bank v. Billings*, 4 Pet., 562.

But the exemption from taxation was a mere gratuity, intended to last during the pleasure of the State. *Phalen v. Va.*, 8 How., 163; *Bk. v. Okely*, 4 Wheat., 235; *Aspinwall v. Davison Co.*, 23 How., 864 (63 U. S., XVI., 296).

The Legislature of 1853 omitted to provide for any advantage in the future to the State, which should be commensurate with the greater and growing advantage to the Institution which

would accrue from the increase of taxes appropriated to its use, with the increase of its property. The law shields it from rendering any account of the amount of public funds thus devoted to its use, and authorizes an unlimited increase.

This omission of the Legislature, as the agent of the State, to provide for any commensurate advantage to the State, or for any check upon the Institution, is fatal to the instrument as a contract. For it will not be held that the Legislature could have intended any such arrangement to have been perpetual and obligatory as a contract upon the people; and if such was its intention, it had no such legal power as an agent.

Bank v. Billings (supra); *Christ Church v. Phila.* (supra); *Bank v. Knoop*, 16 How., 378; *Com. v. Bird*, 12 Mass., 442; 12 Harris, 232; *Brewster v. Hough*, 10 N. H., 139; *People v. Roper*, 35 N. Y., 629; *Mott v. Pa. R. R.*, 30 Pa., 9; *Com. v. Easton Bank*, 10 Pa., 442; *Gardner v. State*, 1 Zab., 557.

V. Retrospective laws, divesting rights not secured by contract may be passed by States.

Satterlee v. Matthewson, 2 Pet., 413; *R. R. v. Nesbit*, 10 How., 401; *Watson v. Mercer*, 8 Pet., 110.

Mr. Justice Davis delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Missouri. It appears that the plaintiff in error, a Corporation created by the Legislature of Missouri, commenced a suit on the equity side of the Circuit Court of St. Louis County, to restrain the defendant, who was Collector of the Revenue for the County, from collecting the taxes on two parcels of real estate of which it was the owner at the time of the assessment, on the ground that the taxes were illegally assessed, because all its property by its Act of Incorporation, was expressly exempted from taxation at all times. The defendant interposed a demurrer, which was overruled and the judgment on the demurrer made final. The cause was removed to the Supreme Court of the State, and resulted in the reversal of the judgment of the lower court and the dismissal of the bill of petition.

The case is relieved of all difficulty on the question of the jurisdiction of this court, as the Supreme Court of Missouri certify, as a part of the record, that in the determination of the suit there is, necessarily, drawn in question the construction of that clause of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of a contract, and that the decision was against the right claimed by the plaintiff in error, and was necessary to the adjudication of the cause. The important question raised by the record is: whether the State of Missouri contracted with the plaintiff in error not to tax its property. If he did so contract, it is undisputed that the assumed legislation, under the authority of which the property in controversy was taxed, impaired the obligation of this contract.

The object for which the Home of the Friendless was incorporated was to enable those persons of the female sex, who were desirous of establishing a charitable institution in St. Louis

for the relief of destitute and suffering females, to carry out their laudable undertaking.

It can readily be seen that a charity of this kind would be a great benefit to the people of St. Louis, and that the Legislature of the State would naturally be desirous of using all proper means to promote it. The purposes to be attained by such a charity are usually beyond the ability of individual effort, and require an association of persons who will themselves contribute pecuniary aid, and are willing to become solicitors for the contributions of others. Usually the initiation of such an enterprise is in the hands of a few persons who need to be clothed with more than ordinary powers in order to obtain the successful co-operation of others. In no way could this co-operation be better secured than by conferring on the incorporators the authority to say to the benevolent people of St. Louis, that their donations in money or lands, for the relief of the suffering female poor of the city, would be held by the Institution undiminished by taxation.

It was doubtless under the influence of these considerations, and because every government wishes to encourage benevolent enterprises, that the Legislature granted the charter for the Home of the Friendless, and said to the charitable persons engaged in this business, that if they would organize the society and conduct its affairs, would give themselves and solicit others to give for the common purpose, "that the property of the corporation shall be exempt from taxation." This charter is a contract between the State of Missouri and the incorporators that the property given for the charitable uses specified in it, shall, so long as it is applied to these uses, be exempted from taxation. It follows, that any attempt to tax it impairs the obligation of the contract. It is proper to observe, that the immunity from taxation does not attach to the property after the corporation has parted with it, but is operative on it while owned by the corporation, and devoted to the uses for which it was originally given.

It is objected that there is no consideration stated in the Act for the release from taxation, which is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*, 4 Wheat., 519.

It is contended that the rules of construction applicable to legislative contracts are more stringent than those which are applied to contracts between natural persons, and that, applying these rules to this contract, it cannot be sustained as a perpetual exemption from taxation.

It is true that legislative contracts are to be construed most favorable to the State if on a fair consideration to be given the charter, any reasonable doubts arise as to their proper interpretation; but, as every contract is to be construed to accomplish the intention of the par-

ties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons. Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. "All property of said corporation shall be exempt from taxation," are the words used in the Act of Incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word "forever" after the word "taxation" could not make the meaning any clearer. It was, undoubtedly, the purpose of the Legislature to grant to the Corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the Legislature, without taking direct action on the subject, could, at its will, resume the power of taxation. This view is fortified by the provisions of the general law of the State regarding corporations, in force at the time this charter was granted, and which the Legislature declared should not apply to this Corporation. The 7th section of the Act concerning corporations, approved March 19, 1845, provided that "The charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature." As the charter in controversy was granted in 1833, it would have been subject to this general law if the Legislature had not, in express terms, withdrawn from it this discretionary authority. Why the necessity of doing this if the exemption from taxation was only understood to continue at the pleasure of the Legislature?

The validity of this contract is questioned at the bar on the ground that the Legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by the repeated adjudications of this court, that the State may, by contract based on a consideration, exempt the property of an individual or corporation from taxation, either for a specified period, or permanently. And it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State if the charter containing it is accepted. *New Jersey v. Wilson*, 7 Cranch, 164; *Gordon v. Appeal Tax Court*, 8 How., 133; *Piqua Bank v. Knoop*, 16 How., 389; *Ohio Life and Trust Co. v. Debolt*, 16 How., 416; *Dodge v. Woolsey*, 18 How., 331 [58 U. S., XV., 401]; *Mechanics' and Traders' Bank v. Thomas*, 18 How., 384 [59 U. S., XV., 460]; *Mechanics' and Traders' Bank v. Debolt*, 18 How., 380 [59 U. S., XV., 458]; *McGee v. Mathis*, 4 Wall., 143 [71 U. S., XVIII., 314].

It is proper to say that the present Constitution of Missouri prohibits the Legislature from entering into a contract which exempts the property of an individual or corporation from taxation; but when the charter in question was passed there was no constitutional restraint on the action of the Legislature in this regard.

Without pursuing the subject further, we are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the Corporation from taxation, and

that the attempt made on behalf of the State through its authorized agent, notwithstanding this agreement, to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

The judgment of the Supreme Court of Missouri reversed, and the cause remanded to that court below, with directions to proceed in conformity with this opinion.

Dissenting, *Mr. Chief Justice Chase, Mr. Justice Field and Mr. Justice Miller.*

See opinion written by *Mr. Justice Miller*, entitled in, and to apply to both this and the following case at page 499 post.

Cited—13 Wall., 376; 15 Wall., 456; 21 Wall., 498; 93 U. S., 223; 95 U. S., 690; 105 U. S., 363; 2 Abb. U. S., 331; 12 Blatchf., 466; 82 N. Y., 466; 35 Wis., 206.

THE WASHINGTON UNIVERSITY, *Plff.* in *Err.*, v.

EDWARD S. ROUSE, Collector of the Revenue for St. Louis County, STATE OF MISSOURI.

(See S. C., 8 Wall., 439, Note.)

Contract for exemption from taxation—consideration—is a franchise—when not forfeited.

The same contract of permanent exemption from taxation, exists in this case as in the charter of the Home of the Friendless, *ante*, p. 495.

The public purposes to be attained in each case constituted the consideration on which the contracts were based.

The charter of the University having been accepted, the exemption from taxation became one of the franchises of the Corporation, of which it could not be deprived by any species of state legislation.

So long as the Corporation uses its property to support the educational establishments for which it was organized, it does not forfeit its right not to be taxed under the contract which the State made with it.

[No. 83.]

Argued Nov. 23, 1869. Decided Dec. 20, 1869.

IN ERROR to the Supreme Court of the State of Missouri.

The petition in this case was filed in the Circuit Court of St. Louis County, State of Missouri, by the plaintiff in error, praying for an injunction against the collection of certain taxes. A decree was entered in favor of the petitioner, and the defendant sued out a writ of error to the Supreme Court of Missouri. That court having entered judgment reversing the decree and dismissing the petition, the plaintiff sued out this writ of error.

The case is in all respects similar to the one preceding, in connection with which it was argued and decided, and to which reference is made for the arguments of counsel.

Messrs. B. R. Curtis and H. Hitchcock, for plaintiff in error.

Messrs. M. Blair and F. A. Dick, for defendant in error.

Mr. Justice Davis delivered the opinion of the court:

There are no material points of difference between the case of *The Home of the Friendless v. Rouse, Collector* [*ante*, 595], just decided, and this case, and the views presented in that case are ap-

plicable to this. The object of the charter in the one was to promote a charity, in the other to encourage learning. Both were public objects of advantage to the country, and which every government is desirous of promoting. Whether the endowment of a charity is of more concern to the State than the endowment of a University for learning, is within the power of the Legislature to determine. If the Legislature has acted in a manner to show that it considered both objects equally worthy of favor, it is not the province of this court to pass on the wisdom of the measure.

On the contrary, it is the duty of the court to carry out the intention of the Legislature, if ascertainable, by applying to both charters the ordinary rules of construction applicable to legislative grants. In applying these rules to this charter, we find the existence of the same contract of permanent exemption from taxation, as in the charter of the Home of the Friendless. The State contracted in the one case, as in the other, not to tax the property of the Corporation, using the same words in both charters, to convey its meaning, and binding itself in the same terms, not to repeal or modify either charter in that regard. Both charters were passed by the same Legislature, within a few days of each other, and neither charter is unusual in its provisions, except in this particular. The inference would, therefore, seem to be clear, that it was the legislative intention that both should, in this respect, be on an equality. The public purposes to be attained in each case constituted the consideration on which the contracts were based. The charter of the University, with its amendment (not material to notice, because not affecting this question), having been accepted, and the Corporation, since its acceptance, having been actively employed in the specific purpose for which it was created, the exemption from taxation became one of the franchises of the Corporation of which it would not be deprived by any species of state legislation.

It is urged that the Corporation, as there is no limit to its right of acquisition, may acquire property beyond its legitimate wants, and in this way abuse the favor of the Legislature and, in the end, become dangerous, on account of its wealth and influence. It would seem that this apprehension is more imaginary than real, for the security against this course of action is to be found in the nature of the object for which the Corporation was created. It was created specially to promote the endowment of a seminary of learning, and it is not to be presumed that it will ever act in such a manner as to jeopardize its corporate rights; nor can there be any well grounded fear that it will absorb, in its effort to establish a literary institution of a high order of merit, in the City of St. Louis, any more property than is necessary to accomplish that object. Should a state of case in the future arise, showing that the Corporation has pursued a different line of conduct, it will be time enough then to determine the rights of the parties to this contract, under this altered condition of things. The present record presents no such question, and we have no right to anticipate that it will ever occur. It is enough for the purposes of this suit to say, that so long as the Corporation uses its property to

See 8 WALL.

support the educational establishments for which it was organized, it does not forfeit its right not to be taxed under the contract which the State made with it.

We cannot see that the case of the University is distinguishable from that of the *Home of the Friendless*.

The Judgment of the Supreme Court of the State of Missouri is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion.

Mr. Justice Miller, dissenting:

The Chief Justice, Mr. Justice Field, and myself, do not concur in these judgments.

It is the settled doctrine of this court, that it will, in every case affecting personal rights, where, by the course of judicial proceedings, the matter is properly presented, decide whether a state law impairs the obligation of contracts; and if it does, will declare such law ineffectual for that purpose. And it is also settled, beyond controversy, that the State Legislatures may, by the enactment of statutes, make contracts which they cannot impair by any subsequent statutes.

It may be conceded that such contracts are so far protected by the provisions of the Federal Constitution that even a change in the fundamental law of the State, by the adoption of a new Constitution, cannot impair them, though express provisions to that effect are incorporated in the new Constitution. We are also free to admit that one of the most beneficial provisions of the Federal Constitution, intended to secure private rights, is the one which protects contracts from the invasion of state legislation. And that the manner in which this court has sustained the contracts of individuals has done much to restrain the State Legislatures, when urged by the pressure of popular discontent under the sufferings of great financial disturbances, from unwise as well as unjust legislation.

In this class of cases, when the validity of the contract is clear, and the infringement of it by the Legislature of a State is also clear, the duty of this court is equally plain.

But we must be permitted to say, that in deciding the first of these propositions, namely: the validity of the contract, this court has, in our judgment, been, at times, quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts were not so, by reason of the want of authority in those who profess to bind others. This has been especially apparent in regard to contracts made by Legislatures of States, and by those municipal bodies to whom, in a limited measure, some part of the legislative function has been confided.

In all such cases, where the validity of the contract is denied, the question of the power of the legislative body to make it, necessarily arises; for such bodies are but the agents and representatives of the greater political body—the people, who are benefited or injured by such contracts, and who must pay, when anything is to be paid, in such cases.

That every contract fairly made ought to be performed, is a proposition which lies at the basis of judicial education, and is one of the strong desires of every well organized judicial

mind. That, under the influence of this feeling, this court may have failed in some instances to examine, with a judgment fully open to the question, into the power of such agents, is to be regretted, but the error must be attributed to one of those failings which lean to virtue's side.

In our judgment, the decisions of this court, relied upon here as conclusive of these cases, belong to the class of errors we have described.

We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual Legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful.

It cannot be maintained that this power to bargain away, for an unlimited time, the right of taxation, if it exist at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the Legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies or rich men, making contracts with the Legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all the burdens of supporting the government.

The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity.

With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned.

Cited—21 Wall., 498; 12 Blatchf., 446; 35 Wis., 206.

JACOB D. COX, SECRETARY OF THE INTERIOR, *Plff. in Err.*,

v.

THE UNITED STATES, *ex rel.* WILLIAM MCGARRAHAN.

Practice on writs of error—notice, when given—writ issued within 30 days before term.

The 30 days' notice for re-examination of cases on writs of error, provided for by the 22d section of the Judiciary Act in connection with the Act of 1808, need not be given prior to the first day of the term. This court will not compel the hearing of the cause at the first term, unless such notice has been given.

Where the writ of error issued within 30 days before the meeting of the court, defendant is at liberty to enter his appearance and proceed to trial.

It is the duty of plaintiff to docket the cause or file the record within the first six days of the term, on failure of which defendant may docket the cause and file the record, and thereupon the cause stands for trial as if the record had been filed within the first six days.

[No. 837.]

Argued Jan. 13, 1870. Decided Jan. 19, 1870.

ON MOTION to rescind the order of December 18th, advancing this cause on the docket.

A sufficient statement of the case appears in the opinion of the court. See, also, the report of the decision of this court on the merits, *post*.

Messrs. E. R. Hoar, Atty-Gen., and J. Hubley Ashton, for plaintiff in error.

Messrs. P. Phillips and A. L. Morrigan, for defendants in error.

Mr. Chief Justice Chase delivered the opinion of the court:

We have considered the objection made by Mr. Phillips to the hearing, during the present term, of the case of *The Secretary of the Interior v. McGarrahan*. It is founded upon the fact, that the writ of error to the judgment of the Supreme Court of the District of Columbia, directing the issue of a peremptory *mandamus* to the Secretary, was allowed on the 30th November, 1869, less than thirty days before the first day of the present term, begun on the 6th of the present month.

The citations and the writ of error were both served on the same day. The 22d section of the Judiciary Act, taken in connection with the Act of 1808, provides for the re-examination of cases on writ of error, the adverse party having at least thirty days' notice. This provision does not necessarily require that the thirty days' notice shall be given prior to the first day of the term, but in the case of *Welsh v. Mandeville*, 5 Cranch, 321, the court held as a matter of discretion, that they would not compel the hearing of the cause at the first term, unless such notice had been given. And this decision was made the rule of the court. This decision was made in accordance with a rule of the court adopted February Term, 1803 (1 Wheat., Rule XVI.), that where the writ of error issued within thirty days before the meeting of the court, the defendant is at liberty to enter the appearance and proceed to trial; otherwise, the cause must be continued. The above decision seems to have been made in 1809. By the rule adopted February Term, 1831 (1 Pet., Rule XXIX.), it was made the duty of the plaintiff to docket the cause or file the record within the first six days of the term, on failure of which the defendant

might docket the cause and file the record; and thereupon the cause was to stand for trial, as if the record had been filed within the first six days. The defendant had the option, upon a certificate of the clerk of the court where the judgment was rendered, to have the cause continued or dismissed.

JOSEPH C. WILLARD, Appr.,

BENJAMIN O. TAYLOR.

(See S. C., 8 Wall., 557-574.)

Accepted offer to sell, becomes a contract—specific performance, in discretion of court—practice in objection to partial owners, when not necessary parties—party who is to deliver deed must prepare it—parol evidence to vary contract not receivable in equity—contracts previous to the Legal Tender Act must be paid in gold.

A covenant in a lease, giving the right to purchase the premises, is a continuing offer to sell, which, when accepted, constitutes a contract of sale.

Specific execution of a contract is not a matter of absolute right to either party, but is a matter resting in the discretion of the court, to be exercised upon consideration of each particular case.

Such discretion is not an arbitrary or capricious one, but controlled by the settled principles of equity.

Where a proposition to sell lands is made before but is not accepted till after the passage of the Act of Congress, making notes of the United States a legal tender for private debts, the contract must be construed as if it had been concluded before the passage of the Act.

A party may apply for a specific performance, and submit the amount to be paid by him to the judgment of the court.

Mere increase in the value of land since the proposition to sell, is no objection to specific performance of the contract.

The owners of partial interests in contracts for land acquired subsequent to their execution, are not necessary parties to bills for their enforcement.

The party who is to execute and deliver a deed, should prepare it.

Conversations controlling or changing the stipulations in contracts that have been reduced to writing are, in the absence of fraud, no more received in a court of equity than in a court of law.

When, at the time of the proposition to sell, the currency consisted only of gold and silver coin, then a legal tender, payment of the stipulated price must be made in gold and silver coin only, notwithstanding the Act of Congress making the United States notes a legal tender for debts.

[No. 4.]

Argued Jan. 27, 1868. Decided Jan. 24, 1870.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below by the appellant, to compel the specific performance of a contract. A decree having been

entered in that court dismissing the bill, the complainant took an appeal to this court.

The case is fully stated by the court.

Messrs. B. R. Curtis, George House and L. P. Poland, for appellant:

1. Where a contract for the conveyance of lands is, in its nature and circumstances, unobjectionable, it is as much a matter of course for a court of equity to decree its specific performance, as it is for a court of law to give damages for its breach.

2 Story, Eq., sec. 751, and cases cited.

II. When the complainant, within the prescribed time, notified to the respondent his election to purchase, the contract became complete. The covenant in the lease was a continuing offer to sell on the terms therein mentioned; and as soon as that offer was accepted, there arose a complete and concluded agreement.

Boston & Me. R. R. v. Bartlett, 3 Cush., 224; *Welchman v. Spinks*, 5 Law Times (N. S.), 385. Such acceptance might be by parol.

Bos. & M. R.R. v. Bartlett, (*supra*); *Warner v. Willington*, 8 Drew, 528.

But here the acceptance was in writing, and the respondent might have at once filed his bill against the complainant to compel specific performance, or brought an action at law.

R. R. v. Evans, 6 Gray, 25.

The money payable by Willard to Taylor, became a debt as soon as Willard had signified to Taylor his option to make the purchase.

III. The tender of treasury notes was sufficient.

The contract was made in the District of Columbia; was to be there performed; and respected real property in Washington.

Within this District, Congress has power to exercise exclusive legislation, in all cases whatsoever. Art. 1, sec. 8, ch. 17.

These terms unquestionably include the power to make treasury notes legal tender for all debts.

Congress having power to borrow money, the choice of means is with Congress with but two general limitations:

1. That the means chosen by Congress should be appropriate and conducive to the end.

McCulloch v. Maryland, 4 Wheat., 418.

2. That they are not prohibited by any express provision of the Constitution, nor by any just deduction or implication from its provisions.

That, speaking generally and subject to the qualifications stated, the choice of means to execute a granted power is with Congress, does not admit of doubt.

U. S. v. Bishop, 2 Cranch.

The obligation of a contract, in the sense in which those words are used, not only in the

NOTE.—*Specific performance.* Plaintiff must show performance, or readiness to perform and offer to perform; when denied; decreed against subsequent purchaser with notice; where vendor is unable to fulfill wholly; title must be good and free from incumbrances; contract must be fair and honest; not when description is too uncertain for identity; nor when compensation may be awarded; nor when contract is uncertain; nor when default in payment of purchase money; nor where good title cannot be made. See note to Colson v. Thompson, 15 U. S. (2 Wheat.), 336.

When specific performance decreed and when refused; remedy at law adequate; suppression of material fact, or mistake, or fraud; sufficient if plaintiff can make good title at time of decree; time not gener-

See 8 WALL.

U. S., Book 19.

ally material; by alien; not generally of contract as to personal chattels; exceptions; long delay and change of circumstances will defeat action for; contract for construction of railroad. See note to Hepburn v. Dunlop, 14 U. S. (1 Wheat.), 180.

Laches of plaintiff; readiness of plaintiff to perform; change of circumstances; time, when material. See note to Pratt v. Carroll, 12 U. S. (8 Cranch), 471. Time or excess of price not a bar to action for doubtful title. See note to Brashier v. Gratz, 19 U. S. (6 Wheat.), 528.

Title may be made any time before decree; necessary parties to action, objection to; unnecessary parties; when objection made, striking out parties. See note to Morgan v. Morgan, 15 U. S. (3 Wheat.), 280.

Constitution of the United States, but in the jurisprudence from which the framers of our Constitution borrowed them, is that duty of performing it which is recognized and enforced by law.

Curran v. Arkansas, 15 How., 819; Maine, Ancient Law, 818.

It has been adjudged, in this court, in England and elsewhere, that a tender in what was lawful money at the time the tender was made, is a sufficient tender, though its actual value is not the same as that of the lawful money in use when the contract was made.

Favo v. Marsteller, 2 Cranch, 20; *U. S. v. Robertson*, 5 Pet., 644; *Gilbert v. Brett*, Davies, 44; *Downman v. Downman*, 1 Wash. (Va.), 29; Bac. Abr. Tender, B. 2.

It is clearly settled that if the contract was fair and not grossly unequal when made, each party took the risk of subsequent events and supposed hardships arising out of them cannot be regarded.

Webb v. London & P. R. R. Co., 9 Hare, 129; *Lauder v. Blatchford*, Beat., 523; *Low v. Treadwell*, 12 Me., 441; Fry, Spec. Performance, 107.

It plainly appears that when this contract was made, both the rent reserved and the sum stipulated to be paid (\$22,500) very largely exceeded the market value. The only rational conclusion is, that this excess was attributable to, and was the price of the option.

Messrs. John D. McPherson and Walter S. Cox, for appellee:

It was a covenant to convey an estate on certain conditions precedent. These conditions must have been strictly performed, both as to time and terms. Equity cannot relieve against a failure and vest an estate dependent on a condition precedent, where it will not vest at law.

Popham v. Bampffield, 1 Vern., 83; *Cary v. Bertie*, 2 Vern., 339; *Wells v. Smith*, 2 Edw., 78; 1 Story, Eq. Jur., sec. 288.

The covenant was, in effect, a continuing open offer during the lease. The moment the lease expired, the offer was withdrawn by operation of law.

See *Frith v. Lawrence*, 1 Paige, Ch., 435; *Wells v. Smith*, 7 Paige, Ch., 22.

The only offer of payment ever made was in legal tender notes. This offer was not according to the terms of the contract.

(a) Because such notes are not a legal tender for any purpose.

(b) Because if a legal tender, they are a legal tender only for debts, and the amount to be paid in order to entitle the complainant to a conveyance, was not a debt or obligation of any kind, but its payment was simply the performance of the condition.

Under all the circumstances of the case, the agreement is one which ought not to be enforced specifically.

Mr. Justice Field delivered the opinion of the court:

This is a suit in equity for the specific performance of a contract for the sale of certain real property situated in the City of Washington in the District of Columbia.

The facts out of which the case arises, briefly stated, are as follows:

In April, 1854, the defendant leased to the

complainant the property in question, which was generally known in Washington as the "Mansion House," for the period of ten years from the 1st of May following, at the yearly rent of \$1,200. The lease contained a covenant that the lessee should have the right or option of purchasing the premises with all the buildings and improvements thereon at any time before the expiration of the lease, for the sum of \$22,500, payable as follows: \$2,000 in cash, and \$2,000, together with the interest of all the deferred installments, each year thereafter, until the whole was paid; the deferred payments to be secured by a deed of trust on the property, and the vendor to execute to the purchaser a warranty deed of the premises, subject to a yearly ground rent of \$390.

On the 15th of April, 1864, two weeks before the expiration of the period allowed the complainant for his election to purchase, he addressed a letter to the defendant, inclosing a check payable to his order on the Bank of America in New York, for \$2,000, as the amount due on the 1st of May following, on the purchase of the property, with a blank receipt for the money, and requesting the defendant to sign and return the receipt, and stating that if it were agreeable to the defendant, he would have the deed of the property and the trust deed to be executed by himself prepared between that date and the 1st of May. To this letter the defendant on the same day replied, that he had no time then to look into the business, and returned the check, expressing a wish to see the complainant for explanation before closing the matter.

On the following morning the complainant called on the defendant, and informed him that he had \$2,000 to make the first payment for the property, and offered the money to him. The money thus offered consisted of notes of the United States, made by Act of Congress a legal tender for debts. These the defendant refused to accept, stating that he understood the purchase money was to be paid in gold, and that gold he would accept, but not the notes, and give the receipt desired. It is admitted that these notes were at the time greatly depreciated in the market below their nominal value.¹ On repeated occasions, subsequently, the complainant sent the same amount, \$2,000, in these United States notes to the defendant, in payment of a cash installment on the purchase, and as often were they refused by him. On one of these occasions, a draft of a deed of conveyance to be executed by the defendant, and a draft of a trust deed to be executed by the complainant, were sent for examination with the money. These deeds were returned by the defendant, accompanied with a letter expressing dissatisfaction at the manner in which he was induced to sign the lease, with the clause for the sale of the premises, but stating that as he had signed it, "He should have carried the matter out," if the complainant had proffered the amount which he knew he had offered for the property; meaning by this statement, as we understand it, if he had proffered the amount stipulated in gold. No objection was made to the form of either of the deeds.

1. Between the 15th of April and May 1st, 1864, one dollar in gold was worth from \$1.75 to \$1.80 in United States notes.

Soon afterwards, the defendant left the City of Washington, with the intention of being absent over the first of May.

On the 29th of April, the complainant finding that the defendant had left the city, and perceiving that the purchase was not going to be completed within the period prescribed by the covenant in the lease, and apprehensive that unless legal proceedings were taken by him to enforce its execution, his rights thereunder might be lost, instituted the present suit.

In the bill he sets forth the covenant giving him the right or option to purchase the premises; his election to purchase; the notice to the defendant; the repeated efforts made by him to obtain a deed of the property; his offer to pay the amount required as the first installment of the purchase money in United States notes and to execute the trust deed stipulated to secure the deferred payment; and the refusal of the defendant to receive the United States notes and to execute to him a deed of the premises. It also sets forth the departure of the defendant from the City of Washington, and his intended absence beyond the first of May following, and alleges that the appeal is made to the equitable interposition of the court, lest on the return of the defendant he may refuse to allow the complainant to complete the purchase, and urge as a reason that the time within which it was to be made had passed. The bill concludes with a prayer that the court decree a specific performance of the agreement by the execution of a deed of the premises to the complainant, the latter offering to perform the agreement on his part, according to its true intent and meaning.

The bill also states some facts which it is unnecessary to detail, tending to show that the acquisition of the property in question was of especial importance to the complainant.

The covenant in the lease, giving the right or option to purchase the premises, was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. *B. and M. Railroad Co. v. Bartlett*, 8 Cush., 224; *Weichman v. Spinks*, 5 Law T.R. (N.S.), 385; *Warner v. Willington*, 3 Drew., 523; *Old Col. R. R. v. Evans*, 6 Gray, 25. This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under \$15,000, and a greater increase than one half in value during the period of ten years could not then have been reasonably anticipated.

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of

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each particular case. The jurisdiction, said Lord Eldon, "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it." 12 Ves., 882.

And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In *Jones v. Statham*, 8 Atk., 388, Lord Hardwicke said: "The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in *Underwood v. Hitchcock*, 1 Ves., Sr., 279, the same great judge said, in refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. *Chancellor Kent*, in *Seymour v. Delancey*, 6 Johns. Ch., 222, upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and *Chancellor Bates*, of Delaware, in *Goodum v. Collins*, recently decided, upon a very full consideration of the adjudged cases, says that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of *The City of London v. Nash*, 1 Ves., 12, the defendant, a lessee, had covenanted to rebuild some houses, but, instead of doing this, he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, "The most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." In *Faine v. Brown*, cited in *Ramsden v. Hyllon*, 2 Ves., 306, similar hardship, flowing from the specific execution of a contract, was made the ground for refusing the decree prayed. In that case the defendant was the owner of a small estate, devised to him on condition that if he sold it

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within twenty-five years one half of the purchase money should go to his brother. Having contracted to sell the property, and refusing to carry out the contract under the pretense that he was intoxicated at the time, a bill was filed to enforce its specific execution, but Lord Hardwicke is reported to have said that, without regard to the other circumstance, the hardship alone of losing half the purchase money, if the contract was carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave the parties to the law.

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subvert the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis v. Hone*, 2 Sch. & Lef., 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first installment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency, except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts.

Although the contract in this case was not completed until the proposition of the defendant was accepted in April, 1864, after the passage of the Act of Congress making notes of the United States a legal tender for private debts, yet as the proposition containing the

terms of the contract was previously made, the contract itself must be construed as if it had been then concluded to take effect subsequently.

It is not our intention to express any opinion upon the constitutionality of the provision of the Act of Congress, which makes the notes of the United States a legal tender for private debts, nor whether, if constitutional, the provision is to be limited in its application to contracts made subsequent to the passage of the Act. These questions are the subject of special consideration in other cases, and their solution is not required for the determination of the case before us. In the view we take of the case, it is immaterial whether the constitutionality of the provision be affirmed or denied. The relief which the complainant seeks rests, as already stated, in the sound discretion of the court; and, if granted, it may be accompanied with such conditions as will prevent hardship and insure justice to the defendant. The suit itself is an appeal to the equitable jurisdiction of the court, and in asking what is equitable to himself, the complainant necessarily submits himself to the judgment of the court, to do what it shall adjudge to be equitable to the defendant.

The kind of currency which the complainant offered, is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required. The condition of the currency at the time repels any imputation of bad faith in the action of the complainant. The Act of Congress had declared the notes of the United States to be a legal tender for all debts, without, in terms, making any distinction between debts contracted before and those contracted after its passage. Gold had almost entirely disappeared from circulation. The community at large used the notes of the United States in the discharge of all debts. They constituted, in fact, almost the entire currency of the country in 1864. They were received and paid out by the government; and the validity of the Act declaring them a legal tender had been sustained by nearly every state court before which the question had been raised. The defendant, it is true, insisted upon his right to payment in gold, but before the expiration of the period prescribed for the completion of the purchase, he left the City of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

Nothing further could have been reasonably required of him under the circumstances, even if we should assume that the Act of Congress, making the notes of the United States a legal tender, does not apply to debts created before its passage, or if applicable to such debts, is, to that extent, unconstitutional and void.

In the case of *Chesterman v. Mann*, 9 Hare, 212, it was held by the Court of Chancery of England, that where an underlessee had a covenant for the renewal of his lease, upon paying to his lessor a fair proportion of the fines and expenses to which the lessor might be subjected in obtaining a renewal of his own term from the superior landlord, and of any increased rent upon such renewal, and there was a difference between the parties as to the amount to be paid by the underlessee, he might apply for a specific performance of the covenant, and submit to the court the amount to be paid. So here in this case, the complainant applies for a specific performance, and submits the amount to be paid by him to the judgment of the court.

We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made, which renders the enforcement of the contract of sale, subsequently completed between the parties, inequitable. Such circumstances are asserted to have arisen in two particulars; first, in the greatly increased value of the property; and second, in the transfer of a moiety of the complainant's original interest to his brother.

It is true, the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts, in case of the lessee's election to purchase, the payment of one half more than its then estimated value. If the actual increase has exceeded the estimate then made, that circumstance furnishes no ground for interference with the arrangement of the parties. The question, in such cases, always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement. *Wells v. The Direct L. and P. Railway Co.*, 9 Hare, 129; *Low v. Treadwell*, 12 Me., 441; *Fry, Spec. Perf. of Contracts*, secs. 235 and 252. Here the contract, as already stated, was, when made, a fair one, and in all its attendant circumstances, free from objection. The rent reserved largely exceeded the rent then paid, and the sum stipulated for the property largely exceeded its then market value.

The transfer, by the complainant to his brother, of one half interest in the lease, assuming now, for the purpose of the argument, that there is, in the record, evidence, which we can notice, of such transfer, in no respect affects the obligation of the defendant, or impairs the right of the complainant to the enforcement of the contract. The brother is no party to the contract, and any partial interest he may have acquired therein, the defendant was not bound to notice. The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The

original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern.

If the entire contract had been assigned to the brother, so that he had become substituted in the place of the complainant, the case would have been different. In that event, the brother might have filed the bill, and insisted upon being treated as representing the vendee. The general rule is, that the parties to the contract are the only proper parties to the suit for its performance, and, except in the case of an assignment of the entire contract, there must be some special circumstances to authorize a departure from the rule.

"The court," says *Chancellor Cottenham*, in *Tasker v. Small*, 3 Mylne & Craig, 69, "assumes jurisdiction in cases of specific performance of contracts, because a court of law, giving damages only for the non-performance of the contract, in many cases, does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties: and the object of both proceedings is to place the party complaining, as nearly as possible, in the same situation as the defendant had agreed that he should be placed in. It is obvious, that persons, strangers to the contract and, therefore, neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

When the complainant has received his deed from the defendant, the brother may claim from him a conveyance of an interest in the premises, if he have a valid contract for such interest, and enforce such conveyance by suit; but that is a matter with which the defendant has no concern.

It seems that the draft of the trust deed, to secure the deferred payments, sent to the defendant for examination, was prepared for execution by the complainant alone, and contained a stipulation that he might, if he should so elect, pay off the deferred payments at earlier dates than those mentioned in the covenant in the lease; and it is objected to the complainant's right to a specific performance, that the trust deed was not drawn to be executed jointly by him and his brother, and that it contained this stipulation. A short answer to this objection is found in the fact that the parties had disagreed in relation to the payment to be made, and until the disagreement ceased no deeds were required. It is admitted that the form of the trust deed was not such an one as the defendant was bound to receive, but as it was sent to him for examination, good faith and fair dealing required him to indicate in what particulars it was defective, or with which clauses he was dissatisfied. Whether it was the duty of the complainant or defendant to prepare the trust deed, according to the usage prevailing in Washington, is not entirely clear from the evidence. There is testimony both ways. The true rule, independent of any usage on the subject, would seem to be that the party who is to execute and deliver a deed should prepare it. It is, however, immaterial for this case, what rule obtains in Washington. Until the purchase money was accepted, there was

no occasion to prepare any instrument for execution. So long as that was refused the preparation of a trust deed was a work of supererogation. Besides, the execution of a trust deed by the complainant was to be simultaneous with the execution of a conveyance by the defendant. The two were to be concurrent acts; and if the complainant was to prepare one of them, the defendant was to prepare the other, and it is not pretended that the defendant acted in the matter at all.

The objection to the trust deed, founded upon the omission of the name of the claimant's brother as a co-grantor, does not merit consideration. All that the defendant had to do was to see that he got a trust deed, as security for the deferred payments, from the party to whom he transferred the title.

The defendant states in his testimony that when the lease was executed he objected to the stipulation for a sale of the premises, and that the defendant told him that it should go for nothing. And it has been argued by counsel that this evidence should control the terms of the covenant. The answer to the position taken is brief and decisive. First, nothing of the kind is averred in the answer; second, the testimony of the defendant in this particular is distinctly contradicted by that of the complainant, and is inconsistent with the attendant circumstances; and third, the evidence is inadmissible. When parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law.

Upon a full consideration of the positions of the defendant, we perceive none which should preclude the complainant from claiming a specific performance of the contract.

The only question remaining is, upon what terms shall the decree be made? And upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The decree of the court below will, therefore, be reversed, and the cause remanded with directions to enter a decree for the execution, by the defendant to the complainant, of a conveyance of the premises with warranty, subject to the yearly ground rent specified in the covenant in the lease, upon the payment by the latter of the installments past due, with legal interest thereon, in gold and silver coin of the United States, and upon the execution of a trust

deed of the premises to the defendant as security for the payment of the remaining installments as they respectively become due, with legal interest thereon, in like coin; the amounts to be paid and secured to be stated, and the form of the deeds to be settled, by a master; the costs to be paid by the complainant.

Mr. Chief Justice Chase:

I concur in the conclusion as above announced—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin—but I am unable to yield my assent to the argument by which, in this case, it is supported.

• Mr. Justice S. Nelson :

I concur in the above.

Cited—12 Wall., 624; 26 N. J. Eq., 332; 8 Am. Rep., 370 (44 Vt., 236); 18 Am. Rep., 87 (29 Mich., 170); 41 Am. Rep., 367, 721 (47 Mich., 449); 105 Mass., 335; 87 N. Y., 317, 318.

UNITED STATES, *Plff.*,

v.

HENRY C. SMITH, ANSON SMITH, ALLEN DARROW, AND FRANCIS V. DARROW.

(See S. C., 8 Wall., 587-590.)

Surety in bond, how far liable.

Where one got a license as a distiller of coal oil, and gave bond with surety, neither he nor his surety was liable for any breach after the expiration of the license.

[No. 85.]

Argued Nov. 24, 1869. Decided Jan. 24, 1870.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Northern District of Ohio.

An action of debt was brought in the court below by the United States, upon a coal distiller's bond given for a license. The license expired May 1, 1866. The acts charged against the defendants by which they were alleged to be liable on said bonds, were done in June, 1866.

The judges of the circuit court being divided in opinion, certified upon request of the plaintiff a statement of the pleadings, facts and point of disagreement to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, *Atty-Gen.*, and W. A. Field, *Asst. Atty-Gen.*, for the United States.

In behalf of the United States it is submitted:

1. That the condition of the bonds required by the 58d section of the Act of March 3, 1865, being for the benefit of the obligors, must be strictly performed to relieve them of liability. 2 Wm. Saund., 47.

2. That the condition is not, in terms, restrained from extending to breaches occurring beyond the duration of the license.

3. The defendants are liable on the bond, for the failure to pay taxes accruing after the expiration of the license.

Mr. John A. Wills, for defendants:

The bond had no vitality to secure the pay-

ment of dues to the United States on account of the oil "distilled, sold and removed for consumption and sale by the said principals, the Smiths, from their said distillery, after the first day of May, 1866, to wit: after the expiration of the license granted to them as coal oil distillers." May 27th, 1865.

1. By the Act of 1864, approved June 30 (Stat. at L., Sanger, 1864, ch. 173, p. 228), sec. 74, last sentence, on p. 249, it is provided: "All licenses granted after the first day of May in any year, shall continue in force until the first day of May next succeeding."

There is no authority for requiring the bond, except by section 94, p. 265, last proviso but one, "Distillers of coal oil shall be subject to all the provisions of law applicable to distillers of spirits with regard to licenses, bonds, etc., and all other provisions designed for the purpose of securing the payment of duties, so far as the same may in the judgment of the Commissioner of Internal Revenue and under regulations prescribed by him, be deemed necessary for that purpose."

So far as the record instructs us, the commissioner has exercised no judgment about the matter, and prescribed no regulations, and there is no statutory authority for taking his bond. But if it is assumed that the provisions of law applicable to distillers of spirits apply to coal oil distillers, this bond does not, in any particular, conform to these provisions. The 53d section, p. 42, contains these provisions. The proposed licensed distiller "shall make an application to the assessor therefor, and before the license is issued he shall give a bond to the United States," which provides as conditions, among other things, "That he will render to said assessor on the 1st, 11th and 21st days of each and every month, or within five days thereafter, during the continuance of said license, an exact account of the number of gallons distilled; that he will not sell, etc., any spirits distilled by him under and by virtue of his said license until, etc.; and that he will pay the duties on the spirits so distilled." How? The answer is: "Under and by virtue of his said license." It seems evident, therefore, that the condition of the bond has explicit reference to the current license, and must cease to be operative for acts after the expiration of the license.

Mr. Justice Grier delivered the opinion of the court:

The question submitted to the court for our solution arises on the construction to be given to the condition of a coal distiller's bond, dated 27th of May, 1865, which is as follows:

"That, whereas, the said H. C. Smith & Co. have made application to the Collector of Internal Revenue for the 18th collection district of the State of Ohio, for a license as coal oil distillers at their distillery, situate in the City of Cleveland, County of Cuyahoga, and State aforesaid: now, therefore, if the said H. C. Smith & Co. shall truly and faithfully conform to all the provisions of an Act entitled 'An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt,' approved July 1, 1862, and of such other Act or Acts as are now or may hereafter

be in this behalf enacted, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue."

Now, this Act of July 1st, 1862, has been inserted *ex majori cautela*; yet it is admitted that the Act of June 30th, 1864, entitled "An Act to Provide Internal Revenue, to Support the Government, to Pay Interest on the Public Debt, and for other Purposes," is the only Act applicable to this case. The Act of 1862 was repealed by it.

As might be expected in an Act embracing the almost innumerable subjects of taxation contained in this bill, and covering over seventy pages of the statute book, it may probably contain provisions in one part of it, difficult to be reconciled with others. Yet, when carefully examined, we find no difficulty in answering the question proposed by the circuit judges, which is as follows:

"Whether the said Henry C. Smith, Anson Smith, Allen Darrow, and Francis D. Darrow, are liable as principals or sureties on said bond, for the failure of said principals, Henry C. Smith and Anson Smith, to pay the said taxes due and levied on the oil distilled, sold, and removed for consumption and sale by them, the said principals as aforesaid, from their said distillery, after the first day of May, A. D. 1866, to wit: after the expiration of the license granted to them as coal oil distillers upon their said application, mentioned in the condition of said bond."

The 71st section of the Act is the one which prescribes the conditions under which licenses shall be given, and requires—

"That no person, firm, company or corporation shall be engaged in prosecuting or carrying on any trade, business or profession hereinafter mentioned and described, until he or they shall have obtained a license therefor in the manner hereinafter provided."

The 73d section subjects all persons who neglect it, to fine and imprisonment.

The 74th section, *inter alia*, has this provision: That "all licenses granted after the first day of May in any year, shall continue in force until the first day of May next succeeding."

This section of the Act fixes the limit to the license, beyond which time the parties to the bond are not bound to answer for any breach of the condition.

The provisions of the 53d and 94th sections of the Act, which subject distillers of coal oil to the provisions of the Act applicable to the distillers of spirits, "so far as the same may, in the judgment of the Commissioner of Internal Revenue, be deemed necessary," have no application to the point. The commissioner has exercised no judgment, and prescribed no regulations on the subject, so far as appears. The bond has no reference to such conditions as are required in distillery bonds, and cannot be affected by them. "'Tis not so written in the bond."

Therefore it is ordered that it be certified to the judges of the Circuit Court, in answer to the question submitted, that the defendants are not liable.

SAMUEL C. MORGAN, *Appt.*,

v.

THE TOWN OF BELOIT AND SIMON
RUBLE ET AL.*Judgment affirmed by equal division—town bonds.*

Judgment of the court below dismissing a bill affirmed by equal division in a case where the town officers had resigned to avoid levying a tax to pay a judgment on town bonds, as was required by a *mandamus*, and there was no Board of Supervisors, and the action was brought against leading citizens, as representatives of the town, to recover the amount of the judgment.

[No. 17.]

*Argued Feb. 23, Mar. 25, and Nov. 15, 1869.
Decided Jan. 31, 1870.*

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The bill in this case of *Morgan v. Beloit* was filed in the court below by the appellant, to obtain satisfaction of a judgment upon certain town bonds, from certain leading citizens of said town. The bill alleged, among other things, that by the laws of the State, no writ of *flori facias* could be issued against the town; that the Board of Supervisors, whose duty it was to levy a tax for the payment of the judgment, neglected to levy such tax; that he had already obtained a writ of *mandamus* to compel such levy, and that the said officers had not obeyed the same, but had resigned their offices; and that, for the purpose of evading payment of said judgment, the inhabitants of said Town had conspired to prevent the existence of any lawful Board of Supervisors; and that there was not any such lawful Board then in existence. Therefore this bill asked to have the judgment enforced against the said defendants, as representatives of the town. Upon demurrer thereto, the said bill was dismissed; whereupon the complainant took an appeal to this court.

Mr. M. H. Carpenter, for appellant.

Messrs. H. L. Palmer and E. G. Ryan, for appellees.

Mr. Chief Justice Chase delivered the opinion:

Judgment affirmed by equal division.

HENBY DREHMAN, *Plff. in Err.*,

v.

CHARLES G. STIFLE.

(See S. C., 8 Wall., 595-608.)

Bill of attainder, and bill of pains and penalties—exemption from suits for acts done by military authority—is not unconstitutional—State may pass retroactive laws.

The term "bill of attainder" in the National Constitution is generic, and embraces both bills of attainder and bills of pains and penalties.

A provision in the Constitution of Missouri, which exempts from suits for acts done by military authority, belongs to neither of those classes of bills.

Such provision is not a law impairing the obligation of contracts, in violation of the Constitution of the United States.

A State Legislature may pass retroactive laws,

NOTE.—What laws are void as impairing the obligation of contracts. Vested rights; constitutionality of laws, or of repeal, or modification of statutes. See note to *Fletcher v. Peck*, 10 U. S. (6 Cranch), 87.

where there is no inhibition in the Constitution of the State, provided they do not impair the obligation of a contract, and are not *ex post facto* in their character.

[No. 24.]

Argued Dec. 14, 1869. Decided Jan. 31, 1870.

IN ERROR to the Supreme Court of the State of Missouri.

This action was brought by the plaintiff in error before a justice of the peace in the City of St. Louis, for forcible entry and detainer. Judgment having been given for the plaintiff, the defendant took an appeal to a special term of the Circuit Court of St. Louis County, and in that court obtained a verdict and judgment in his favor. The plaintiff thereupon took an appeal, first to the General Term of said court, and afterwards to the Supreme Court of the State of Missouri, in each of which courts the judgment for the defendant was affirmed. Whereupon the plaintiff sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. James Hughes, John P. Hudgens and J. O. Moody, for plaintiff in errors:

Plaintiff now assigns in error:

1. That the Ordinance of sec. 4, of art. XI. of the Constitution of Missouri pleaded in bar of this action, is a bill of attainder within the meaning of the Constitution of the United States and of no validity.

In the case of *Cummings v. Mo.*, 4 Wall., 277 (71 U. S., XVIII., 856), the kindred provisions of this new Constitution were thoroughly reviewed by this court and declared to be a bill of attainder, in the milder form of pains and penalties. This ordinance is the 4th section of the same Constitution, and part of the machinery intended by the convention to deprive the same class of persons of their property and rights of action against another class of persons, which they intended to favor.

It is true the Act does not impute any crime to the plaintiff or his class, but it deprives him of his property, nevertheless, without a judicial trial. The result is the same as though it had imputed a crime.

It is admitted: that plaintiff had the right to the property since 1854, by lease extending to 1874; that plaintiff obtained two judicial determinations of that right in this cause in 1863; that an appeal was taken from these judicial determinations to the circuit court by the respondent, and pending the appeal, this Ordinance, of section 4, was adopted by the Convention. Since the adoption of the Ordinance, the court says by its instructions, that plaintiff now has "no right" to the property, or that the respondent is protected, by the Ordinance, in forcibly depriving the plaintiff of his property, and "The subsequent detainer of the property cannot afford any cause of action under the proceedings in this cause." Respondent has forcibly detained the premises now over six years; yet the court says: "Under the Ordinance this detainer affords no cause of action to the plaintiff."

It is, then, as construed by the court, clearly a bill of pains and penalties, prohibited by the Constitution of the United States, and of no binding force.

2. The Ordinance of section 4, article XI., is

a law impairing the obligation of contracts; in violation of the Constitution of the United States and of no validity.

In the case of *Sturgis v. Crowninshield*, 4 Wheat., 123. plaintiff sued the defendant on a promissory note. Defendant pleaded in bar of the action a discharge under a bankrupt law of New York, passed subsequently to the making of the note.

The court declared the law within the Constitution inhibited and void, because it impaired the obligation of contracts made before its passage.

The same doctrine was held in a similar case of *McMillan v. McNeill*, 4 Wheat., 209; *Ogden v. Saunders*, 12 Wheat., 214, and *Bl. v. Smith*, 6 Wheat., 181.

In the case of *Green v. Biddle*, 8 Wheat., 1, the Supreme Court of the United States say: "If these Acts so change the nature and extent of existing remedies as materially to impair the rights of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests."

In the case of *Bronson v. Kinzie*, 1 How., U. S., 311, the court adopted and approved this rule.

See, also, *Hathorn v. Cales*, 2 Wall., 10 (69 U. S., XVII., 776); *Woodruff v. Trapnall*, 10 How., 190; and *Curran v. Arkansas*, 15 How., 304; *Ogden v. Blackledge*, 2 Branch, 273; *Calder v. Bull*, 3 Dall., 386.

At the time the defendant seized the private property of the plaintiff, in June, 1861, he could not have acted by authority of the State of Missouri, and this court will take judicial knowledge of the fact from the public history of the country (*Greenl. Ev.*, 4-6); at that time there was no loyal government in Missouri, under which he could act as a permanent home guard."

Harmony v. Mitchell, 19 Curt., 427; 1 Blatchf., 549.

The principle that an illegal order of a superior to an inferior officer is no justification to such inferior or subordinate officer, has long been recognized in cases of civil offices.

Tracey v. Swartwout, 10 Pet., 81; Sedg. Dam., 486.

Messrs. E. R. Hoar, Atty-Gen., Louis Janin and Montgomery Blair, for defendant in error:

The defendant relied upon the 4th section of the 11th article of the Missouri Constitution of 1865, for his defense.

The plaintiff in error insists that this section operates to forfeit his right, without giving an opportunity to be heard in the judicial tribunals, and is, therefore, a bill of attainder, and also impairs the obligation of his contract with Mary Tyler.

This court, in *Cummings v. Mo.*, 4 Wall., 277 (71 U. S., XVIII., 356). defines a bill of attainder to be, "A legislative Act which inflicts punishment without judicial authority," and an *ex post facto* law to be "One which imposes punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then prescribed."

Punishment is the common object of bills of attainder, and of *ex post facto* laws, and a legis-

lative Act, in relation to past transactions, which does not impose punishment and is not an *ex post facto* law, is not a bill of attainder.

The section under consideration related to past acts, but cannot be considered a bill of attainder or an *ex post facto* law, unless its effect, to take away a right of action, makes it an Act to inflict punishment.

Locke v. N. O., 4 Wall., 172 (71 U. S., XVIII., 384); *Carpenter v. Pa.*, 17 How., 456 (58 U. S., XV., 127).

In *Calder v. Bull*, 3 Dall., 390, the court says, that the meaning of the prohibition against *ex post facto* laws is, that "The Legislatures of the several States shall not pass laws after a fact done by a subject or citizen, which shall have relation to said fact, and shall punish him for having done it. * * * I do not think it was intended to secure the citizen in his private rights of either property or contracts. *

* * * There are cases in which laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon. * * * The restraint against making any *ex post facto* laws was not considered by the framers of the Constitution as extending to depriving a citizen even of a vested right of property."

An Act which divested title by curing void deeds was held to be constitutional.

Wilkinson v. Leland, 2 Pet., 637; *Watson v. Mercer*, 8 Pet., 88; *Kearney v. Taylor*, 15 How., 494.

A retrospective Act, giving defendants in ejectment right to recover for improvements, was held constitutional.

Albee v. May, 2 Paine, 74.

Also depriving plaintiff of *mesne* profits. *Society, etc., v. Pawlet*, 4 Pet., 490.

Vested rights are not protected. *B. & S. R. R. Co. v. Nisbit*, 10 H., 401; *Satterlee v. Mathewson*, 2 Pet., 380.

In this case the right denied was at most only to recover damages: not a vested right.

See *Calder v. Bull* (*supra*); also 2 Story, Const., sec. 1398; Sm. Com. Const. L., secs. 266, 267, 378.

It is an Act of indemnity and oblivion, indispensable to the peace of society; one of the cases, if ever one existed, "in which laws made justly and for the benefit of the community, as also of individuals, relate to a time antecedent to their commencement."

Mr. Justice Swayne delivered the opinion of the court:

This case is brought here by a writ of error issued under the 25th section of the Judiciary Act of 1789, to the Supreme Court of the State of Missouri.

Drehman held the lot to which the controversy between the parties relates by a lease terminating in 1874, and built upon the premises a dwelling house, store, and other improvements. The lessor sold and conveyed the reversion to Stifle. The house was rendered untenable by fire. Stifle, as colonel of the "home guards," pursuant to an order from his military superior, took possession of the lot, removed all the buildings, and has since held and used the property for his own private purposes. Thereafter, on the 23d of December, 1863, Drehman

commenced an action of forcible entry and detainer against Stifle, before a justice of the peace, to recover possession of the premises. The justice rendered a judgment in his favor for restitution, for a large amount of damages, for a specified sum for rent per month, to be paid from the time of the recovery until restitution should be made, and for costs. Stifle removed the case by appeal to the St. Louis Land Court, where a verdict and judgment were rendered in his favor. Drehman appealed to the Circuit Court of St. Louis County.

Upon the trial at that court Stifle relied for his defense upon the 4th section of the Constitution of Missouri, adopted in 1865, which is as follows:

"Section 4. No person shall be prosecuted in any civil action for or on account of any act by him done, performed or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the Government of the United States, or that of this State, to do such acts, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

The court instructed the jury, substantially, that if the facts established by the evidence to their satisfaction, brought the case within this provision, the defense was valid and the defendant was entitled to their verdict. Drehman excepted. The jury found for Stifle, and the court gave judgment accordingly. Drehman thereupon appealed to the Supreme Court of the State, which affirmed the judgment, and he has brought the case to this court for review.

Two grounds of jurisdiction here and of error below are relied upon:

I. It is alleged that this section of the Constitution of Missouri "is a bill of pains and penalties within the meaning of the Constitution of the United States and, therefore, invalid."

The Constitution of the United States declares that "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." When the Constitution was adopted, bills of attainder and bills of pains and penalties, were well known in the English law. Each of those terms had a clear and well defined meaning. Bills of attainder were Acts of Parliament whereby sentence of death was pronounced against the accused. Courts of justice were employed only to register the edict and carry the sentence into execution. Bills of pains and penalties were Acts denouncing milder punishments. The term "bill of attainder" in the National Constitution is general, and embraces bills of both classes. 2 Wooddeson, Lectures, 622-624; *Gaines v. Buford*, 1 Dana, 509; Story, Const., sec. 1844; *Ex parte Garland*, 4 Wall., 338 [71 U. S., XVIII., 386]. It is too clear to require discussion that the provision in question of the Constitution of Missouri belongs to neither of the categories mentioned. If not the opposite of penal, there is certainly nothing punitive in its character. It simply exempts from suits in a certain class of cases those who might otherwise be harassed by litigation and made liable

in damages. It is rather in the nature of the Indemnity Acts, also well known in the English law. Rowland, Eng. Const., 563; 2 May, 267, 324.

II. It is insisted that this section "is a law impairing the obligation of contracts, in violation of the Constitution of the United States."

This proposition is founded upon a provision in the lease that the lessor should keep the lessee "in lawful possession of the said leased premises during this lease," etc. It is said that this covenant became obligatory upon Stifle by virtue of his being the assignee of the reversion of the estate; that the law of landlord and tenant of Missouri, in force when the lease was executed, became a part of the contract; that one of the remedies to which Drehman was entitled by this law to enforce the covenant in question was the proceeding by forcible entry and detainer; that this section of the Constitution of Missouri, as construed by the Supreme Court of the State, has deprived him of that remedy, and thus impairs the obligation of his contract. This view of the subject is supported by the counsel for the plaintiff in error with ingenuity, research, and ability; but they have failed to convince us of the soundness of the proposition.

The 26th section of the Statute of Missouri upon the subject of forcible entry and detainer declares as follows: "The merits of the title shall in no wise be inquired into on any complaint which shall be exhibited by virtue of the provisions of this Act." This proceeding has no relation to the rights of property of the parties. It turns entirely on the facts of lawful possession by the plaintiff and unlawful entry by the defendant. The defendant may have a valid title, the plaintiff possession without any title; and yet the defendant, having entered without the plaintiff's consent, may be dispossessed, and the plaintiff be restored to possession. If a party desires to assert his title and enforce his rights, he must resort to the remedies provided for that purpose. This form of procedure is not one of them. *Gibson v. Tong*, 29 Mo., 184; *Beeler v. Cardwell*, 33 Mo., 86. It cannot, therefore, be maintained that this remedy entered into the contract between the lessor and lessee. The Legislature might have abolished it, by repealing the statute, without impairing any right within the meaning of the contract provision of the Federal Constitution, acquired while the statute was in force. In this respect it stands on the same footing with any other action *ex delicto*.

Whether the instructions excepted to were right or wrong is an inquiry which lies beyond the sphere of our powers and duties. If an action of covenant or ejectment had been brought, and it had been held that the Constitution of Missouri affected the right of recovery, the question would perhaps have presented a different aspect. But no such case is before us, and we have not had occasion to consider the subject. The right of a State Legislature to pass retroactive laws, where there is no inhibition in the Constitution of the State, provided they do not impair the obligation of a contract, and are not *ex post facto* in their character, is too well settled to admit of doubt. *Wilkinson v. Leland*, 2 Pet., 627; *Watson v. Mercer*, 8 Pet., 88; *Kearney v. Taylor*, 15

How., 494; *Satterlee v. Matthewson*, 2 Pet., 380; *Society v. Pavlet*, 4 Pet., 480; *Balt. & S. Railroad v. Nesbit*, 10 How., 401; *Albee v. May*, 2 Paine, 74; *Andrews v. Russell*, 7 Blackf., 475; 16 O. R., 356; 7 Pet., 516. We find no error in the record of which we can take cognizance.

Judgment affirmed.

S. C.—41 Mo., 184.
Cited—107 U. S., 775; 1 Dill., 14.

WILLIAM N. McVEIGH, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 8 Wall., 640.)

Defect in date of writ of error, when immaterial.

Where the writ of error was dated Dec. 3, 1868, and by mistake was made by its terms returnable "on the third Monday of December next," but the citation dated on the same day read: "You are hereby cited the third Monday of December *inst.*," pursuant to a writ of error filed," the case will not be dismissed for the defect in the writ of error.

[No. 179.]

Argued Jan. 28, 1870. Decided Jan. 31, 1870.

IN ERROR to the Circuit Court of the United States for the District of Virginia.

On motion to dismiss.

This case arose upon a libel of information filed in the District Court of the United States for the Eastern District of Virginia, for the confiscation of certain real estate of the plaintiff in error. That court having entered a decree for the condemnation of said property, the defendant sued out a writ of error to the circuit court which affirmed the decree. Whereupon the said defendant sued out a writ of error to this court.

The writ of error was dated Dec. 8, 1868, and by mistake was made by its terms returnable "on the third Monday of December next." The citation, however, dated on the same day read: "You are hereby cited, etc., the third Monday of December, *inst.*," pursuant to a writ of error filed, etc."

Mr. Hughes, for the plaintiff in error, filed a motion to amend the writ of error; but Mr. *Asst. Atty-Gen.* Field moved to dismiss the case for the defect in the writ of error.

Messrs. E. R. Hoar, Atty-Gen., and *W. A. Field, Asst. Atty Gen.*, for defendant in error.

Messrs. B. R. Curtis, G. W. Brent, C. W. Wattles, J. W. Moore and Jas. Hughes, for plaintiff in error.

Mr. Chief Justice Chase announced the decision of the court:

On consideration of the motion filed by Mr. *Asst. Atty Gen.* Field, to dismiss this writ of error, and of the arguments of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court, that the said motion be, and the same is hereby overruled.

See 8 WALL.

MOTT BEDELL, Libellant and *Appt.*,

v.

THE STEAMSHIP POTOMAC, Her Tackle, etc., JOHN E. PARSONS ET AL., Claimants.

(See S. C., "The Potomac," 8 Wall., 590-595.)

Collision, when steamer not liable—declarations of the master, evidence against owner.

If a steamer adopts proper measures of precaution, to avoid a collision with a schooner, which would have been effective if the schooner had not changed her course, she is not chargeable for the consequences of the collision.

The declarations of the master, in a case of collision are evidence against the owner.

[No. 82.]

Argued Jan. 21, 1870. Decided Feb. 7, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, by the appellant, to recover damages resulting from a collision. A decree having been entered in that court in favor of the libellant, the claimants of The Potomac took an appeal to the circuit court, by which the said decree was reversed; whereupon the libellant took an appeal to this court.

The case is fully stated in the opinion of the court. The arguments, being chiefly upon the facts, are not given.

Mr. E. C. Benedict, for appellant.

Messrs. B. R. Curtis, C. E. Whitehead and John E. Parsons, for appellees.

Mr. Justice Davis delivered the opinion of the court:

The schooner Bedell, and the steamer Potomac, collided in the Chesapeake Bay on the night of the 7th of July, 1859. The collision resulted in the total loss of the schooner, and this libel was filed by her owner, on the ground that the accident was caused by the wrongful conduct of the steamer.

It is a rare occurrence in the history of cases of this kind, where a sailing vessel and steamship approaching each other in opposite directions, or on intersecting lines, have come in contact, that the sailing vessel has been adjudged to be in fault. The law casting the greater responsibility on the steamer on account of her motive power, and the sailing vessel having an easy duty to perform, it has been generally found, on investigation, that the collision was the result of a relaxation of vigilance on the part of the officers of the steamer. It has sometimes happened, however, that the steamer was not to blame, and the present case, in our opinion, is one of that character. It is unnecessary to restate the rules of navigation, obligatory upon vessels in the predicament these were on the night in question. They were elaborately presented by this court in the case of *The Steamship Co. v. Rumball*, 21 How., 373 [63 U. S., XVI., 144], and were recently affirmed in the case of *The Carroll*, *supra*, 302. One of these rules requires the steamer to keep out of the way of the

NOTE.—Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557. Rules for avoiding collision. Steamer meeting steamer. See note to *Williamson v. Barrett*, 54 U. S. (13 How.), 101.

sailing vessel; but to enable her to do this effectively, the law imposes the corresponding obligation on the sailing vessel to keep her course. If, therefore, the steamer adopts proper measures of precaution to avoid the collision, which would have been effective if the schooner had not changed her course, she is not chargeable for the consequences of the collision. Any other rule would condemn the steamer, no matter how gross the misconduct of the sailing vessel.

That The Potomac, on this occasion, seasonably employed the proper measures to have prevented this disaster, and that it would not have occurred if the schooner had been equally mindful of her duty, is, we think, unmistakably shown by the evidence. The schooner was heading about north, going up the bay, sailing by the wind, close-hauled, with a fresh breeze, west-northwest, while the steamer was descending the bay and sailing due south, with all her lights brightly burning. When about three quarters of a mile off, the schooner was discovered on the starboard bow of the steamer by the lookout of the steamer, who reported the fact to the officer in charge. The order was immediately given to starboard the helm two points; and after this was done and the mate who had the command saw the vessel about half a point on the starboard bow, the further order was given and executed to steady the helm. These proceedings were enough, if the schooner had kept her course, to place the respective boats out of reach of danger.

But this was not all that was done; for the mate, in watching the movements of the schooner, discovered, notwithstanding his efforts to give her a wide berth to the west, that she was still approaching nearer the steamer and again starboarded his helm and immediately slowed and backed. These movements were, however, ineffectual to prevent the boats coming together, and the question for solution is: which boat was in fault? There would seem to be no difficulty in answering the question.

The accident could have happened in no other way than by a change of the schooner's course, and that this was made is evident, for when the vessels collided the schooner had fallen off from about a north course to nearly an east course. Besides, the only man on board the schooner who was examined as a witness, says that he put his helm hard up, by the captain's order, about two minutes before the collision. If the schooner had kept her course, instead of porting her helm and changing it to the eastward, the collision would not have occurred.

The effect of the change of course was to bring the schooner directly across the steamer's track, and to render what followed inevitable. There is nothing in the record to show a justification for this change of course, and it will not do to say it was taken on account of the dangerous proximity of the vessels, for at the united rate at which they were running, they were, according to the testimony of the wheelsman of the schooner as to the point of time when he ported her helm, at least half a mile apart. We think it is clear that this change of course was adopted earlier than the wheelsman says; but be this as it may, whenever adopted there was no necessity for it, either real or apparent, and the persons in charge of the schooner do not furnish even an excuse for their conduct.

It is not seen in what respect the steamer was remiss. She had the full complement of competent seamen, the necessary lookout and lights, and began her measures to keep clear of the schooner as soon as she was observed. That she was not sooner observed was not the fault of those in charge of the steamer, for the schooner was sailing without a light; and there is nothing to show that the lookout of the steamer, by vigilant watching, could have reported her any sooner. It is true the evidence is somewhat conflicting on the point of whether the schooner had a light or not, but the better opinion on the whole case is, that she had no light.

If the persons on board the steamer were watchful, it was not the case with those in control of the schooner, for, if they had been equally attentive to their business, they would not have allowed the steamer—sailing as she was in a starlight night, and with her lights brightly burning—to have approached within a half mile without being seen by them.

We have considered this case thus far without reference to the admissions of the master of the schooner on this subject, but if we give them their proper weight, they corroborate very strongly the view we take of the cause of this collision. The master admitted, as soon as he was taken on board the steamer after the disaster, that the collision occurred through his fault, and this admission was repeated when he noted his protest. His statements on the point were full and explicit, and could not have been easily misunderstood; but if they were not true, or were misunderstood, why was he not called to contradict or explain them? The legality of this evidence cannot be questioned, for courts of admiralty have uniformly allowed the declarations of the master, in a case of collision, to be brought against the owner, on the ground that when the transaction occurred, the master represented the owner, and was his agent in navigating the vessel. This sort of evidence is confined to the confessions of the master, and cannot be extended to any other person in the employment of the boat, for in no proper sense has the owner intrusted his authority to any one but the master. The authorities on this subject are collected in the case of *The Enterprise*, 2 Curt. C. C., 320.

It has been argued that the lookout and helmsman of the steamer, whose testimony was taken by the owner of the schooner, prove want of vigilance on the part of the steamer. We have carefully examined this testimony, and cannot see that it materially contradicts the testimony given by the officers of the schooner, save in one particular. The helmsman says the mate was asleep when the schooner was reported to him, but this the mate expressly denies. It is not necessary, however, to determine this point, because the evidence clearly shows that as soon as the schooner was discovered and reported, and there was a necessity for action, the mate was wide awake, and promptly gave the necessary order to starboard the helm, which order was as promptly executed. This was timely done, and would have been effectual but for the subsequent fault of the schooner, for which she is adjudged to bear the loss caused by this collision.

The judgment of the Circuit Court is affirmed.

ATT'G—2 Black, 581.

Cited—41 U. S., 204, 206; 3 Sawy., 573; 1 Bro., 354.

SUSAN P. HEPBURN AND HENRY H. P.
HEPBURN. *Piffs. in Err.*,
v.
HENRY A. GRISWOLD.

(See S. C., 8 Wall., 608-639.)

Notes and contracts made before Legal Tender Act of 1862, can only be paid in coin—power of Congress—Legal Tender Act, how far constitutional—how far authorized as part of war making power.

*1. Construed by the plain import of their terms and the manifest intention of the Legislature, the Statutes of 1862 and 1863, which make United States notes a legal tender in payment of debts, public and private, apply to debts contracted before, as well as to debts contracted after enactment.

2. The cases of *Lane County v. Oregon*, *Bronson v. Rodas*, and *Buller v. Horvitz*—in which it was held that upon a sound construction of those statutes, neither taxes imposed by state legislation, nor dues upon contracts for the payment or delivery of coin or bullion are included, by legislative intent, under the description of debts, public and private—are approved and re-affirmed.

3. When a case arises for judicial determination, and the decision depends on the alleged inconsistency of a legislative provision with the Constitution, it is the plain duty of the Supreme Court to compare the Act with the fundamental law, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than to the Statute.

4. There is in the Constitution no express grant of legislative power to make any description of credit currency a legal tender in payment of debts.

5. The words "All laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends which are not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

6. Among means appropriate, plainly adapted, not inconsistent with the spirit of the Constitution nor prohibited by its terms, the Legislature has unrestricted choice; but no power can be derived by implication from any express power to enact laws as means for carrying it into execution, unless such laws come within this description.

7. The making of notes or bills of credit a legal tender in payment of pre-existing debts, is not a means appropriate, plainly adapted nor really calculated to carry into effect any express power vested in Congress; is inconsistent with the spirit of the Constitution; and is prohibited by the Constitution.

8. The clause in the Acts of 1862 and 1863, which makes United States notes a legal tender in payment of all debts, public and private, is, so far as it applies to debts contracted before the passage of those Acts, unwarranted by the Constitution.

9. Prior to the 25th of February, 1862, all contracts for the payment of money not expressly stipulating otherwise, were, in legal effect and universal understanding, contracts for the payment of coin, and under the Constitution, the parties to such contracts are respectively entitled to demand, and bound to pay the sums due, according to their terms, in coin, notwithstanding the clause in that Act and the subsequent Acts of like tenor, which make United States notes a legal tender in payment of such debts.

[No. 5.]

Argued Dec. 10, 1869. Decided Feb. 7, 1870.

IN ERROR to the Court of Appeals of the State of Kentucky.

The petition in this case was filed in the Louisville Chancery Court of the State of Ken-

*[Head notes by Mr. Chief Justice CHASE].

NOTE.—Obligations payable in gold and silver or in specie. See note to *Bronson v. Rodas*, 74 U. S. (ante, 141).

See 8 WALL.

tucky, by the defendant in error, to enforce payment of a promissory note, dated Louisville, June 20, 1860, due Feb. 20, 1862. The amount of the note with interest and costs, was paid into court in United States Treasury notes, at their face valuation. Whereupon the Chancellor ordered a decree to be entered, declaring the claim paid. The plaintiffs took an appeal to the Court of Appeals of Kentucky, on the ground that the debt was not fully satisfied because the said notes were not equal in value to coin, which was, at the making of said promissory note, the only legal tender, and that the Act of Feb. 25, 1862, making United States Treasury Notes a legal tender, was unconstitutional so far as it affected previous contracts. The Court of Appeals reversed the said decree and ordered judgment to be given for the plaintiffs, whereupon the defendants sued out this writ of error.

The case is further stated by the court.

Messrs. Wm. M. Evans, Atty-Gen., in behalf of the United States, and *W. Preston*, for plaintiffs in error:

First. To determine what shall be the money of a country, and how it shall serve its purposes as a measure of value and a medium of exchange, including its efficacy as a legal tender in satisfaction of debts, belongs to government.

So, too, to determine whether anything besides money shall be a legal tender in satisfaction of debts among its subjects or citizens, belongs to government.

I. No theory of liberty nor personal rights could possibly affect to withdraw either of these subjects from the just sphere of government, nor presume to claim either of them as within the province of private immunities from all public control.

II. The actual regulation of this subject of legal tender in satisfaction of debts, is neither a principal end nor a substantive power of government. In its nature it is a subordinate and administrative means in execution of some duty, or in aid of some authority of government.

Whatever laws may be established respecting it, are to be judged of as just means or as wise means, towards the fulfillment of the duties or the exercise of the powers of government.

Second. The complete regulation of legal tender in satisfaction of debts being, then, a necessary and proper means, at the disposal of government, for the ends to which it is applicable, the only question before the court is, whether, under our government, in the form and to the extent in which this regulation is attempted in this Act of Congress, the authority therefor is within its legislative power.

This attempted exercise of authority by Congress may exceed its constitutional power, either because:

I. The whole regulation of legal tender in satisfaction of debts belongs to the States, and thus any legislation by Congress on the subject is invalid, or,

II. Because, though a certain measure of power over the subject is accorded to the Federal Government, yet this particular exercise

1. See the cases of *Knox v. Lee* and *Parker v. Davis*, 18 Wall., 457, 79 U. S., in which the questions here involved are elaborately argued, and the decision of the court in this case overruled.

of it is in excess of that measure of authority; or.

III. Because this particular exercise of power, by Congress, is expressly prohibited by the Constitution, though but for such express prohibition, it would be within the competency of the affirmative powers of the Federal Government.

But if this exercise of legislative power by Congress cannot be impugned for one or the other of these reasons, then the Act in question is valid.

Third. The Act of Congress is not an encroachment upon any authority respecting legal tender reserved to the States.

1. The principal argument in support of the pretension that—in the main discrimination between the powers which pertain to the General Government and those which pertain to the States—the regulation of legal tender falls to the States, rests upon the proposition that it is included in the general dominion over the mass of personal rights and domestic interests which belong to the State Governments.

But this inference fails, even as a general proposition and upon its own reasoning, in respect to the great mass of private rights and interests which arise between citizens of different States and between individuals and foreigners.

A priori, therefore, the treatment of the two great divisions of interest—those wholly local, and those on one part external—would require that the regulation of legal tender should be apportioned between the General and the State Governments (the inconvenience of which is manifest) or should be accorded to the General Government, as the only proper guardian of the common interest involved and, therefore, if uniformity is indispensable, the only single guardian of what is common and what is several.

The inference in favor of the state authority over legal tender, from its being involved in the general jurisdiction of contracts, fails for this further reason: the regulation of legal tender has so close an affinity with the regulation of money, that it would seem scarcely predicable of any scheme of government, that it would accord dominion over the two subjects to different authorities.

We should expect, therefore, that if the money system of the country was regarded as suitable to the care of the General Government, the regulation of legal tender would follow the same allotment.

II. Whatever of undisputed and of undivided dominion over contracts, dealings, debts and payments may be reserved to the State Governments, so far as all these feel the influence of the money system of the country, they are subject to the exclusive possession of that province of sovereignty by the General Government.

Const., sec. 8: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin, etc."

"To provide for the punishment of counterfeiting the securities and current coin of the United States."

Sec. 10: "No State shall coin money, nor emit bills of credit."

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If, then, the text of the Constitution left the matter thus, it would be a necessary implication that whatever authority (great or small) in regulation of legal tender existed for us in government, went to the General Government in the allotment to it of the regulation of the money of the country.

III. But any regulation of legal tender is wholly withdrawn from the States by the Federal Constitution.

(1) By an express prohibition, which in its own terms, and if it stood alone, would leave an implication of some reserve of authority to the State.

Sec. 10: "No State shall make anything but gold and silver coin a tender in payment of debts."

(2) But this implication that a State has the regulation of tender of gold and silver in payment of debts, under the affirmative coinage power to the General Government, and the express prohibition of that power to the State, is wholly illusory.

The coinage power covers the whole subject of the efficiency of our own and foreign coins, of all metals, in the payment of debts; and the practice of Federal legislation has so dealt with it.

It is impossible, then, that a State should legislate concerning the current gold or silver coin as a legal tender.

It is competent for a State to make gold and silver in the shape of jewelry, or plate or bullion, a legal tender at a standard of its own? If so, there is a double and contrary authority in the efficiency of the same metals in the payment of debts possible, and debts in lawful money of the United States may, by state authority, be required to be discharged with a tithe of the metal, or tenfold the metal, which would be required in Federal coinage, to discharge the same debts.

The conclusion seems irresistible that, under the Federal Constitution, all regulation of legal tender is withdrawn from the States.

The intent and effect of the Federal Constitution to carry this subject of money and legal tender over to the General Government, under the motive that they touched the common interests which the Constitution was framed to protect, and could not be properly left to the State Governments, is distinctly stated by the Connecticut delegates, Mr. Sherman and Mr. Ellsworth, in their letter commending the Constitution to that State for adoption.

"The restraint on the Legislatures of the several States, respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners, as well as of the citizens of different States, may be affected."

4 Elliott, Deb., 492.

The rigor with which the authority of a State was withheld from any discretion on the subject of legal tender, is manifested from the refusal of this discretion, even with the consent of Congress.

The "Committee on Detail," of the Convention, reported this clause:

"No State, without the consent of the Legis-

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lature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts."

2 Mad. Deb., 1289.

This possible and permissive authority to a State was rejected, doubtless under the peremptory motive that what belonged to the general powers and interests confided to the Federal Government, should not be yielded, under any possible consideration, to a State.

Fourth. The Constitution contains no word of prohibition, of limitation or of exception, upon the General Government touching either:

1. The regulation of tender in payment of debts.

2. The regulation of money, its currency, and its efficacy in the payment of debts.

3. The forms, vehicles, terms or conditions in and on which the public credit can be issued by the government in the performance of its constitutional duties, or the exercise of its constitutional powers.

4. The authority over contracts, saving only that its laws on the subject of bankruptcies, must be uniform throughout the United States.

Fifth. The foregoing propositions, of themselves, it is respectfully submitted, exclude a conclusion that the regulation of legal tender is not within the scope of legislation accorded to the Federal Government, as inconsistent with all established rules of constitutional construction.

I. Such a conclusion would hold that a certain subordinate and administrative means, in its nature belonging to the sphere of government, and familiar to the experience of all governments, as an aid and sometimes a necessity in their affairs, has been expressly and absolutely prohibited to the State Governments as unsuitable to local administration; has been in no manner, actual or inferential, assigned to the personal or popular rights withdrawn from the domain of government; has been, in no expression of the Constitution, prohibited to or withheld from the General Government, and yet has, by some insensible and unnoticeable evaporation in the process of distributing governmental powers between the federal and the state authority, escaped from the resources of both authorities, and been obliterated from the powers of a complex government framed for perpetuity, and for the service of the people whose wealth and numbers in the future should know no bounds. Such a conclusion would be preposterous.

II. The true presumption and implication is, that whatever in the Federal Constitution is expressly prohibited to a State (and to the States only), is so prohibited for the reason that its subject is included in the powers or means which the common interests confided to the General Government, require should be possessed by that government, unimpeded and unshared by state authority.

III. No presumption nor implication can be allowed that the sum of the united powers of the federal and state authority has suffered any curtailment or diminution from the full measure of sovereignty which belongs to any government, unless in enlargement of the area of personal and inalienable rights, which are intended to be exempted from all human government.

IV. The suppression of the possible exercise,

by either the General or State Government, of any particular means or instrumentality towards an accepted end or power of political expediency or necessity, can only be maintained by the express prohibition, to both the General and the State Governments, of the exercise of the prescribed authority.

Several instances of this suppression of a recognized political power or expedient, by its prohibition to both the General and the State Governments may be found in the Constitution; and the study of these instances will support the argument that no such result can be presumed or implied, but must be effected by this double prohibition.

Passing any bill of attainder is prohibited to both the General and the State Governments.

Passing any *ex post facto* law is prohibited to both governments.

The granting of any title of nobility is prohibited to both governments.

These instances really operate in maintenance of justice and equality, as personal rights of citizens not to be invaded by any government.

One peculiar instance is to be found, of the suppression of a purely financial and administrative means or expedient of government, not possibly to be classed as a reservation in favor of personal rights, viz.: the absolute prohibition of revenue to the General Government or to the State Governments, from duties on exports.

The mischiefs feared from assigning this means of revenue to either the General or the State Governments, induced the peculiar disposition of this subject which the text of the Constitution shows, and practically, duties on exports, as a resource of government, are suppressed. Cons., art I., secs. 9, 10.

Without, therefore, any special examination of the body of affirmative, substantive powers accorded to the General Government in the Constitution, and the relation of the regulation of legal tender as a means to the execution of those powers, it seems necessary to assign the regulation of the legal tender of the country, as familiarly known and exercised in the practice of all governments, to the General Government, to avoid the intolerable and irrational conclusion, that for all time and for every emergency, and by mere tacit implication, this faculty of government has been extinguished.

Indeed, the Tenth Amendment of the Constitution, the great barrier against implied enlargement of the powers of the General Government, distinctly recognizes prohibition of powers to the States, as an inference of grant of the prohibited powers to the General Government. It is only powers that are neither delegated to the United States nor prohibited to the States, that are to be treated as reserved from the General Government. Const. Amendment, X.

Sixth. As then, the regulation of legal tender by Congress is not an encroachment on any authority on that subject, left in the States, and is not within any prohibition upon the General Government to be found in the Constitution, it must follow, either:

I. That the Constitution itself has fixed the legal tender of the country; or,

II. That there is no legal control of the sub-

ject anywhere, which is equivalent to saying that there is and can be no such thing as legal tender in the country; or,

III. That Congress has some authority in the premises, and that authority (whatever be its measure) is the whole legal authority on the subject, and its legislation within that authority constitutes the law of the land on the subject.

Now, it is manifest that the Constitution has not, in terms, fixed the legal tender of the country.

It is equally manifest that it has not in terms fixed the money of the country.

The regulation of the money of the country is, in terms, enumerated among the powers of Congress.

If the regulation of the money of the country carries the power of regulating the legal tender in any degree, then Congress possesses the latter power in that degree.

If other enumerated powers of Congress carry, as necessary or proper means for their exercise, the regulation of the legal tender in any degree, then Congress possesses that power to the requisite degree.

Upon these considerations, then, it is established that whatever power to regulate legal tender exists in this country, resides in Congress; that the Constitution imposes no express limits upon this power in Congress; and that whatever laws, in regulation of legal tender are, in the language of the Constitution, "necessary and proper for carrying into execution any and all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof," are within the authority of the Constitution, and are "the supreme law of the land." Const., art. I., sec. 8, art. VI.

Seventh. The practical wisdom of the framers of the Constitution was satisfied, in their effort to provide political arrangements suited to the well-being of themselves and their posterity, to accommodate the new institutions to human nature and human affairs. They did not aspire to remold the nature of man, or to rule future events. The working of interest and passion, and the vicissitudes of fortune, which history had shown in other times and in other nations, they anticipated for the people whose government they were founding. They built our institutions to meet, not to escape, these imperfections and vicissitudes.

I. The conditions of peace and war, and the diversity of the burdens, perils and duties of government, in these two situations, were pressed upon the attention of the framers of the Constitution by their recent experience of them all.

II. In the main design of the Constitution to assign to the General Government all that was of common interest—that is to say: all the relations of the people to other nations, and all the relations of the States among themselves—no feature is more prominent than the purpose that the condition of war, foreign and civil, and however it should supervene, should be wholly of the common concern and all of its powers, duties and responsibilities should be placed with the General Government.

III. The subjection of the whole system of money currency, credit, public and private, le-

gal tender, trade, contracts and their enforcement, and the compulsory payment of debts, to the rude shock of war, and the pressure upon the powers and duties of government in such event, were fresh in the knowledge of the framers of the Constitution.

IV. The temptations, mischiefs, dangers and disgraces to a people, of a measure of value and medium of exchange which rested on no intrinsic qualities to maintain its virtue and its currency, were before the eyes of the Convention in the actual condition of the country.

V. The condition of war, imposing its own laws upon every community which it afflicts, as history and recent experience had shown, compels a nation however opulent to substitute for the inadequate volume of "coined money," at its service as a measure of value and medium of exchange, its "coined credit," invigorated by law with the efficacy of legal tender.

VI. The fatal facility of this resource to extend itself beyond the justifying need, and beget, instead of relieving, disorder and disaster, history and recent experience had also disclosed.

VII. The wisdom of the Constitution has adjusted these opposite obligations—resting in the opposite situations of peace and war—and provided:

(1) That the States, relieved in their share of governmental administration of all the burdens and responsibilities of the legislation and management of war, shall surrender all power to make anything but gold and silver a legal tender, whatever stress of possible necessity, in time of peace, may thus be left unprovided for.

(2) The General Government, whose money and credit are to supply the sinews of every possible war, shall possess the resource of making this credit available, by the financial expedient of imparting to the public securities the quality of legal tender in the payment of debts, lest an inexorable need and peremptory duty of government should miss a commensurate power.

(3) And last: this power—necessary for emergencies, pernicious as a constant resource—shall not be accorded to the General Government as an independent and substantive power for this would permit its exercise upon any motive and for its own sake.

It shall find its place in the enabling clause of the Constitution, which supplies authority for all legislation that is necessary and proper to carry into execution the powers in whose service the use of this expedient is justified; for thus, alone, can its use be conformed to the exigencies which should furnish, at once its warrant and its measure.

Such is the adjustment, in the Constitution, of the difficult and conflicting considerations which attend the subject.

In eighty years of our history as a nation, this adjustment of powers has secured to us all the benefits of a legal tender of intrinsic value, in peace and during foreign wars. A civil war of such vast proportions and intense energy as to have exacted the expenditure within five years of the public revenues of half a century of peace, has raised an emergency whose stress demanded the relaxation of the private creditor's hold upon his debtor, to nerve the public credit with all the resources of the country.

The Constitution permitted it, and the public safety was purchased by the means.

Who shall question this wisdom of the Constitution, and assume to place the integrity of the legal tender above the safety of the State?

Eighth. Under the light of the foregoing propositions, it is respectfully submitted that the well known principles of public economy, operative in time of war, show that the marshaling of the financial resources of the country in the service of the government required, within the discretionary legislation of Congress to that end, the suspension of the private creditor's control over the currency of the country, in subordination to the exigencies of the public revenues and the public credit.

Accordingly, the Act of Congress of Feb. 25, 1862, was "necessary and proper" for carrying into execution, in time of civil war, the powers of the General Government:

1. "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

2. "To borrow money on the credit of the United States."

3. "To regulate commerce with foreign nations and among the several States."

4. "To coin money, regulate the value thereof, and of foreign coin."

5. "To declare war."

6. "To raise and support armies."

7. "To provide and maintain a navy."

8. "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

9. "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States."

10. "To guarantee republican governments to the States, and protect them against invasion and domestic violence." Const., art. I., sec. 8; art. IV., sec. 4.

The judicial criterion of the relation between legislative means to constitutional powers, as laid down in *McCulloch v. Maryland*, and supported in later cases, has by its intrinsic and perfect reason, been wrought into the texture of our constitutional law; and the propositions in the case before the court need no novel principles of constitutional interpretation to sustain them.

"The sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

"Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

McCulloch v. Md., 4 Wheat.; *U. S. v. Fisher*, 2 Cranch; *The Prize cases* (69 U. S., XVII., 459).

Of the appropriateness of this legislation, respecting legal tender, to the financial exigencies of a nation in time of war, the history of all nations in modern times furnishes examples.

Its wisdom can never be a judicial question.

See 8 WALL.

U. S., Book 19.

The argument is entitled to put the judicial question of constitutionality upon the political postulate that, in the actual situation of the resources and obligations of government, in the presence of which this Act of Congress was passed, the provisions of this Act were necessary to the control of these resources and the maintenance of these obligations.

The judicial question then determines whether, under the Constitution, fidelity on the part of Congress to its high public trusts, required that it should permit the government to fall, under the stress of war, rather than conform the legal tender to the exigencies of the public safety.

The statement of the question supplies the answer and sustains the Act of Congress in question.

Ninth. If, however, it should be held that the Act of Congress of Feb. 25, 1862, at the time of its passage, lacked adequate constitutional support, and that the feature impressed upon the issue of the public debt authorized by the Act, of efficacy as a legal tender, was, though unquestionably in the law, questionable in the courts for constitutional invalidity, then the 14th Amendment of the Constitution has ratified the Act of Congress, and the validity of this issue of the public debt to the full measure of its statutory qualities, can no longer be questioned in the courts.

The 4th section of this Amendment provides as follows:

"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, should not be questioned."

This provision of the Constitution executes itself; it is retroactive and remedial; its motive is to establish, by the Constitution, whatever has been hitherto authorized by statute respecting the public debt; whatever question respecting the constitutional validity of any statutory regulation or tenor of the issues of the public debt might, but for this "amendment," have been made, is by and after the adoption of the amendment, suppressed in all courts and tribunals.

But how shall it be said that this supreme and deliberate decree of the people in full sovereignty has its effect, if a main feature in a principal class of public securities, which procured their acceptance with the public creditors, is still questioned in the courts?

The history of the times exhibits no other actual form or instance in which any quality of the public debt has been questioned, save only in this feature of the currency with the people, in favor of the public creditor, imparted as the quality of legal tender.

The doubts here raised, then, were the very doubts this amendment was framed to suppress.

Tenth. The validity of this Act of Congress being sustained, the judicial difficulties of private controversies in its application belong to the parties to solve by their forensic contentations.

The public question goes no further than to demand that every private debt liquidated, by contract or judgment, in lawful money of the United States, shall be discharged by the "United States Notes," issued under this Act of Congress as lawful money according to their face.

When the sum is liquidated, as debt, by contract, in any form of lawful money of the United States, then United States Notes are efficacious, at their face, to discharge it.

When the liquidation is first made in lawful money of the United States by judgment, these notes are efficacious, at their face, to discharge the judgment.

Messrs. Clarkson N. Potter, and H. A. Griswold, in person, for defendant in error:

Anyone who has studied the judicial opinions sustaining the law, cannot fail to have been struck with the vagueness and indefiniteness of the processes of reasoning by which, in many cases, their authors seem to have been brought to their conclusions in the premises. Starting far off, in the clouds almost, with misty notions of the origin and abstract nature and attributes of government in general, they seem to muddle up and confuse the powers of an unlimited sovereignty with those of a constitutional government, founded on a written organic law. Further on, the argument turns very much on political necessity; on the obligations to preserve the life of the nation (whatever that may be); on war powers; on the suppression of the rebellion; on the support of the government and similar topics. The mischief of such methods of conducting investigations, strictly legal and technical in their nature, is, that in the result, constitutional powers are sure to be measured by private opinions respecting necessity or even policy. By such methods of proof, whatever men desire becomes constitutional.

I shall endeavor to test the validity of the Act of February, 1862, by its accordance with the letter and spirit of the Constitution as it is, and not as this or that political party may think it ought to be.

In war, the powers of war may be exercised; but the Constitution itself is the same in peace and war.

It is acknowledged that the Federal Government is one of enumerated powers; and however sovereign it may be within the range of its authority, yet it cannot exercise any power which is not expressly, or by necessary implication, delegated in the Constitution. In testing an Act of Congress, the burden of proof is on those who sustain it. The fact that the Constitution may not forbid any particular act, does not afford even a presumption that the government may perform that act, for, in terms, all powers not delegated are reserved. The power is not prohibited and, therefore, exists, is not the logic of the Constitution. The power is not granted and, therefore, does not exist, is the true formula.

The only provision of the Constitution relating in terms to tender, is one forbidding the States to make anything but gold and silver legal tender. This prohibition is in no sense a grant to the General Government, while on the other hand, it is a proof that in the distribution of powers, tender would normally fall within state control, else why the prohibition?

The only direct grant of power over money is in art. 1, secs. 8, 5, to coin money, regulate the value thereof, and of foreign coin.

Respecting the nature and extent of the power thus granted, I shall quote the forcible and conclusive argument of *Judge Emott*. "The term 'money,' here," he says, "means in

my judgment metallic money, gold, silver and copper, or the metals used for coin, and nothing more. The word 'metals' cannot, without violence, be applied to the issue of paper money. To coin money is to make, stamp and issue coins as money. Coins are pieces of metal of a particular weight and standard, and to which particular value is given in account and payment. The clause which follows evidently means to authorize the regulation of the value of the coin thus issued, or the money coined; and that this is strictly metallic money, appears from the words immediately following: and of foreign coin." The design was to confer upon Congress the power to regulate the value of foreign and domestic coins; and as the domestic money, where regulation is thus conferred upon Congress, is the money whose coinage is authorized by the first part of the clause, the inference is inevitable, that this money is simply domestic coin or metallic money. The clause confers upon Congress absolute and exclusive powers over the circulating coin of the country, domestic and foreign, by regulating the standard and coinage of the former, and the value in account of the latter.

If the emission of Treasury Notes is "coining money," then we come to the absurdity that the notes themselves are coined money or coins. By the same absurd definition the foreign coin, the value of which Congress may regulate and force into circulation, may consist of Bank of England notes, Turkish shipplasters, or any like worthless rubbish.

For the intent of any statute, this court has sanctioned the doctrine that we may look, if necessary, "to the public history of the times in which it was passed." *Aldridge v. Williams*, 8 How., 24.

Now, there is no provision of the great organic law that has less need of such an inquiry, than the provision as to coinage.

It is clear that, in regard to money, the people knew what they wanted and just how to accomplish it. They evidently intended that the lawful money should be coin, and nothing but coin. They, therefore, gave the government power to coin money and regulate its value, and also that of foreign coin; and they gave no further latitude, not a hair's breadth. But the object was not yet accomplished. The power of spoiling their work must be taken from the States. The States were accordingly forbidden to coin money and to make anything but gold and silver a legal tender. By these provisions, and the further rule that all powers not granted are reserved, the work is accomplished, and coin is established as the only legal money of the country, as effectually as can be done by a written instrument.

The Act of Congress of February, 1862, declares "the Treasury notes therein authorized to be lawful money." They are not money, but forms of representation of government credit. They are mere evidences of a debt, like promissory notes or bills of exchange, the government being debtor to the holder for the amount. When money is transferred in satisfaction of debt, not only is the debt canceled as between the parties, but it is absolutely paid. The creditor receives in hand the actual amount of his claim. But when a Treasury Note is transferred, the process merely substitutes the gov-

ernment as debtor. The creditor is still unpaid. The notes promise on their face to pay money. A promise is not the same as the thing promised. If it were, then the government could pay in a second slip of paper printed in the same form, and this latter again with another, so that in fact it never promises to pay, anything beyond swapping one slip of paper for another exactly similar. This absurdity has sometimes been too much, even for those who maintain the validity of the act. "Most clearly," says Judge Johnson, "they are not money. Upon their face, they only promise to pay money."

If not money, still more clearly they are not lawful money; and if not lawful money, there is no error in the judgment of the Kentucky Court of Appeals.

If base coins are legal tender, whether or without limit, they are so by virtue of an express grant of coinage power to Congress; but no such express grant of power is alleged in the case of greenbacks. *Ergo, nihil probatur.*

But the argument is fallacious. Congress can "regulate the value" of both foreign and domestic coins, that is to say: can declare on what terms, at what rates, within what limits, they shall pass in payments and account. Our proposition is not that coins become legal tender merely when coined, but only when and as their value is regulated or declared. If Congress limits or conditions their value, their legal quality is affected accordingly, though it might be a question whether, in the case of gold or silver coin, any State might not waive such limitation within its own jurisdiction.

The difference between the provision regarding coining and the provision regarding tender is not unimportant. It is shown in the following parallel:

Coining Money.

(1) Is forbidden to the States.	(2) Is granted to the United States.
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Power Over Tender.

(1) Is forbidden to the States.	(2) Is not granted to the United States.
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So far, therefore, as a direct grant is concerned, neither can make anything but gold and silver a legal tender. The States cannot, because it is expressly forbidden. The United States cannot, because it is not expressly granted.

Unless, therefore, the power to make Treasury Notes a legal tender can be shown to be necessary and proper to the exercise of some power that is expressly granted, it must follow that the Act in question is invalid and unconstitutional.

Before proceeding to the investigation whether such authority is given by implication, two questions require consideration:

I. Does the Act of 1862 impair the faith of contracts in this case?

II. If it does impair, is it for that reason unconstitutional?

The contract was made in Kentucky, in which State, both in 1860 and 1861, nothing but gold or silver coin could be lawfully tendered in payment of debts. *Johnson v. Vickers*, 1 Duv., 267.

It must be held that the makers of the notes promised to pay the specified amounts of the gold or silver coins, which alone, then as now, is what the law recognizes as dollars.

The general rule requires that a contract See 8 WALL.

shall be construed in the sense as understood by the parties. If the meaning of words undergoes change between the times of execution and performance, the former will control and overrule the latter. Is there any reason of justice or public policy, why a different rule should prevail in the interpretation of an obligation to pay dollars? This is not a question of the power of Congress to regulate the value of coined money. If Congress should declare a copper cent to be a dollar, the term 'dollar,' in all contracts thereafter made, would, unquestionably, by presumption of law, mean a copper cent and nothing more. But as unquestionably, by the same presumption of law, in case of contracts previously made, it would mean a given amount of pure gold, and such contracts cannot be satisfied except by the performance on the part of the obligor of what he agreed to perform, as understood by the parties.

The Act of 1862, in forcing us to receive greenbacks in payment of our debt, impairs the sanctity of contracts. The question follows: if it does impair, is it therefore unconstitutional? No, say its defenders; for Congress is not forbidden to impair the obligation of contracts.

In reply to this we ask: but where is it granted? The argument reverts to the old formula; does the prohibition of a power to a State imply the concession of that power to Congress? If so, why was it not operative in the case of letters of marque and reprisal, and of coining money? They are forbidden to the States; why a special grant to Congress, if the prohibition is itself a grant? But the short of the matter is, that Amendment X decides the controversy.

Bankrupt laws, they say, have been enacted by Congress, the effect of which is to impair the obligation of contracts.

The matter lies in a nutshell. Bankrupt laws are part of the approved legislation of some of the most civilized States; and are held beneficial by many jurists and practical men. But, as they do in some cases impair the obligations of contracts, the States are, in effect, deprived of the power to enact them. To remedy evils that might ensue if that power did not exist somewhere, it is bestowed by special grant on Congress, for weighty reasons the most suitable depository. *Expressio unius, exclusio alterius.* The special grant disproves the intention to bestow any larger power.

There being no direct authority granted in the Constitution to make any kind of paper legal tender, the question arises, whether it may be inferred from any of the express powers.

Among the powers expressly delegated to Congress is the power to "borrow money;" and it is mainly as being necessary and proper to the exercise of this power, that the right to declare Treasury notes legal tender is maintained by its ablest advocates.

But to infer from the borrowing power the power of emitting bills of credit, and from this latter again, to infer the power of making them legal tender, is to double inferences, and to pile incident upon incident, to the utter destruction of all limitation of power in the General Government.

It is only because Treasury Notes are not money, but only a form of the public credit, just as much as 5-20's or the 6's of '81, that

they fall within the scope of the borrowing power.

In the United States Senate Mr. Sumner says: "It is difficult to escape the conclusion, that if Congress is empowered to issue Treasury notes, it may affix to these notes such character as shall seem just and proper, declaring the conditions of their circulation and the dues for which they shall be received. Grant the first power, and the rest must follow.

It is easy to imagine other characters which Congress might have thought proper, or may yet think proper, to affix to these emissions, and which would tend most powerfully to give them credit and circulation. They might be invested, for instance, with the character of an execution, to be levied at the holder's will on any property, real or personal, with power to sell, with or without notice, the proceeds of the sale to go to the holder. If it were said that such a provision would be unconstitutional, as depriving a person of his property without process of law, so is the creditor deprived of his property who is forced to receive paper, worth sixty cents on the dollar, in satisfaction of his debt.

We have now to examine the arguments adduced to sustain so extraordinary a claim. The case of *McCulloch v. Md.*, 4 Wheat., 316, is the great reliance for its support. But the authority adduced from this decision in favor of the law under consideration is not based on the analogy of the issue, but rather on certain *dicta* uttered by the court as general rules of interpretation in respect to implied powers. In the words of the *Chief Justice*:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

To ascertain the import of this canon of interpretation, reference should be had to the question under consideration. That question was, whether Congress had power to create a corporation as an agent for transacting the fiscal business of the government; and the court decided in the affirmative.

The question that is raised here is, whether Congress can affix to its bills of credit whatever character it pleases, for the purpose of giving them credit and circulation. No analogous question came before the court in the case of *McCulloch v. Md.*

I quote another passage from the same decision: "The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers or used as a means of executing them."

But the power of controlling tender is a great substantive and independent function of the supreme authority, and forms an integral department of the law of contracts, by which the industry and well being of communities are regulated.

Such a power, if it exists at all, must exist, says the Supreme Court, by direct grant and not by mere implication.

The legal tender power is applied by the Act

of 1862, to contracts made previous to its passage.

1. The Act releases the debtor from his contract without performance.

2. It deprives the creditor of his property without compensation.

3. It substitutes, against the creditor's will, the government as his debtor, in place of the party with whom he contracted.

4. It does not bind the government thus substituted as debtor, to pay the debt at any particular time, at any particular place, nor in any particular value.

5. It claims for Congress the power to annihilate all debt; for it may make tender of a blank slip of paper, or a dry leaf of the forest; indeed, Congress has been urged to emit an additional billion of dollars, in order to alleviate the burden of public and private debt by its depreciation.

6. It amends the Constitution, by asserting for Congress a power to emit bills of credit and to regulate the value thereof.

7. Its operation *in invitum*, is to confiscate all existing debts or money claims, common or fiduciary.

"Legal tender for all debts," is a phrase of unpretending and innocent aspect, but of substantive and independent power, not inferior to the power of taxation.

The 10th Amendment of the Constitution is as follows: "The powers, not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Now, among the subjects which the people have neither granted to the United States nor forbidden to the States, is the whole law of contracts, with all their rights and remedies as between citizen and citizen, with the exception of the single limitation of the power of the States over tender.

The power of Congress to make Treasury Notes legal tender has been sustained as incidental to the following powers:

1. To declare war. 2. To raise and support armies. 3. To provide and maintain a navy.

The Constitution provides the means of raising revenue. These means are comprised in two powers: (1) of taxation, and (2) of borrowing.

The power of taxation is unlimited in extent. Congress may take from the nation its last dollar. But to declare Treasury Notes legal tender is not taxation, and if it were taxation, could not be constitutional, because it is not uniform. Its burden falls on one class only of the community, viz.: creditors; and on them in unequal proportions. But in its very nature it is not taxation. The money of which the creditor is deprived goes to the debtor, not to the government.

Mr. Chief Justice Chase delivered the opinion of the court:

The question presented for our determination by the record in this case is: whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it. And this requires,

in the first place, a construction of that clause of the 1st section of the Act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts.

The entire clause is in these words: "And such notes, herein authorized, shall be receivable in payment of all taxes, internal duties, excises, debts and demands of any kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private with the United States, except duties on imports and interest as aforesaid."

12 Stat. at L., 845.

The clause has already received much consideration here, and this court has held that, upon a sound construction, neither taxes imposed by state legislation [*Lane Co. v. Oregon, ante.*, 101], nor demands upon contracts which stipulate in terms for the payment or delivery of coin or bullion [*Bronson v. Rhodes, ante.*, 141; *Buller v. Horwitz, ante.*, 149], are included by legislative intention under the description of debts public and private. We are now to determine whether this description embraces debts contracted before as well as after the date of the Act.

It is an established rule for the construction of statutes, that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them. But this rule cannot prevail where the intent is clear. Except, in the scarcely supposable case, where a statute sets at nought the plainest precepts of morality and social obligation, courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution.

Applying the rule just stated, to the Act under consideration, there appears to be strong reason for construing the word "debts" as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the Act makes a legal tender in payment, are essentially unlike in nature, and being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the Act, and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper, prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value, determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value, determined by the quantity in circulation, by general consent to its currency in payments, and by opinion as to the probability of redemption in coin. Both derive, in different degrees, a certain ad-

See 8 WALL.

ditional value from their adaptation to circulation by the form and impress given to them under national authority, and from the Acts making them respectively a legal tender.

Contracts for the payment of money, made before the Act of 1863, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was, in legal import, a contract for the payment of coin.

There is a well known law of currency, that notes or promises to pay, unless made conveniently and promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin. It is an equally well known law, that depreciation of notes must increase with the increase of the quantity put in circulation and the diminution of confidence in the ability or disposition to redeem. Their appreciation follows the reversal of these conditions. No Act making them a legal tender can change materially the operation of these laws. Their force has been strikingly exemplified in the history of the United States notes. Beginning with a very slight depreciation when first issued, in March, 1863, they sank in July, 1864, to the rate of \$2.85 for a dollar in gold, and then rose until recently \$1.20 in paper became equal to a gold dollar.

Admitting, then, that prior contracts are within the intention of the Act, and assuming that the Act is warranted by the Constitution, it follows that the holder of a promissory note, made before the Act, for \$1,000, payable, as we have just seen, according to the law and according to the intent of the parties, in coin, was required, when depreciation reached its lowest point, to accept in payment a thousand note dollars, although with the thousand coin dollars, due under the contract, he could have purchased on that day two thousand eight hundred and fifty such dollars. Every payment, since the passage of the Act, of a note of earlier date, has presented similar, though less striking features.

Now, it certainly needs no argument to prove that an Act, compelling acceptance in satisfaction of any other than stipulated payment, alters arbitrarily the terms of the contract and impairs its obligation, and that the extent of impairment is in the proportion of the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it need argument to prove that the practical operation of such an Act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an Act of Congress is to be favored, or indeed to be admitted, if any other can be reconciled with the manifest intent of the Legislature.

What, then, is that manifest intent? Are we at liberty, upon a fair and reasonable construction of the Act, to say that Congress meant that the word "debts" used in the Act should not include debts contracted prior to its passage?

In the case of *Bronson v. Rhodes*, we thought ourselves warranted in holding that this word, as used in the statute, does not include obligations created by express contracts for the pay-

ment of gold and silver, whether coined or in bullion. This conclusion rested, however, mainly on the terms of the Act, which not only allow, but require payments in coin by or to the government, and may be fairly considered, independently of considerations belonging to the law of contracts for the delivery of specified articles, as sanctioning special private contracts for like payments; without which, indeed, the provisions relating to government payments could hardly have practical effect. This consideration, however, does not apply to the matter now before us. There is nothing in the terms of the Act which looks to any difference in its operation on different descriptions of debts payable generally in money—that is to say, in dollars and parts of a dollar. These terms, on the contrary, in their obvious import, include equally all debts not specially expressed to be payable in gold or silver, whether arising under past contracts and already due, or arising under such contracts and to become due at a future day, or arising and becoming due under subsequent contracts. A strict and literal construction, indeed, would, as suggested by *Mr. Justice Story* (1 Story, Const., sec. 921), in respect to the same word used in the Constitution, limit the word “debts” to debts existing; and if this construction cannot be accepted because the limitation sanctioned by it cannot be reconciled with the obvious scope and purpose of the Act, it is certainly conclusive against any interpretation which will exclude existing debts from its operation. The same conclusion results from the exception of interest on loans and duties on imports from the effect of the legal tender clause. This exception affords an irresistible implication that no description of debts, whenever contracted, can be withdrawn from the effect of the Act if not included within the terms or the reasonable intent of the exception. And it is worthy of observation in this connection, that in all the debates to which the Act gave occasion in Congress, no suggestion was ever made that the legal tender clause did not apply as fully to contracts made before as to contracts made after its passage.

These considerations seem to us conclusive. We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the Act.

We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.

The delicacy and importance of this question has not been overstated in the argument. This court always approaches the consideration of questions of this nature reluctantly; and its constant rule of decision has been and is, that Acts of Congress must be regarded as constitutional, unless clearly shown to be otherwise.

But the Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the people. All the legislative power granted by the Constitu-

tion belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms.

It is the function of the judiciary to interpret and apply the law to cases between parties as they arise for judgment. It can only declare what the law is, and enforce, by proper process, the law thus declared. But, in ascertaining the respective rights of parties, it frequently becomes necessary to consult the Constitution. For there can be no law inconsistent with the fundamental law. No enactment not in pursuance of the authority conferred by it can create obligations or confer rights. For such is the express declaration of the Constitution itself in these words:

“The Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

Not every Act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every Act of Congress that the judges are bound. This character and this force belong only to such acts as are “made in pursuance of the Constitution.”

When, therefore, a case arises for judicial determination, and the decision depends on the alleged inconsistency of a legislative provision with the fundamental law; it is the plain duty of the court to compare the Act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise, the Constitution is not the supreme law: it is neither necessary or useful, in any case, to inquire whether or not any Act of Congress was passed in pursuance of it; and the oath which every member of this court is required to take, that he “will administer justice without respect to persons, and do equal right to the poor and the rich, and faithfully perform the duties incumbent upon him to the best of his ability and understanding, agreeably to the Constitution and laws of the United States,” becomes an idle and unmeaning form.

The case before us is one of private right. The plaintiff in the court below sought to recover of the defendants a certain sum expressed on the face of a promissory note. The defendants insisted on the right, under the Act of February 25th, 1862, to acquit themselves of their obligation by tendering in payment a sum nominally equal in United States notes. But the note had been executed before the passage of the Act, and the plaintiff insisted on his right under the Constitution to be paid the amount due in gold and silver. And it has not been and cannot be denied that the plaintiff was entitled to judgment according to his claim, unless bound by a constitutional law to accept the notes as coin.

Thus two questions were directly presented: Were the defendants relieved by the Act from the obligation assumed in the contract? Could the plaintiff be compelled, by a judgment of the court, to receive in payment a currency of different nature and value from that which was in the contemplation of the parties when the contract was made?

The Court of Appeals resolved both questions in the negative, and the defendants, in the original suit, seek the reversal of that judgment by writ of error.

It becomes our duty, therefore, to determine whether the Act of February 25th, 1862, so far as it makes United States notes a legal tender in payment of debts contracted prior to its passage, is constitutional and valid or otherwise. Under a deep sense of our obligation to perform this duty to the best of our ability and understanding, we shall proceed to dispose of the case presented by the record.

We have already said, and it is generally, if not universally, conceded, that the Government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution.

It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with the further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

But the extension of power by implication was regarded with some apprehension by the wise men who framed and by the intelligent citizens who adopted the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included under the description of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers."

The same apprehension is equally apparent in the 10th article of the amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people."

We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words "necessary and proper" were intended to have a "sense," to use the words of *Mr. Justice Story*, "at once admonitory and directory," and to require that the means used in

the execution of an express power "should be *bona fide*, appropriate to the end." 2 *Story*, *Const.*, p. 142, sec. 1353. The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated.

It has not been maintained in argument, nor, indeed, would anyone, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts.

We must inquire then whether this can be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by *Chief Justice Marshall*, speaking for the whole court, in the case of *McCulloch v. The State of Maryland*, 4 *Wheat.*, 421, and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." And in another part of the same opinion the practical application of this rule was thus illustrated: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground." 4 *Wheat.*, 423.

It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States Notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

It is not doubted that the power to establish a standard of value by which all other values may be measured, or in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States,

so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money. But can a power to impart these qualities to notes, or promises to pay money, when offered in discharge of pre-existing debts, be derived from the coinage power, or from any other power expressly given?

It is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power. Nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins. This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States.

Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the Articles of Confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency; and yet that Congress was not clothed with the power to make these bills a legal tender in payment. And this court has recently held that the Congress, under the Constitution, possesses, as incidental to other powers, the same power as the old Congress to emit bills or notes; but it was expressly declared at the same time that this decision concluded nothing on the question of legal tender. Indeed, we are not aware that it has ever been claimed that the power to issue bills or notes has any identity with the power to make them a legal tender. On the contrary, the whole history of the country refutes that notion. The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control of Congress, for the purpose of establishing and securing a national currency; and yet the States are expressly prohibited by the Constitution from making anything but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes and the power to make them a legal tender are not the same power, and that they have no necessary connection with each other.

But it has been maintained in argument that the power to make United States notes a legal tender in payment of all debts is a means appropriate and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money. If it is, and is not prohibited, or inconsistent with the letter or spirit of the Constitution, then the Act which makes them such legal tender must be held to be constitutional.

Let us, then, first inquire whether it is an appropriate and plainly adapted means for carrying on war. The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war; Congress has also power to emit bills of credit, or circulating notes receivable for government dues, and payable, so far at least as parties are willing to receive them, in discharge of government obligations; it will facilitate the use of such notes in disbursements to make them a legal

tender in payment of existing debts; therefore Congress may make such notes a legal tender.

It is difficult to say to what express power the authority to make notes a legal tender in payment of pre-existing debts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? And is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish postoffices and post-roads, for example, involves the collection and disbursement of a great revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power?

The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Can this proposition be maintained?

It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is, that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated *Chief Justice* in the case already cited, established for the determination of the question whether legislative Acts are constitutional or unconstitutional.

Undoubtedly, among means appropriate, plainly adapted, really calculated, the Legislature has unrestricted choice. But there can be no implied power to use means not within the description.

Now, then, let it be considered what has actually been done in the provision of a national currency. In July and August, 1861, and February, 1862, the issue of \$60,000,000 in United States notes, payable on demand, was authorized. 12 U. S. St., 259, 313, and 338. They were made receivable in payments, but were not declared a legal tender until March, 1863 (12 Stat. at L., 370), when the amount in circulation had been greatly reduced by receipt and cancellation. In 1862 and 1863 (12 Stat. at L., 845, 532, and 709), the issue of \$450,000,000 in United States notes, payable not on demand, but, in effect, at the convenience of the government, was authorized, subject to certain restrictions as to \$50,000,000. These notes were made receivable for the bonds of the national loans, for all debts due to or from the United States, except duties on imports and interest on the public debt, as were also declared a legal tender. In March, 1863 (12 Stat. at L., 711),

the issue of notes for parts of a dollar was authorized to an amount not exceeding \$50,000,000. These notes were not declared a legal tender, but were made redeemable under regulations to be prescribed by the Secretary of the Treasury. In February, 1863 (12 Stat. at L., 669), the issue of \$300,000,000 in notes of the national banking associations was authorized. These notes were made receivable to the same extent as United States notes, and provision was made to secure their redemption, but they were not made a legal tender.

The several descriptions of notes have since constituted, under the various Acts of Congress, the common currency of the United States. The notes which were not declared a legal tender have circulated with those which were so declared without unfavorable discrimination.

It may be added as a part of the history that other issues, bearing interest at various rates, were authorized and made a legal tender, except in redemption of bank notes, for face amount exclusive of interest. Such were the one and two years five per cent. notes, and three years compound interest notes. 13 Stat. at L., 218, 425. These notes never entered largely or permanently into the circulation; and there is no reason to think that their utility was increased or diminished by the Act which declared them a legal tender for face amount. They need not be further considered here. They serve only to illustrate the tendency remarked by all who have investigated the subject of paper money, to increase the volume of irredeemable issues, and to extend indefinitely the application of the quality of legal tender. That it was carried no farther during the recent civil war, and has been carried no farther since, is due to circumstances, the consideration of which does not belong to this discussion.

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many, perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts.

The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted; but that the making of them a legal tender to the extent mentioned was such a means.

Now, we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount.

It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes. But this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for government dues. All modern history testifies that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a ready circulation; and even when not redeemable in coin, on demand, are

as little and usually less subject to depreciation than any other description of notes, for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon this quality of receivability, and not upon the quality of legal tender, that reliance for circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender clause seems to have been introduced at a later stage of its progress.

These facts certainly are not without weight as evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts. It is denied, indeed, by eminent writers, that the quality of legal tender adds anything at all to the credit or usefulness of government notes. They insist, on the contrary, that it impairs both. However this may be, it must be remembered that it is as a means to an end to be attained by the action of the government, that the implied power of making notes a legal tender in all payments is claimed under the Constitution. Now, how far is the government helped by this means? Certainly it cannot obtain new supplies or services at a cheaper rate, for no one will take the notes for more than they are worth at the time of the new contract. The price will rise in the ratio of the depreciation, and this is all that could happen if the notes were not made a legal tender. But it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments. This is, as we have seen, by no means certain. If the quantity issued be excessive, and redemption uncertain and remote, great depreciation will take place; if, on the other hand, the quantity is only adequate to the demands of business, and confidence in early redemption is strong, the notes will circulate freely, whether made a legal tender or not.

But if it be admitted that some increase of availability is derived from making the notes a legal tender under new contracts, it by no means follows that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of pre-existing debts. And there is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money. It is true that these evils are not to be attributed altogether to making it a legal tender. But this increases these evils. It certainly widens their extent and protracts their continuance.

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if while facilitating in some degree the circulation of the

notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it, as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts.

But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by *Chief Justice Marshall*, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end.

Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution.

Among the great cardinal principles of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it is, happily, not a matter of dispute. It is not left to inference or conjecture, especially in its relations to contracts.

When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory northwest of the Ohio, the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, "of extending the fundamental principles of civil and religious liberty, whereon these republics" (the States united under the Confederation), "their laws and constitutions are erected." Among these fundamental principles was this: "And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed."

The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against injustice, that "no State shall pass any law impairing the obligation of contracts."

It is true that this prohibition is not applied in terms to the Government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason.

But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should

pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

Another provision, found in the 5th amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligation of contracts; but, unlike that, it is addressed directly and solely to the National Government. It does not, in terms, prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but if such property cannot be taken for the benefit of all, without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition.

But there is another provision in the same amendment, which, in our judgment, cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that "no person shall be deprived of life, liberty or property, without due process of law."

It is not doubted that all the provisions of this amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution. The only question is, whether an Act which compels all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value deprives such persons of property without due process of law.

It is quite clear that whatever may be the operation of such an Act, due process of law makes no part of it. Does it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money. And we have already seen that contracts in the United States, prior to the Act under consideration for the payment of money, were contracts to pay the sums specified in gold and silver coin. And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property.

But it may be said that the holders of no description of property are protected by it from legislation which incidentally only impairs its value. And it may be urged in illustration that the holders of stock in a turnpike, a bridge, or a manufacturing corporation, or an insurance company, or a bank, cannot invoke its protection against legislation which, by authorizing similar works or corporations, reduces its price in the market. But all this does not appear to meet the real difficulty. In the cases mentioned the injury is purely contingent and incidental. In the case we are considering, it is direct and inevitable.

If in the cases mentioned the holders of the stock were required by law to convey it on de-

mand to anyone who should think fit to offer half its value for it, the analogy would be more obvious. No one probably could be found to contend that an Act enforcing the acceptance of fifty or seventy-five acres of land in satisfaction of a contract to convey a hundred would not come within the prohibition against arbitrary deprivation of property.

We confess ourselves unable to perceive any solid distinction between such an Act and an Act compelling all citizens to accept, in satisfaction of all contracts for money, half or three quarters or any other proportion less than the whole value actually due, according to their terms. It is difficult to conceive what Act would take private property without process of law if such an Act would not.

We are obliged to conclude that an Act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an Act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution.

It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution.

We are obliged, therefore, to hold that the defendant in error was not bound to receive from the plaintiffs the currency tendered to him in payment of their note, made before the passage of the Act of February 25th, 1862. *It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.*

It is proper to say that *Mr. Justice Grier*, who was a member of the court when this cause was decided in conference, Nov. 27, 1869, and when this opinion was directed to be read (Jan. 29, 1870), stated his judgment to be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the Act by the other judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution.

Mr. Justice Miller, dissenting:

The provisions of the Constitution of the United States which have direct reference to the function of legislation may be divided into three primary classes:

See 8 WALL.

1. Those which confer legislative powers on Congress.

2. Those which prohibit the exercise of legislative powers by Congress.

3. Those which prohibit the States from exercising certain legislative powers.

The powers conferred on Congress may be subdivided into the positive and the auxiliary, or, as they are more commonly called, the express and the implied powers.

As instances of the former class may be mentioned the power to borrow money, to raise and support armies, and to coin money and regulate the value thereof.

The implied or auxiliary powers of legislation are founded largely on that general provision which closes the enumeration of powers granted in express terms, by the declaration that Congress shall also "have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The question which this court is called upon to consider, is whether the authority to make the notes of the United States a lawful tender in payment of debts, is to be found in Congress under either of these classes of legislative powers.

As one of the elements of this question, and in order to negative any idea that the exercise of such a power would be an invasion of the rights reserved to the States, it may be as well to say at the outset, that this is among the subjects of legislation forbidden to the States by the Constitution. Among the unequivocal utterances of that instrument on this subject of legal tender, is that which declares that "No State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts;" thus removing the whole matter from the domain of state legislation.

No such prohibition is placed upon the power of Congress on this subject, though there are, as I have already said, matters expressly forbidden to Congress; but neither this of legal tender, nor of the power to emit bills of credit, or to impair the obligation of contracts, is among them. On the contrary, Congress is expressly authorized to coin money and to regulate the value thereof, and of foreign coins, and to punish the counterfeiting of such coin and of the securities of the United States. It has been strongly argued by many able jurists that these latter clauses, fairly construed, confer the power to make the securities of the United States a lawful tender in payment of debts.

While I am not able to see in them standing alone a sufficient warrant for the exercise of this power, they are not without decided weight when we come to consider the question of the existence of this power, as one necessary and proper for carrying into execution other admitted powers of the government. For they show that so far as the framers of the Constitution did go in granting express power over the lawful money of the country, it was confided to Congress and forbidden to the States; and it is no unreasonable inference, that if it should be found necessary in carrying into effect some

of the powers of the government essential to its successful operation, to make its securities perform the office of money in the payment of debts, such legislation would be in harmony with the power over money granted in express terms.

It being conceded, then, that the power under consideration would not, if exercised by Congress, be an invasion of any right reserved to the States, but one which they are forbidden to employ, and that it is not one in terms either granted or denied to Congress, can it be sustained as a law necessary and proper, at the time it was enacted, for carrying into execution any of these powers that are expressly granted either to Congress, or to the government, or to any department thereof?

From the organization of the government under the present Constitution, there have been from time to time attempts to limit the powers granted by that instrument, by a narrow and literal rule of construction, and these have been specially directed to the general clause which we have cited as the foundation of the auxiliary powers of the government. It has been said that this clause, so far from authorizing the use of any means which could not have been used without it, is a restriction upon the powers necessarily implied by an instrument so general in its language.

The doctrine is, that when an Act of Congress is brought to the test of this clause of the Constitution, its necessity must be absolute, and its adaption to the conceded purpose unquestionable.

Nowhere has this principle been met with more emphatic denial and more satisfactory refutation, than in this court. That eminent jurist and statesman, whose official career of over thirty years as *Chief Justice* commenced very soon after the Constitution was adopted, and whose opinions have done as much to fix its meaning as those of any man living or dead, has given this particular clause the benefit of his fullest consideration.

In the case of *The United States v. Fisher*, 2 Cranch, 358, decided in 1804, the point in issue was the priority claimed for the United States as a creditor of a bankrupt over all other creditors. It was argued mainly on the construction of the statutes; but the power of Congress to pass such a law was also denied. *Chief Justice* Marshall said: "It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government, or in any department thereof. In construing this clause, it would be incorrect, and would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution."

It was accordingly held that, under the authority to pay the debts of the Union, it could

pass a law giving priority for its own debts in cases of bankruptcy.

But in the memorable case of *McCulloch v. The State of Maryland*, 4 Wheat., 316, the most exhaustive discussion of this clause is found in the opinion of the court by the same eminent expounder of the Constitution. That case involved, it is well known, the right of Congress to establish the Bank of the United States, and to authorize it to issue notes for circulation. It was conceded that the right to incorporate or create such a bank had no specific grant in any clause of the Constitution, still less the right to authorize it to issue notes for circulation as money. But it was argued, that as a means necessary to enable the government to collect, transfer and pay out its revenues, the organization of a bank with this function was within the power of Congress. In speaking of the true meaning of the word "necessary" in this clause of the Constitution, he says: "Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without it? We think it does not. If reference be had to its use, in the common affairs of the world; or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another. To employ means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable."

The word "necessary" admits, he says, of all degrees of comparison. "A thing may be necessary, very necessary, absolutely or indispensably necessary. * * * This word, then, like others, is used in various senses, and in its construction the subject, the context, the intention of the person using them are all to be taken into view. Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to various crises of human affairs. To have prescribed the means by which the government should in all future time execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been but dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used but those alone without which the power given would be nugatory, would have been to deprive the Legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

I have cited at unusual length these remarks

of Chief Justice Marshall, because though made half a century ago, their applicability to the circumstances under which Congress called to its aid the power of making the securities of the government a legal tender, as a means of successfully prosecuting a war, which without such aid seemed likely to terminate its existence, and to borrow money which could in no other manner be borrowed, and to pay the debt of millions due to its soldiers in the field, which could by no other means be paid, seems to be almost prophetic. If he had had clearly before his mind the future history of his country, he could not have better characterized a principle which would in this very case have rendered the power to carry on war nugatory, which would have deprived Congress of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances, by the use of the most appropriate means of supporting the government in the crisis of its fate.

But it is said that the clause under consideration is admonitory as to the use of implied powers, and adds nothing to what would have been authorized without it.

The idea is not new, and is probably intended for the same which was urged in the case of *McCulloch v. The State of Maryland*, namely: that instead of enlarging the powers conferred on Congress, or providing for a more liberal use of them, it was designed as a restriction upon the ancillary powers incidental to every express grant of power in general terms. I have already cited so fully from that case, that I can only refer to it to say that this proposition is there clearly stated and refuted.

Does there exist, then, any power in Congress or in the government, by express grant, in the execution of which this Legal Tender Act was necessary and proper, in the sense here defined, and under the circumstances of its passage?

The power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defense and general welfare, are each and all distinctly and specifically granted in separate clauses of the Constitution.

We were in the midst of a war which called all these powers into exercise and taxed them severely. A war which, if we take into account the increased capacity for destruction introduced by modern science, and the corresponding increase of its cost, brought into operation powers of belligerency more potent and more expensive than any that the world has ever known.

All the ordinary means of rendering efficient the several powers of Congress above mentioned had been employed to their utmost capacity, and with the spirit of the rebellion unbroken, with large armies in the field unpaid, with a current expenditure of over a million of dollars per day, the credit of the government nearly exhausted, and the resources of taxation inadequate to pay even the interest on the public debt, Congress was called on to devise some new means of borrowing money on the credit of the nation; for the result of the war was conceded by all thoughtful men to depend on the capacity of the government to raise money

in amounts previously unknown. The banks had already loaned their means to the treasury. They had been compelled to suspend the payment of specie on their own notes. The coin in the country, if it could all have been placed within the control of the Secretary of the Treasury, would not have made a circulation sufficient to answer army purchases and army payments, to say nothing of the ordinary business of the country. A general collapse of credit, of payment, and of business seemed inevitable, in which faith in the ability of the government would have been destroyed, the rebellion would have triumphed, the States would have been left divided, and the people impoverished. The National Government would have perished, and, with it, the Constitution which we are now called upon to construe with such nice and critical accuracy.

That the Legal Tender Act prevented these disastrous results, and that the tender clause was necessary to prevent them, I entertain no doubt.

It furnished instantly a means of paying the soldiers in the field, and filled the coffers of the commissary and quartermaster. It furnished a medium for the payment of private debts, as well as public, at a time when gold was being rapidly withdrawn from circulation, and the state bank currency was becoming worthless. It furnished the means to the capitalist of buying the bonds of the government. It stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind.

The results which followed the adoption of this measure are beyond dispute. No other adequate cause has ever been assigned for the revival of government credit, the renewed activity of trade, and the facility with which the government borrowed, in two or three years, at reasonable rates of interest, mainly from its own citizens, double the amount of money there was in the country, including coin, bank notes, and the notes issued under the Legal Tender Acts.

It is now said, however, in the calm retrospect of these events, that Treasury Notes suitable for circulation as money, bearing on their face the pledge of the United States for their ultimate payment in coin, would, if not equally efficient, have answered the requirement of the occasion without being made a lawful tender for debts.

But what was needed was something more than the credit of the government. That had been stretched to its utmost tension, and was clearly no longer sufficient in the simple form of borrowing money. Is there any reason to believe that the mere change in the form of the security given would have revived this sinking credit? On the contrary, all experience shows that a currency not redeemable promptly in coin, but dependent on the credit of a promisor whose resources are rapidly diminishing, while his liabilities are increasing, soon sinks to the dead level of worthless paper. As no man would have been compelled to take it in payment of debts, as it bore no interest, as its period of redemption would have been remote and uncertain, this must have been the inevitable fate of any extensive issue of such notes.

But when by law they were made to dis-

charge the function of paying debts, they had a perpetual credit or value, equal to the amount of all the debts, public and private, in the country. If they were never redeemed, as they never have been, they still paid debts at their par value, and for this purpose were then, and always have been, eagerly sought by the people. To say, then, that this quality of legal tender was not necessary to their usefulness, seems to be unsupported by any sound view of the situation.

Nor can any just inference of that proposition arise from a comparison of the legal tender notes with the bonds issued by the government about the same time. These bonds had a fixed period for their payment, and the Secretary of the Treasury declared that they were payable in gold. They bore interest, which was payable semi annually in gold, by express terms on their face, and the customs duties, which by law could be paid in nothing but gold, were sacredly pledged to the payment of this interest. They can afford no means of determining what would have been the fate of Treasury Notes designed to circulate as money, but which bore no interest, and had no fixed time of redemption, and by law could pay no debts, and had no fund pledged for their payment.

The legal tender clauses of the statutes under consideration were placed emphatically by those who enacted them, upon their necessity to the further borrowing of money and maintaining the army and navy. It was done reluctantly and with hesitation, and only after the necessity had been demonstrated and had become imperative. Our statesmen had been trained in a school which looked upon such legislation with something more than distrust. The debates of the two Houses of Congress show, that on this necessity alone could this clause of the bill have been carried, and they also prove, as I think very clearly, the existence of that necessity. The history of that gloomy time, not to be readily forgotten by the lover of his country, will forever remain, the full, clear and ample vindication of the exercise of this power of Congress, as its results have demonstrated the sagacity of those who originated and carried through this measure.

Certainly it seems to the best judgment that I can bring to bear upon the subject that this law was a necessity in the most stringent sense in which that word can be used. But if we adopt the construction of *Chief Justice Marshall* and the full court over which he presided, a construction which has never to this day been overruled or questioned in this court, how can we avoid this conclusion? Can it be said that this provision did not conduce towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection? Or that it was not calculated to effect these objects? Or that it was not useful and essential to that end? Can it be said that this was not among the choice of means, if not the only means, which were left to Congress to carry on this war for national existence?

Let us compare the present with other cases decided in this court.

If we can say judicially that to declare, as in the case of *The United States v. Fisher*, that the debt which a bankrupt owes the government shall have priority of payment over all other debts, is a necessary and proper law to enable

the government to pay its own debts, how can we say that the legal tender clause was not necessary and proper to enable the government to borrow money to carry on the war?

The creation of the United States Bank, and especially the power granted to it to issue notes for circulation as money, was strenuously resisted as without constitutional authority; but this court held that a bank of issue was necessary, in the sense of that word as used in the Constitution, to enable the government to collect, to transfer and to pay out its revenues.

It was never claimed that the government could find no other means to do this. It could not then be denied, nor has it ever been, that other means more clearly within the competency of Congress existed, nor that a bank of deposit might possibly have answered without a circulation. But because that was the most fitting, useful and efficient mode of doing what Congress was authorized to do, it was held to be necessary by this court. The necessity in that case is much less apparent to me than in the adoption of the legal tender clause.

In *The Veazie Bank v. Fenno* [ante 483], decided at the present term, this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress. And that as a means of making this power of Congress efficient, that body could make this currency exclusive by taxing out of existence any currency authorized by the States. It was said "that having, in the exercise of undoubted constitutional power, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate means." Which is the more appropriate and effectual means of making the currency established by Congress useful, acceptable, perfect—the taxing of all other currency out of existence, or giving to that furnished by the government the quality of lawful tender for debts? The latter is a means directly conducive to the end to be attained, a means which attains the end more promptly and more perfectly than any other means can do. The former is a remote and uncertain means in its effect, and is liable to the serious objection that it interferes with State legislation. If Congress can, however, under its implied power, protect and foster this currency by such means as destructive taxation on state bank circulation, it seems strange, indeed, if it cannot adopt the more appropriate and the more effectual means of declaring these notes of its own issue, for the redemption of which its faith is pledged, a lawful tender in payment of debts.

But it is said that the law is in conflict with the spirit, if not the letter, of several provisions of the Constitution. Undoubtedly, it is a law impairing the obligation of contracts made before its passage. But while the Constitution forbids the States to pass such laws it does not forbid Congress. On the contrary, Congress is expressly authorized to establish a uniform system of bankruptcy, the essence of which is to discharge debtors from the obligation of their contracts; and in pursuance of this power Congress has three times passed such a law, which

in every instance operated on contracts made before it was passed. Such a law is now in force, yet its constitutionally has never been questioned. How it can be in accordance with the spirit of the Constitution to destroy directly the creditor's contract for the sake of the individual debtor, but contrary to its spirit to affect remotely its value for the safety of the nation, it is difficult to perceive.

So it is said that the provisions, that private property shall not be taken for public use without due compensation, and that no person shall be deprived of life, liberty or property, without due course of law, are opposed to the Acts under consideration.

The argument is too vague for my perception by which the indirect effect of a great public measure, in depreciating the value of lands, stocks, bonds, and other contracts, renders such a law invalid as taking private property for public use, or as depriving the owner of it without due course of law.

A declaration of war with a maritime power would thus be unconstitutional, because the value of every ship abroad is lessened twenty-five or thirty per cent., and those at home almost as much. The abolition of the tariff on iron or sugar would in like manner destroy the furnaces; and sink the capital employed in the manufacture of these articles. Yet no statesman, however warm an advocate of high tariff, has claimed that to abolish such duties would be unconstitutional as taking private property.

If the principle be sound, every successive issue of government bonds during the war was void, because by increasing the public debt it made those already in private hands less valuable.

This whole argument of the injustice of the law—an injustice which, if it ever existed, will be repeated by now holding it wholly void; and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National Legislature.

Upon the enactment of these legal tender laws they were received with almost universal acquiescence as valid. Payments were made in the legal tender notes for debts in existence when the law was passed, to the amount of thousands of millions of dollars, though gold was the only lawful tender when the debts were contracted. A great if not larger amount is now due under contracts made since their passage, under the belief that these legal tenders would be valid payment.

The two houses of Congress, the President who signed the bill, and fifteen state courts, being all but one that has passed upon the question, have expressed their belief in the constitutionality of these laws.

With all this great weight of authority, this strong concurrence of opinion among those who

have passed upon the question, before we have been called to decide it, whose duty it was as much as it is ours to pass upon it in the light of the Constitution, are we to reverse their action, to disturb contracts, to declare the law void, because the necessity for its enactment does not appear so strong to us as it did to Congress, or so clear as it was to other courts?

Such is not my idea of the relative functions of the legislative and judicial departments of the government. Where there is a choice of means the selection is with Congress, not the court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the Legislature and not for the court to determine. In the case in *Wheaton*, from which I have already quoted so fully, the court says that "where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the Judicial Department, and to tread on legislative ground. This court disclaims all pretenses to such a power." This sound exposition of the duties of the court in this class of cases, relieves me from any embarrassment or hesitation in the case before me. If I had entertained doubts of the constitutionality of the law, I must have held the law valid until those doubts became convictions. But as I have a very decided opinion that Congress acted within the scope of its authority, I must hold the law to be constitutional, and dissent from the opinion of the court.

I am authorized to say that *Mr. Justice Swayne* and *Mr. Justice Davis* concur in this opinion.

Overruled—12 Wall., 457.
Cited—8 Wall., 568; 12 Wall., 458, 530, 553, 569, 570-574, 577, 590, 600, 615, 634, 648, 662, 663, 677; 15 Wall., 198; 66 U. S., 754; 3 Cliff., 392; 2 Wood, 480; 1 Dill., 249; 8 Bank. Reg., 407; 17 Blatchf., 248; 66 Ill., 488; 53 Ill., 369, 389; 69 Ill., 76; 73 Ill., 423; 62 N. Y., 67, 60, 61; 69 N. Y., 600; 16 Minn., 139, 140, 141; 23 Minn., 101; 8 Am. Rep., 355 (44 Va., 356); 14 Am. Rep., 287 (65 N. Y., 423); 20 Am. Rep., 40 (86 Ill., 435); 32 Am. Rep., 778 (47 Wis., 560), 21 Mich., 575.

JOHN A. MCGLYNN, Executor of D. C. BRODERICK, Deceased, *Plff. in Err.*,

v.

EMILY W. MAGRAW, Administratrix of HENRY S. MAGRAW, Deceased.

(See S. C., 8 Wall., 639, 640. *Note*.)

Hepburn v. Griswold, *ante*, p. 514, *followed*

The principles of the decision rendered in *Hepburn v. Griswold*, *ante*, 514, govern this case.

[No. 3 of Dec. Term, 1867.]
Argued Jan. 22, 1868. Decided Feb. 7, 1870.

IN ERROR to the Supreme Court of the State of California.

This case arose upon a petition filed in the Probate Court of San Francisco, by the defendant in error, to compel the payment in coin of a certain debt due before the passage of the

Legal Tender Act. A decree having been entered in said court for the payment of said debt in United States gold coin, the respondent took an appeal to the Supreme Court of the State, by which court the said decree was affirmed; whereupon the respondent sued out this writ of error.

The case is further stated by the court.

Messrs. J. M. Carlisle and W. W. Cope, for plaintiff in error:

It will be maintained that "The Legal Tender Act was within powers of Congress conferred by article 1, sec. 8, subd. 18, of Constitution."

It is settled, that in the choice of means to carry into effect its powers expressly granted, Congress is not restricted to those which are absolutely essential, but may select those which are useful or conducive to the end or calculated to effect the object. And Congress is the sole judge of the degree of necessity or expediency.

McCulloch v. Md., 4 Wheat., 316; *U. S. v. Fisher*, 2 Cranch, 358.

Nor is it necessary even that the power to be exercised should be necessary to the execution of any single one of the powers expressly granted. It may result from the aggregate powers of the government. Such is the power to sue and make contracts, the power to acquire territory, etc.

The power to issue notes or bills of credit and make them a legal tender in payment of debts, was a well known expedient of governments in time of emergency. It was a common practice of the American Colonies before the Revolution.

See *Craig v. Mo.*, 4 Pet., 410; *Briscoe v. Bank*, 11 Pet., 257; and *Darrington v. Bank*, 13 How., 12.

The Continental Congress also issued bills of credit, and recommended that the States should make them a legal tender, which some of them did.

So in the wars of the French Revolution, the *assignats* were made a legal tender by law.

In England, during the long wars that followed the French Revolution, specie payments were suspended by the Bank of England by authority of law, and so remained for over twenty years, and the notes of that bank were made in effect a legal tender, and speculating in coin was forbidden by law.

It is seen that long, protracted and expensive wars could not be conducted by governments in modern times on cash principles, and have often required the issue of legal tender bills of credit, as a means of conducting them successfully. This must surely, then, be considered an appropriate means to that end.

There is nothing in the Constitution to conflict with the power claimed. It cannot be said that the aggregate sentiment of the framers of the instrument was against the exercise of the power when necessary.

In practice, the construction of the Constitution has been settled the other way. Treasury notes, which are nothing but bills of credit, have been issued repeatedly during a period of of fifty years without objection, the first issue having been approved by Mr. Madison himself.

See Acts of Feb. 25, 1813; Mar. 4, 1814; Dec. 26, 1814, Oct. 12, 1837; Jan. 31, 1842; Aug. 31, 1842, July 22, 1846; Jan. 28, 1847; Dec. 22, 1857, etc., etc.

It has been decided that Treasury notes may be made a legal tender in payment of debts of the United States. *Thorndike v. U. S.*, 2 Mas., 1.

It has been decided that Congress may, under the power to borrow money, declare U. S. stocks and securities exempt from taxation, in order to add to their value.

People v. Commissioners, 2 Black, 620 (67 U. S., XVII., 451).

There is no reason why, for the same object, the Treasury notes may not be made legal tenders.

The prohibition in the Constitution clearly applies to the States alone.

See the cases of *The Bank v. Van Dyck*, and *Meyer v. Roosevelt*, 27 N. Y., 400; *Hintrager v. Bates*, 18 Ia., 174; *Lick v. Faulkner*, 25 Cal., 404; *Schollenberger v. Brinton*, 3 Am. Law Reg. (N. S.), 591; *Schoenberger v. Watts*, 1 Am. Law Reg. (N. S.), 553; *Warnibold v. Schlicting*, 16 Ia., 243.

Mr. J. A. Wills, for defendant in error.

Mr. Chief Justice Chase delivered the opinion of the court.

In this case a claim was preferred by petition in the Probate Court of the City of San Francisco, upon a note made by Broderick to the petitioner at New York, on the 1st of July, 1858.

The defense set up by the executor was a tender of the amount due, in United States notes.

To this it was answered that the executor had collected the debts due to the estate in coin, and was bound as trustee to pay the coin thus collected, to the creditors; and further, that the debt was contracted prior to the passage of the Legal Tender Act, and could, therefore, be satisfied only in coin, according to the terms of the contract.

Judgment was rendered in favor of the petitioner, and the judgment was affirmed by the Supreme Court of the State.

It is not necessary now to examine the several questions presented by the record, for that the principles of the decision just rendered require the affirmation of the judgment of the Supreme Court, and that it is accordingly affirmed.

THE STATE OF TEXAS, Compt.,

v.

GEORGE W. WHITE, JOHN CHILES,
GEORGE W. STEWART, ET AL.

Order that defendant pay into court the proceeds of property in suit, received by him pending the suit, for plaintiff's use.

Where the decree of this court required a defendant to restore certain bonds or make good their proceeds, and payment of the bonds has been received by him pending the suit, he will be ordered to pay into court the amount so received by him for the use of the plaintiff.

[No. 4. Original.]

Argued Feb. 4, 1870. Decided Feb. 7, 1870.

ON MOTION.

The case is sufficiently stated by the court. See, also, the report of the decision of this case on the merits, *ante*, 227.

Mr. Geo. W. Paschal, in support of the motion.

Mr. James Hughes, contra.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion in behalf of the complainant for an order upon the defendant, Stewart, to pay the amount of the money received by him pending the litigation, into court.

The decree in this cause heretofore rendered, found that the complainant was entitled to recover certain bonds and coupons, and any proceeds thereof which had come into the possession or control of the defendant, with notice of the equity of the complainant; and further that the defendant, Stewart, was accountable to the complainant to make restitution of four of said bonds, numbered 4230, 4231, 4235 and 4236, with the coupons attached, or make good the proceeds thereof.

The decree as to Stewart was rendered *pro confesso*, and a motion was made to set it aside, and for a new hearing, on the ground that the proceeds of the bonds were paid to him before serving of process; but on consideration, the court being satisfied that the payment of the bonds was received by him pending the litigation, and though before service of process on him, with notice of the equity of the complainant, denied the motion.

Upon the principle of this decision the complainant is entitled to the order for which the motion asks, and it will be allowed.

The clerk is directed to ascertain the amount received by the defendant, Stewart, which amount the defendant is required to pay into court, for the use of the complainant, within thirty days from the date of this order, Feb. 7, 1870.

THE STATE OF TEXAS, *Complainant*,

v.

GEORGE W. WHITE, JOHN CHILES
ET AL.

Defendant who has received payment of bonds in suit, pending the suit, ordered to show cause why he should not pay the amount so received to the clerk, for plaintiff—practice on such motion.

Where this court has decreed that defendant restore certain bonds to plaintiff, or make good their proceeds, and defendant has received payment of
See 8 WALL. U. S. BOOK 19.

the bonds, pending the litigation, a rule *nisi* ordered to issue, that defendant show cause why an order should not be made requiring him to pay the amount so received by him, to the clerk, for plaintiff.

Motions for such rule should generally be accompanied by an affidavit verifying the facts on which they are grounded, but where due notice has been given to defendant, and he has appeared and admitted that he has received the amount and stated that he is ready to answer on the merits, the court will grant the rule *nisi*, giving leave to the parties to file their affidavits on the hearing.

[No. 4, Original.]

Argued Nov. 11, 1870. Decided Nov. 11, 1870.

ON MOTION

The case is stated by the court.

See, also, the report of the decision of this case on the merits, *ante*, 237.

Mr. T. J. Durant, in support of the motion.

Mr. A. G. Riddle, contra.

Mr. Justice Clifford delivered the opinion of the court:

Responsive to the motion submitted by T. J. Durant in this case: Ordered, that a rule *nisi* issue to George W. Paschal, returnable on Friday next, to show cause, if any, why the rule prayed in the motion shall not be granted—that he, the said Paschal, pay to the clerk of this court for the benefit of the complainant, the sum of \$47,325, gold, received by him in behalf of the complainant in said cause, as alleged in the pending motion.

Motions for such a rule ought regularly to be accompanied by an affidavit verifying the facts on which they are grounded, and when not so supported, they will not in general be entertained by the court for affirmative action, but the docket entries and papers in the case show that due notice was given to the respondent before the hearing; and inasmuch as the respondent appeared by counsel and admitted that he had received the amount alleged in the motion, and expressed through his counsel his readiness to answer the motion upon the merits, the court think it proper to grant the rule *nisi*, giving leave to the parties respectively to file, at the hearing on the rule now ordered, such affidavits, pertinent to the issue involved in the rule, as they shall be advised are necessary to the present inquiry.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

DECEMBER TERM, 1869.

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THE DECISIONS OF THE Supreme Court of the United States,

AT
DECEMBER TERM, 1869.

MICHAEL REESE, *Plff. in Err.*,

v.
UNITED STATES.

(See S. C., 9 Wall., 13-22.)

Sureties in recognizance, how far bound—what postponement will discharge—arrest of bail by principal.

Where a condition of recognizance is that defendant shall appear at the next regular term and at any subsequent term of the court, the sureties therein are not bound for his appearance at a term, years later.

A stipulation to postpone the trial until after the final disposition of other cases, was inconsistent with the condition of the recognizance and discharged the sureties.

Liability of sureties on a recognizance is limited to the precise terms of their contract.

Any change in the contract made by the principals, without the assent of the sureties, discharges them; nor does it matter how trivial the change, or even that it may be of advantage to the sureties.

The power of arrest by bail, of their principal, can only be exercised within the territory of the United States.

Where the government has consented that a defendant in a criminal action might depart out of the territory of the United States to a foreign country, beyond the reach of his bail, and remain abroad for an indefinite period, without the concurrence or even knowledge of the sureties, they are released.

[No. 8.]

Argued Dec 8, 1869. Decided Jan. 24, 1870.

IN ERROR to the Circuit Court of the United States for the District of California.

NOTE.—When and where bail in criminal cases may arrest principal.

The law supposes the principal to be in the custody of his bail, and the bail or his authorized agent may take him when and where he chooses and detain or surrender him into the custody of the sheriff. *Nicholls v. Ingersoll*, 7 Johns., 145; *Parker v. Bidwell*, 3 Conn., 85; *Meddowcroft v. Sutton*, 1 Bos. & P., 61; *State v. Mahon*, 3 Harr., 568; *Harp v. Osgood*, 2 Hill, 216; *Hawk, P. C. B.*, 2, ch. 15, sec. 3.

If bail, in arresting principal, use unnecessary violence, they are liable for false imprisonment. *Pease v. Burt*, 3 Day, 485.

The bail has a right, at his own discretion, to arrest his principal and to deliver him to the custody of the magistrate before whom the bail was entered. *State v. Lazarre*, 12 La. Ann., 166; *State v. LeClerc*, 1 Bailey, 470; *Com. v. Bronson*, 14 B. Mon., 361; *Milburn, Ex parte*, 34 U. S. (9 Pet.), 704.

Where private individual arrests one under bail for crime without any deputation or authority in writing, the arrest is illegal and does not discharge the recognizance. *People v. Moore*, 2 Doug., 1.

See 9 WALL.

This action was brought in the court below by the defendant in error, upon a recognizance for the appearance of a certain defendant in indictment. Judgment having been given by that court for the plaintiff, the defendant sued out this writ of error.

The case is fully stated by the court.

Mr. E. Casserly, for plaintiff in error:

Even though the recognizance was, when taken, a valid obligation, yet the sureties were discharged by matters subsequently arising out of the written stipulation for a postponement of the criminal actions against their principal, Limantour, for a long and uncertain period, made without their knowledge or privity in any way, between him and the United States, August 24, 1857, and then entered as an order of court; and by the circumstances connected with the same.

It was fully understood among the parties to the stipulation, that if it (the stipulation) should be entered into, Limantour and his witnesses would return to Mexico, and would remain there until the several cases in the United States District Court were finally disposed of; and in case the criminal actions against him were to be brought on for trial, that Limantour should afterwards have time enough allowed him to notify and get his witnesses, and return with them to San Francisco.

The sureties knew nothing of the stipulation and had nothing whatever to do with it. The

Bail may take their principal in another State; may break open outer door of the house to take him; so, also, may person deputed by the bail. *Nicholls v. Ingersoll*, 7 Johns., 145; *Petersdorf on Bail*, 514; *Com. v. Brickett*, 8 Pick., 138; *Bean v. Parker*, 17 Mass., 591, 604; *Johnson v. Tompkins*, Bald., 578; *U. S. v. Bishop*, 3 Yeates., 37; *Brome v. Hurst*, 4 Yeates, 123; *Read v. Case*, 4 Conn., 166; 8, C., 10 Am. Dec., 110; *Sheers v. Brooks*, 2 H. Bl., 120; *Ex parte Gibbons*, 1 Atk., 238.

Bail may take principal on Sunday or in night. *Com. v. Brickett*, 8 Pick., 140; *Jacob v. Dallo*, 6 Mod., 230.

The court has not the power to compel a continuance of the responsibility against the express dissent of the bail. *People v. Clary*, 17 Wend., 373.

If the defendant is indicted and arrested upon a warrant before a default of appearance, it is equivalent to a surrender, and bail are discharged. *People v. Stoger*, 10 Wend., 431.

Surrender of principal after forfeit of recognizance does not discharge surety, though court may receive a surrender and remit penalty in whole or in part. *Com. v. Johnson*, 3 Cush., 454.

entire transaction was between the parties to the criminal actions, the United States and Limantour.

When Limantour was in court, in August, 1857, ready and pressing for trial, he had fulfilled his obligation on the recognizance, both to the government and to his sureties. Had the trial gone on, the liability of his sureties would doubtless have ended there.

As matter of law, the sureties were discharged by the transaction for the postponement to which they were no parties, and from which, as a natural sequence, the other results followed.

Rees v. Berrington, 2 Ves., Jr., 540; 3 Lead. Cas. Eq., 817; Eng. Note, 819; Am. Notes, 859, and cases cited; Theob. Prin. & Sur., sec. 152; as to bail, *Id.*, 220, and numerous cases cited; Burge, Surety, 208, and cases cited.

It is not material whether inquiry results or not, and although the surety be benefited, he has a right to stand upon his contract.

Burge, Surety, 208, and cases in *n. c.*; *Rees v. Berrington*, 3 L. Cas. Eq., 817; Am. Notes, 560, and cases cited; *Rees v. Berrington*, 2 Ves., Jr., 548, cited and approved in *Ruthbons v. Warren*, 10 Johns., 595.

A fortiori, it is not necessary to show that the surety was damaged. It is enough if he might have been.

Bowmaker v. Moore, 7 Price, 231; and see Theob. Prin. & Sur., sec. 155.

Indeed, the rule is on principle, that the surety is discharged whenever the new agreement is made and before an actual result.

3 Lead Cas. Eq., Am. Notes, 550, and cases cited; *Bowmaker v. Moore*, 7 Price, 233; Burge, Surety, 205, and cases in *n. a.*

During that interval the plaintiff, by the stipulation, was disabled from retaking Limantour, and the rule appears to be that as the right of the ball is merely derivative they cannot retake whenever the plaintiff cannot. This is decided or assumed in the English cases. Theob. Prin. & Sur., sec. 220, and the cases cited.

Had the stipulation done nothing more than that it induced the principal to leave the State, the ball would have been exonerated.

Ruthbons v. Warren, 10 Johns., 595, and see Chancellor's opinion, 589; *Niblo v. Clark*, 3 Wend., 24; S. C., on error, 6 Wend., 236; *Bowmaker v. Moore*, 7 Price, 223; S. C., 8 Price, 214; *King v. Baldwin*, 17 Johns., 391, and see authorities cited *supra*, sac 5, p. 41.

Messrs. E. R. Hoar, Atty-Gen., and *W. A. Field, Asst. Atty-Gen.*, for defendant in error:

The postponement of the trial until this appeal was disposed of, was a very proper exercise of the power of the court, provided the accused waived his right to a speedy trial and assented to the postponement. In this act we do not perceive any ground upon which the bail can claim exemption from liability on their recognizance. They were not bound to continue as sureties any longer from this circumstance than without it. They could have surrendered the defendant at any time afterwards and been exonerated. In the theory of the law, he was in their custody as jailers of his own choosing, subject to be surrendered at any moment. If they failed to exercise their power over him, they must bear the responsibility attached to the position they voluntarily assumed

Mr. Justice Field delivered the opinion of the court:

In December, 1856, Jose Y. Limantour was indicted at San Francisco by the Grand Jury of the Circuit Court of the United States, for uttering and publishing as true—to the Board of Land Commissioners created under the Act of March 3, 1851, to ascertain and settle private land claims in the State of California—a false writing, purporting to be a grant of certain described lands in California from the Mexican Governor, with intent to defraud the United States, knowing the same to be false. To this indictment Limantour appeared and pleaded not guilty. He was then admitted to bail on motion of his counsel, the amount being fixed, by order of the court, at \$30,000.

Soon after the issue was thus joined, a motion was made on the part of the United States, to set the case for trial early in January, 1857. This motion was resisted, and at the same time application was made on the part of Limantour for a continuance of the cause, and in support of the application his affidavit was read, in which he asserted the genuineness of the grant alleged by the United States to have been forged, and that it was made at the time and by the officers as averred by him. For alleged perjury in making this affidavit, the grand jury soon afterwards found a second indictment against him. To this indictment he also appeared and pleaded not guilty, and upon the motion of his counsel was admitted to bail, its amount being fixed at \$5,000.

By order of the court, the recognizance of bail was taken in one instrument, the obligation of the sureties being the amount required in both cases. The defendant, Michael Reese, and one Manuel Castro, became the sureties of Limantour, binding themselves jointly and severally in the sum designated. It is upon this recognizance that the present action was brought. It recites the finding and presentment of the two indictments, the commitment of Limantour thereon, and the order of the court for his discharge on furnishing the required bail, and with condition that Limantour shall personally appear at the next regular term of the circuit court to be held in the City of San Francisco, and at any subsequent term to be thereafter held in that city, to answer all such matters and things as shall be objected against him, and to abide the order of the court, and not to part therefrom without leave first obtained. This recognizance is dated the 5th of February, 1857.

At the subsequent term of the circuit court, in August of that year, Limantour appeared and was ready and pressing for trial in both cases, with witnesses brought in attendance from the City of Mexico. The District Attorney thereupon moved for a postponement of the trials. At this time two cases of Limantour, for land claimed under alleged Mexican grants, were pending in the District Court of the United States, on appeal from decrees of the Land Commissioners, by whom the claims had been confirmed. One of the cases was for a claim under the alleged forged grant. The witnesses in attendance were persons who were brought from Mexico to testify in the land cases, and they were obliged to return without delay. It was, therefore, stipulated between the District

Attorney and the counsel of Limantour on the one side, that the postponement desired by the government should be assented to; and on the other side, that neither of the criminal actions should be brought to trial until after final decrees had been rendered in the two land cases by the district court; and if both or either of the decrees were in favor of the claimant, the criminal actions should be dismissed by the United States, but if the decrees were adverse to the claimant, reasonable time should be given him to prepare for the trial of the criminal actions and to procure the attendance of such of his witnesses as resided without the State of California. The stipulation was entered upon the minutes of the court, and the postponement desired was granted by order of the court, in accordance with its terms.

It was proved at the trial without objection, that it was fully understood by all parties at the time, that if the stipulation should be made, Limantour and his witnesses would return to Mexico and remain there until the civil cases in the United States District Court were finally disposed of, and that Limantour should afterwards have time enough allowed him to notify and get his witnesses and return with them to San Francisco.

The result was that the witnesses of Limantour returned at once to Mexico, and after two or three months' delay, Limantour followed them and never returned to California.

The sureties on the recognizance had nothing to do with the stipulation in any way, and had no knowledge of it.

In November, 1858, the district court, by its decree, rejected the claims of Limantour in both of the land cases, and soon after the District Attorney moved that the criminal actions be set for trial. After repeated adjournments, the motion was finally argued and decided in March, 1859, and on the 26th of that month, the cases were set for trial on the 25th day of April following. On this latter day the two actions were called, and Limantour was called in both, but he did not appear in either of them, and thereupon an order was entered, forfeiting the recognizance of bail.

As a defense to the action the defendant relied in the circuit court upon several grounds, the principal of which were these:

First. That the acts charged in the two indictments did not, at the time of their alleged commission, constitute any offense under the laws of the United States; and, as a consequence, that the indictments and all proceedings thereunder, including the requiring of bail for the appearance of the party indicted, were void.

Second. That if the indictments and proceedings thereunder were not void, the stipulation of August, 1857, for a postponement of the trials, released the sureties from liability on their recognizance; and,

Third. That the recognizance was void in embracing the amount required as bail upon both indictments.

The third ground here stated is not pressed in this court. The other two grounds are substantially the same which are urged here, differing only in their form of statement. Upon the first of these we express no opinion. Upon the second we are of opinion that the circuit

court erred, and for reasons which may be briefly stated.

The condition of the recognizance provided for the personal appearance of Limantour at the next regular term of the Circuit Court in San Francisco, and also at any subsequent term to be thereafter held in that city. It has been suggested that the provision for the appearance of the party at any term subsequent to that succeeding his arrest is unusual and invalid; but we do not pass upon the suggestion, and for the purposes of this case we shall treat the recognizance as unobjectionable in form. At the next regular term after its execution the party personally appeared with his witnesses and pressed the trial of the indictments. The first portion of the condition of the recognizance was thus complied with. The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. It was inserted to obviate the necessity of renewing the bail every time the cases were, from any cause, continued from one term to another. It was not intended to apply to any distant future term to which either party might be disposed to postpone the trials without reference to any intervening term. The principal and sureties by their recognizance covenanted with the United States that the principal should appear before the court and answer all such matters as might be objected against him at the next term, and from term to term until the cases were disposed of; not that he should appear at the next term, and then at a term years later, depending for its designation upon the happening of a contingent event.

The stipulation in this case was for a postponement of the trial of the criminal actions for a period of uncertain duration; until final decrees should be rendered by the District Court of the United States in certain cases pending on appeal from the Board of Commissioners created under the Act of March 3, 1851, to ascertain and settle private land claims in the State of California. Cases on appeal from that Board were not heard upon the record transmitted to the court, and therefore were not subject to be disposed of whenever they could be argued. They were tried anew upon the testimony and proceedings had before the board, and such further testimony as might be produced by the parties in the district court. *U. S. v. Ritchie*, 17 How., 538 [58 U. S., XV., 238]; *Griser v. McDowell*, 6 Wall., 375 [73 U. S., XVIII., 866]. The proceedings in the court advanced slowly when new testimony was produced, as it was required to be taken in writing and by question and answer. Independent of this circumstance it was difficult to anticipate the period which any case, meeting with opposition and seriously contested, would occupy. The difficulty of determining in advance the duration of litigated proceedings, which exists in all cases, was increased with respect to Mexican land cases, appealed from the board to the District Court of the United States, by a variety of causes; among others, from the manner in which the testimony was taken, as already stated; the necessity of looking into the archives of the former department of California, and sometimes of the Supreme Gov-

ernment at the City of Mexico; of examining Mexican witnesses, ignorant of our language, and of interpreting Mexican and Spanish usages, ordinances and laws. In the cases of the City of San Francisco and of the City of Sonoma, 8 Wall., 684 [70 U. S., XVIII., 115], the appeals were pending in the district court for over eight years. These cases of Limantour involved lands, in the City of San Francisco and adjoining it, covered with buildings and expensive and permanent improvements, which were of the value of many millions. His claims were, for this reason, as well as their supposed fraudulent character, vigorously contested, not only by the United States, but by citizens of San Francisco, acting in concert with the district attorney. A final disposition of them until after the lapse of many months, and perhaps of several years, could not, therefore, have been reasonably anticipated.

The stipulation to postpone the trials until after such final disposition, was inconsistent with the condition of the recognizance. It released Limantour from the obligation of appearing at any subsequent term following the then next term in regular succession. It substituted for it an agreement that he need not appear at any such subsequent term, but only at such term as might be held after the happening of an uncertain and contingent event. The stipulation, in other words, superseded the condition of the recognizance.

This will readily appear if we consider the condition, which, subsequent to that stipulation, must have been exacted in a new recognizance, if the sureties on the present recognizance had surrendered their principal. It could not have been for the appearance of the defendant at the next regular term thereafter, or any succeeding term, for such a condition would have been inconsistent with the stipulation. It could only have been for his appearance at such term as might be designated by the district attorney or the circuit court, after the final decrees were rendered by the district court in certain land cases pending therein on appeal from the Board of Land Commissioners; provided always, that such decrees were against the claimant; and provided further, that the term designated allowed reasonable time to the defendant to prepare for trial, and to procure the attendance of witnesses residing out of the State. It requires no argument to show that a condition like this would be a very different one from that embodied in the existing recognizance.

If, now, we apply the ordinary and settled doctrine, which controls the liabilities of sureties, it must follow that the sureties on the recognizance in suit are discharged. The stipulation, made without their consent or knowledge, between the principal and the Government, has changed the character of his obligation; it has released him from the obligation with which they covenanted he should comply, and substituted another in its place.

It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are dis-

charged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking.

There is also another view of the stipulation which leads to the same result. By the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is, in point of fact, in this country at least, subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court and, to the extent necessary to accomplish this, may restrain him of his liberty. This power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent. There is also an implied covenant on the part of the Government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him.

The stipulation in this case was made with the distinct understanding of the parties, that upon its execution Limantour and his witnesses would return to Mexico, and would remain there until the civil cases in the district court were finally disposed of, and that he should afterwards have time allowed him to obtain his witnesses and return to this country with them. The Government thus consented that Limantour might depart out of the territory of the United States to a foreign country, where it would be impossible for the bail to exercise their right to arrest and surrender him; and further, it consented that he might remain abroad for a period of indefinite duration. This was all done without the concurrence or even knowledge of the sureties, whose risks were thus greatly increased.

It would be against all principle and all justice to allow the Government to recover against the sureties for not producing their principal, when it had itself consented to his placing himself beyond their reach and control. *Rathbone v. Warren*, 10 Johns. 587, 589; *Niblo v. Clark*, 3 Wend., 24, 27; S. C., on error, 6 Wend., 236, 245; *Bowmaker v. Moore*, 7 Price, 228, 231, 234; S. C., 3 Price, 214.

The judgment of the Circuit Court must be reversed, and the cause remanded for a new trial, and it is so ordered.

Cited—4 Sawy., 638; 36 Wis., 563.

RICHARD H. MCGOON, *Plff. in Err.*,

v.

SAMUEL H. SCALES.

(See S. C., 9 Wall., 23-32.)

U. S. land not taxable—Wisconsin Statute of Uses—passive trusts—judgment not collaterally questioned—when appearance admits jurisdiction—judicial sale not invalidated by reversal of judgment—state decision.

Land owned by the United States is not subject to state taxation.

In Wisconsin, by the Statute of Uses and Trusts, passive trusts are abolished.

The deed or instrument by which a passive trust is created, or attempted to be, takes effect as a conveyance directly to the *cestui que trust*, in whom the legal title vests, and the trustee acquires no estate or interest whatever.

Land held under a passive trust is liable to be subjected to judicial sale for the debts of the *cestui que trust*.

If a court had jurisdiction to render the judgment which it did, no error in its proceedings will render the judgment void; nor can such errors be considered, when the judgment is brought collaterally into question.

Where parties appeared and contested a suit, they cannot deny a jurisdiction to which they voluntarily submitted.

A State can pass laws to subject the lands of a corporation, whose charter has expired, to the debts which it owes to the citizens.

Where a sale was made under a judgment while it was in force, to one who was no party to the suit, the reversal of the judgment cannot affect the purchaser.

State decision as to amendment of an execution issued under its laws, controls this court.

[No. 92.]

Argued Nov. 30, 1869. Decided Jan. 24, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

An action of ejectment was brought in the court below, by the plaintiff in error, which resulted in judgment for the defendant. The plaintiff thereupon sued out this writ of error.

The case is further stated by the court:

Messrs. William P. Lynde, M. M. Cothren, Henry S. Magoon and J. M. Carlisle, for plaintiff in error:

By virtue of Hezekiah H. Gear's trust deed to James Campbell, dated Nov. 2, 1842, grantee, Campbell, became clothed with the whole estate in law and equity, subject only to the execution of the trust.

The sales under Corwith's execution were void, being without seal; and the purchaser had a perfect remedy against Corwith, the execution creditor, for the purchase money and interest.

NOTE.—Title and transfer by deed or devise governed by *lex loci rei sitæ*, see note to *Clark v. Graham*, 19 U. S. (6 Wheat.), 577; note to *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.), 152; note to *Darby v. Mayur*, 23 U. S. (10 Wheat.), 466, and note to *Jackson v. Chew*, 25 U. S. (12 Wheat.), 153.

Sale of land for taxes—strict compliance with statute necessary. See note to *Williams v. Peyton*, 17 U. S. (4 Wheat.), 77.

See 9 WALL.

"All writs, * * * shall be sealed with the seal of the court from which the same may issue."

Wis. R. S., 1849, p. 493; see *Ins. Co. v. Hallock*, 6 Wall., 556 (73 U. S., XVIII, 948).

The sheriff's deed to defendant, Scales, being executed more than two years after issue joined, made it incumbent on defendant to give notice before trial by proper plea or answer, that he would read the same in evidence.

The defendant and his alleged assignor, Earnest, being purchasers with notice, also being indemnified, by statute and by Corwith, from all loss, are entitled to no protection and could acquire no title, upon the judgment subsequently reversed.

The sheriff's deed to defendant, Scales, based upon a judgment that had been reversed twelve years before, was absolutely void. The Corwith judgment was rendered Oct. 20, 1854, and reversed Nov. 17, 1855. The sheriff's deed to Scales was not executed until Mar. 17, 1868.

All judgments in Wisconsin cease to be a lien in ten years from docketing.

There was no legal evidence of any assignment by Earnest to Scales, of the certificate of sheriff's sale. There was no such corporation as the "State Bank of Illinois," and the court never acquired jurisdiction of the Corporation named the "President, Directors and Company of the State Bank of Illinois," said Corporation having expired before Corwith's suit was begun. The two Acts of the Wisconsin Legislature, July 12, 1853, and March 23, 1864, in so far as they seek by legislation to divest granted estates, and impair the obligation of contracts, are unconstitutional.

Martin v. Water Power Co., 27 How. Pr., 161; *Green v. Biddle*, 8 Wheat., 1; *Bronson v. Kinzie*, 1 How., 311.

Mr. Matt H. Carpenter, for defendant in error:

Hezekiah H. Gear had no title to the land in question, when he made his quitclaim deed therefor to the plaintiff in error, because the moment he acquired the fee from the United States by the patent dated Sep. 1, 1852, that title either vested in James Campbell, under the covenants in the trust deed made by Gear, Nov. 19, 1842, or in the State Bank of Illinois, in virtue of the Statutes of Wisconsin upon the subject of uses and trusts above recited; or that fee vested in the bank under Gear's covenants in his prior mortgage to the Bank.

If the fee vested in Campbell under the covenants in Gear's trust deed to him, then he took and held that fee for the uses and upon the trusts and conditions contained in the deed, by which he had any right or title as trustee. The great and important one was, that he should sell and convey the lands therein described, for such sums as the bank should direct. Without such direction, he had no power whatever to sell or convey.

The execution sale made in July, 1855, and the sheriff's deed thereon, passed all the interest and title of the Bank to the land in question to the defendant in error; whether legal or equitable, and whether acquired by estoppel or rebutter, under Gear's covenants in his mortgage to the bank, or in his deed of trust to Campbell, is immaterial. And this as well by the Statutes of Wisconsin

Act approved July 12, 1853, Sess. L., p. 102; and the same Act perfected in the Sess. Laws of 1854, pp. 48, 51, as by Rev. Stat. of 1859, p. 542, sec. 65; Rev. Stat. 1858, p. 788, sec. 37.

If the title was merely equitable, which the defendant, Scales, acquired under the execution sale with the legal title in James Campbell, by virtue of the deed of trust to him from Gear, then the sole power, once vested in the bank, was vested in the defendant Scales, to direct the sum for which the lands in question could or should be sold or conveyed by Campbell to McGoon, the plaintiff, or to anyone else, as there is no pretense that the defendant, Scales, even gave any direction to Campbell to sell or convey the land. This exhausts all the evidence of title in the plaintiff in error, except the quitclaim from LaFayette County, based on the tax deed. No title passed by that deed, as the land in 1847 belonged to the United States and was not subject to taxation. After this year and in 1851, the land was purchased by Gear, and he got his patent therefor in 1852.

The land lying in the State of Wisconsin, could only be lost or acquired as provided by the laws of that State. Those laws provided that the land in question might be attached and sold on execution, and upon the sale being completed by the execution of a deed by the officer making the sale, or by his successor in office, the statute declares that "The grantee in such deed shall be deemed vested with the legal estate from the time of the sale on such execution, for the purpose of maintaining an action for any injury to such real estate."

This sale to Earnest, the assignor of the sheriff's certificate of sale, was sustained by the Supreme Court of Wisconsin.

Corwith v. State Bk. of Ill., 18 Wis., 565; *Vide*, also, S. C., 15 Wis., 289, and S. C., 8 Wis., 376.

Were it conceded that the sheriff's deed to the defendant, Scales, did not relate back to the sale for title, yet as it was made before trial, the deed was evidence of the title in the defendant, and it was a title which he, to protect his possession, might have bought, with certificate of sale included, after this action was commenced.

Tucker v. Keeler, 4 Vt., 163; *Jackson v. Given*, 8 Johns., 140; *Jackson v. Smith*, 13 Johns., 418.

Mr. Justice Miller delivered the opinion of the court:

This was an action of ejectment brought by the plaintiff in error, and both he and the defendant trace their title from Gear, who is grantee of the United States. The record contains a bill of exceptions of many pages, setting forth with minuteness the evidence on which both plaintiff and defendant relied, and the ruling of the court on thirty prayers by the plaintiff for instruction to the jury, to every one of which there is an exception, and also to divers rulings concerning the admission of evidence.

It is unnecessary and unprofitable to notice all this, and the shortest and most satisfactory mode of showing the reasons for our judgment is to examine the title of defendant, which the jury were told was the true one.

On the 2d of November, 1842, Gear and wife conveyed the land in question to James Camp-

bell as trustee of the State Bank of Illinois, the land being in Wisconsin Territory, and through the patent from the United States issued to Gear ten years later, it is conceded by both parties that its effect was to make good the title conveyed to him by Campbell. In 1853, Henry Corwith commenced a suit in the State Court of Wisconsin against the State Bank of Illinois, and attached these lands. In this action he recovered a judgment under which the lands were sold to James H. Earnest, who transferred for value his certificate of purchase to the defendant. After many efforts in the state courts to set aside this sale, it was finally affirmed in the Courts of Wisconsin, including the Supreme Court, and defendant received the sheriff's deed on that sale, on the 17th March, 1868.

If the attachment proceedings conveyed a good title, it must prevail; and we proceed to an examination of some of the objections to it.

1. It is claimed that the land was sold for State taxes in April, 1849, and that the title under that sale became vested in plaintiff.

The answer to this is, that the land was then owned by the United States and was not subject to state taxation, the sale to Gear having been made in 1851, and the patent issued in 1852.

2. It is claimed that at the time the attachment in favor of Corwith was levied on these lands, in his suit against the State Bank of Illinois, they were not subject to attachment and sale for the debts of that institution.

In establishing this proposition it is first asserted that the legal title never vested in the bank.

The deed from Gear to Campbell, in our judgment, did vest the legal title in the Bank after the Act of 1850. It is a principle too firmly established to admit a dispute at this day, that in the law of the State in which land is situated must we look for the rules which govern its descent, alienation and transfer, and for the effect and construction of conveyances.

A Statute of Wisconsin, passed in 1850, abolishes uses and trusts, except as preserved in that Act, and one of its provisions is that, "every person who, by virtue of any grant, assignment or devise, now is, or hereafter shall be, entitled to the actual possession of lands, and the receipt of the rents and profits thereof in law or equity, shall be deemed to have the legal estate therein." Other provisions of the same statute define the only cases in which valid express trusts may be made.

The effect of this statute was to abolish all passive trusts in which the trustee held a mere naked or dry trust for the use of the *cestui que trust*, and to vest the title in the beneficiary. And the only question to be decided in this connection is whether the deed of Gear to Campbell is of this character.

That deed, after reciting that Gear is indebted to the State Bank of Illinois in the sum of \$50,000, to satisfy which the Bank had agreed to take the real estate mentioned in the deed, proceeds to convey the lands to Campbell, who is to stand seised of said premises upon the trust and confidence that they shall be sold by him for such a sum as shall be directed by said Bank, and the proceeds are to be applied, after deducting costs and expenses, to the sole use and benefit of said Bank, and if not sold, then said Campbell is to stand seised to the use of said Bank and its assigns.

The Bank buys the land of Gear for \$50,000, the amount of its debt against Gear, which is thereby satisfied. Campbell does not sign the deed or accept the trust otherwise than by silence. If the land is not sold, he holds the naked legal title to the use of the Bank and its assigns. The only possible event in which he may be called into action is on a sale of the land. It is equally clear, that in this sale the only part to be performed by him was to make conveyance. He is to sell for such sum or sums as shall be directed by the president, directors, etc., of the Bank, and they are to receive the proceeds of sale. In other words, they find a purchaser at such price as they may be willing to take, they receive the purchase money, and Mr. Campbell makes a conveyance. It is difficult to conceive of a more passive trust, or one in which the trustee may be called upon to do less than in this.

A case decided recently by the Supreme Court of Wisconsin is produced to us in manuscript, and much relied on as holding views adverse to those above stated. But we think it supports them. That court says, that "By the Statute of Uses and Trusts passive trusts are abolished. By passive trusts we mean those which are express, or created by the words of some deed or other instrument of writing, and not those arising or resulting by implication of law. Every express passive trust is abolished, and the deed or instrument by which it is created, or attempted to be, takes effect as a conveyance directly to the *cestui que trust* in whom the legal title vests, and the trustee acquires no estate or interest whatever. A conveyance of land from A to B to the use of or in trust for C, the trustee having no active duties to perform, constitutes a passive trust." *Goodrich v. City of Milwaukee*.

We think this is a sound construction of the statute, and that the deed to Campbell comes within it. In the case before the Wisconsin court the trustee was directed to bargain, sell and convey, to lease, demise and mortgage the lands as he might be directed by the *cestui que trust*, and to pay over to her all the moneys arising from said property, whether from rents, sale or mortgage, and take her written receipt therefor, and to re-invest the same from time to time as she should in writing direct.

There can be no doubt that this trust was an active one, and as little that the one before us was not.

But if this were otherwise, a statute of Wisconsin in force when the land was sold under Corwith's judgment declares, that "lands, tenements, and real estate holden by any one in trust for another, shall be liable to debts, judgments, decrees, executions and attachments against the person to whose use they are holden." So that if the trust in Campbell was a valid one, these lands were still liable to be sold on execution for the debt of the Bank. Nor can it be doubted that such a sale, when lawful in all other respects, and completed by the conveyance of the sheriff, vested in the grantee the legal title to the land.

But it is said, secondly, that conceding the title to have been vested in the Bank, that corporation had made a conveyance of the lands, before Corwith's proceedings were instituted, to Uri Manly, John Calhoun, and Nicholas H. Ridgely, for the benefit of the creditors of the Bank and for the payment of its debts.

CHAS. WALL.

There is no question that such a deed was made, nor is it denied that a valid deed of assignment, for the benefit of creditors, generally places the property so assigned beyond the reach of the ordinary process of attachment or execution directed against the property of the assignor.

But the deed in question was a peculiar deed, and made under very peculiar circumstances. For many years before it was made, the Bank had been embarrassed, and several statutes were passed by the Legislature of Illinois for the purpose of enabling and compelling it to close its business and pay its liabilities. The last of these, approved March 1, 1847, required the officers of the Bank, if they should not have closed up its affairs prior to the first day of November, 1848, to turn over to three persons to be named by the Governor all the property, rights and credits of the Bank, when the trustees were to proceed to wind up its affairs. The Governor, under this Act, named Manly, Calhoun and Ridgely as the persons to take charge of the Bank, and on the day before the power of the Bank to act ceased by law, this conveyance we have mentioned was made by order of the Board of Directors. In this deed of conveyance they recited that it was made in pursuance of the Act of March 1, 1847, for the purpose of carrying into effect its provisions, and that it was made to those persons because they had been so appointed by the Governor under the Act.

Under the circumstances it cannot be doubted that the effect of this conveyance is to be measured by the terms of the Act, and that if any of its provisions are in conflict with that Act they must to that extent give way. Now, the very last section of that Act, after the previous sections, and, indeed, previous statutes had fully defined the duties and powers of these trustees, declares expressly that "The real estate of said Bank shall be liable to taxation and sale on execution in the same manner as the property of individuals." So far, then, as this conveyance by the Bank to the trustees affected the liability of these lands to judicial sale for the debts of the Bank, it left them in precisely the same condition they were before, and this whether the deed to Campbell is to be construed as a passive or an active trust, and the title of the Bank under it a legal or an equitable one.

It must, therefore, be taken as established that the land in question was liable to be subjected to judicial sale for the debts of the Bank, and the only remaining question concerns the validity of the proceeding under which this was attempted.

Most of the objections urged under this head relate to the regularity of those proceedings, and many errors are pointed out which are supposed to affect the title acquired under them. But the doctrine of this court, and of all the courts of this country, is firmly established, that if the court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceeding void; nor can such errors be considered when the judgment is brought collaterally into question. With this cardinal principle in mind many of the alleged

errors in the proceeding under the attachment must be disregarded.

There can be no question of the right of the Legislature of Wisconsin to pass such laws as will subject property within her territory, held or owned by non-residents, to the payment of the debts of such owners; and the manner of doing this is also entirely within the legislative control, provided it does not violate some of the provisions of the Federal or State constitutions.

The court in which these proceedings were had was a court of general jurisdiction, and had undoubted authority to attach the property of the Bank for the payment of its debts, and every presumption must be made in favor of the validity of its proceeding not inconsistent with the record.

We will, however, notice a few of the alleged errors which are supposed to touch the point of the court's jurisdiction.

1. It is said that the Bank was dead in law, and that as the suit was instituted against the Bank by name, no jurisdiction was acquired.

It is by no means certain that the Bank had no capacity to sustain a suit, notwithstanding the expiration of its charter and the transfer of its property to trustees. But, however this may be, those very trustees, in whom plaintiff claims that the title was vested, and from whom he derives title by deed, appeared to this suit and moved to dissolve the attachment, and the Bank appeared by attorney and defended the suit. Both must then be bound by these proceedings, and neither can deny a jurisdiction to which they voluntarily submitted.

2. The Legislature of Wisconsin had made provision by special statute for a case in which a bank, whose functions had ceased, but which yet owned property and owed debts in Wisconsin, might be sued and the property subjected to the payment of those debts. The constitutionality of this Act is denied; but no provision of the Constitution of Wisconsin or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a State could not frame laws which would enable her citizens to subject the lands of a corporation whose charter had expired to the debts which it owed to her citizens.

3. It is said that the judgment under which this sale was made was reversed, and this is true.

But the sale was made while the judgment was in force to one who was no party to the suit, and the reversal of the judgment could not, as is well settled, affect the purchaser.

4. It is said the sale was void because made under an execution which had no seal.

The court from which the execution issued permitted it to be amended after sale by affixing a seal. Whether the sale would have been void without the seal, and whether the amendment was rightfully made, were questions of Wisconsin law, and this and all other such questions were decided in favor of the sale by the Wisconsin court on motion to set aside the sale. That decision must control us as to all that concerns the regularity of these proceedings.

As we have examined all that can be said to affect the jurisdiction of the court and the au-

thority of the officer to make the sale, we need inquire no further.

The judgment of the Circuit Court is affirmed.

Cited—10 Wall., 316; 20 Wall., 149; 95 U. S., 746; 96 U. S., 309, 636; 2 Flipp., 599; 23 Mich., 88; 23 Am. Rep., 562, 654 (54 Ind., 430); 34 Am. Rep., 180 (33 Ill., 38).

EDWARD P. BASSETT AND E. H. HARGER, *Piffs. in Err.*,

v.

UNITED STATES.

(See S. C., 9 Wall., 38-41.)

Issue for jury—finding of, when conclusive—question of law and fact—power of court to set aside judgment—recognizance, when valid.

Where the record of a foreign court is denied, the issue is to be tried by a jury.

When a court sits in place of a jury and finds the facts, this court cannot review that finding.

When the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict.

When the existence of a record of the court in which the issue arose is denied, the question is one of law.

A court has power during the same term to set aside a judgment rendered on confession.

Where a judgment by confession rendered on an indictment was set aside, the indictment remained, and the recognizance of the prisoner, and his sureties to appear and answer to it, was valid.

[No. 21.]

Submitted Dec. 14, 1869. Decided Jan. 24, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

This action was brought in the court below, by the defendant in error, upon a recognizance for the appearance of one Olmstead, to answer to an indictment. Judgment having been entered for the plaintiff in that court, the defendants sued out this writ of error.

The case is fully stated by the court.

No counsel appeared in this court for the plaintiff in error.

Messrs. E. R. Hoar, Atty. Gen., and W. A. Field, Asst. Atty. Gen., for defendant in error:

A judgment may be vacated by the court during the same term it was entered.

Miller v. Finkle, 1 Park. Cr. Cas., 374; *King v. Price*, 6 East, 323; *Hawk. P. C.*, bk. 2, ch. 48, sec. 20; *Com. Dig.*, Indictment, n.; *Albers v. Whitney*, 1 Story, 310; *Cheong-Kee v. U. S.*, 3 Wall., 320 (70 U. S., XVIII., 72); *Brush v. Robbins*, 8 McLean, 436; *Cameron v. McRoberts*, 8 Wheat., 591.

Mr. Justice Miller delivered the opinion of the court:

This is an action brought by the United States on a recognizance of bail, to which the defendant pleaded two pleas: 1. That there was no record of any such recognizance in the court. 2. That there was no indictment, as recited in said recognizance, pending against their principal when the recognizance was entered into, because they say that he had pleaded guilty to the indictment, and judgment had been passed against him, and he had been delivered to the jail of Erie County, and had entered upon the expiation of his sentence. The United States

took issue on both these pleas, and the case was submitted to the court without a jury. The court decided that there was a record on the recognizance denied by the first plea, and that there was no such record of conviction and sentence as that set up in the second plea. On motion of defendants a new trial was granted, which was also had by the court, and on this trial a statement of facts agreed to and signed by counsel for both parties was presented to the court, on which it rendered the same judgment that it had before. This statement of facts consists of extracts from the records of the court, and it was upon the inspection of this record that the court decided the case.

Both the pleas of the defendants were pleas of *nul tiel record*, the first denying the existence of the recognizance, and the second denying the pending of the indictment at the time the recognizance was taken. A plea of *nul tiel record* to a supposed record of the court in which the plea is made is tried by the court, because it is an issue to be determined by the inspection of its own records. But where the record of a foreign court is denied by this plea the issue is to be tried by a jury, because the existence of the record to be inspected must first be made by proof, which it may be necessary to submit to a jury.

1 Co. Inst., 117, 270; *Collins v. Mathew*, 5 East, 473; *Hall v. Williams*, 6 Pick., 232; *Patton v. Miller*, 18 Serg. & R., 254.

When a court sits in place of a jury and finds the facts, this court cannot review that finding. If there is any error in such case shown by the record, in admitting or rejecting testimony, it can be reviewed here. But when the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict.

In the case before us, however, the court did not sit to supply the place of a jury, because the record, the existence of which was denied by both pleas, was the record of the court in which the pleas were made. When, therefore, such record as did exist in regard to the matters in issue, was presented to the court, the only question to be determined, on which the court could exercise any judgment, was a question of law, namely: whether in legal effect there was found a record of the recognizance, and a subsisting legal judgment of conviction and punishment prior to the taking of the recognizance.

Both these question of law are proper for review here, and are fairly presented by the agreed statement of what the record is.

1. In regard to the first, there is no doubt that the recognizance was taken, and remains in the records of the court.

2. As regards the second plea, it appears by the record that to the indictment which he was held to answer by the recognizance, he had at an earlier period of the same term pleaded guilty, and had been sentenced to imprisonment in the jail of Erie County for six months, and was sent to that prison. But a few days after, on motion of the district attorney, he was brought back on a writ of *habeas corpus*. When he was thus brought again into court, on motion of the district attorney, the former judgment was set aside, and defendant had leave to withdraw his plea of "guilty" formerly entered. It

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was after this was done that the recognizance on which this action was brought was given, conditioned for the appearance of the prisoner from day to day during the term, and on his failing to appear the second day, his recognizance was declared to be forfeited.

All of this took place during the same term of the court, and we see no reason to doubt that the court had power during that term, for proper cause, to set aside the judgment rendered on confession. This control of the court over its own judgment during the term is of every day practice.

King v. Price, 6 East, 323; *Cheong Kee v. U. S.*, 3 Wall., 320 [70 U. S., XVIII., 72].

The judgment then being set aside the indictment remained, and the recognizance of the prisoner and his sureties to appear and answer to it was valid.

The judgment of the Circuit Court is affirmed.

Cited—18 Wall., 167, 192, 249; 19 Wall., 72; 21 Wall., 161; 95 U. S., 134; 98 U. S., 443; 101 U. S., 752; 15 Blatchf., 543; 32 Ohio St., 115.

EMILY J. FILOR AND WILLIAM PINKNEY, Administrators of JAMES FILOR, Deceased, WILLIAM PINKNEY AND WILLIAM CURRY, *Appts.*,

v.

UNITED STATES.

(See S. C., 9 Wall., 45-49.)

Quartermaster cannot make lease for U. S.—Court of Claims—unauthorized acts of officers.

Assistant quartermaster at Key West was not invested with power to bind the United States to a lease, even though his action was approved by the military commander at that station.

The jurisdiction of the Court of Claims under the Act of July 4, 1864, does not extend to any claim against the United States, growing out of the appropriation of property by the Army or Navy.

The consideration by that court, of any claim, whatever its character, growing out of such appropriation, is excluded.

Unauthorized acts of officers cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States.

[No. 86.]

Argued Nov. 24, 1869. Decided Jan. 24, 1870.

APPEAL from the United States Court of Claims.

The petition in this case was filed in the court below by the appellant, to recover money alleged to be due upon the lease of a certain wharf. The court entered a decree dismissing the petition. Whereupon the petitioner took an appeal to this court.

The case is fully stated by the court.

Messrs. Thomas Wilson, N. P. Chipman, Thomas J. Murant and William Marvin, for appellants:

The acts of Major Hill, commanding at Key West, and Lieutenant Gibbs, acting Assistant Quartermaster, in making the lease of these premises as agents and officers of the defendant, being within the scope of their power and general authority, if unauthorized at the time, having been acquiesced in and the benefit thereof received by the defendant, have been subsequently ratified and confirmed; and the defend-

ant cannot be permitted now to deny their authority so to act.

Reeside v. U. S., 2 Ct. of Cl., 82.

Mearns. E. R. Hoar, Atty-Gen., and T. L. Dickey, Asst. Atty-Gen., for appellee:

1. No contract on the part of the United States to pay the rent claimed, has been shown in the case. A regimental lieutenant, acting as quartermaster, has no authority of himself to make a contract for the lease of real estate; and no other authority is shown in this case.

See statutes regulating the Army, *passim*.

II. This is a claim growing out of the appropriation of property by a part of the Army engaged in the suppression of the rebellion, from the commencement to the close thereof; and, as such, excluded from the jurisdiction of the Court of Claims, by the Act of July 4, 1864, sec. 1, Vol. 14, p. 381.

(The case being decided with reference only to this question, the arguments of counsel on other points are omitted.)

Mr. Justice Field delivered the opinion of the court:

This case comes before us on appeal from the Court of Claims. The material facts, as found by the court, may be briefly stated, as follows:

In 1861, one Asa F. Tift, a citizen of Florida, was the owner in fee of certain real property, situated in Key West, in that State, known as Tift's wharf. In January of that year, he was a member of the Convention which passed the Ordinance of Secession, purporting to dissolve the connection of the State with the National Union, and signed the Ordinance. In May following, with the intention of joining the Confederate forces against the United States, he left Key West and removed to the State of Georgia, where he resided during the continuance of the rebellion. Before leaving Key West, he executed a power of attorney to one Charles Tift, authorizing him to sell and convey all his property, or any part of it, situated on that island. In December, 1861, through his attorney, he sold and conveyed the premises to the petitioners, as tenants in common, for the consideration of \$18,000, for which sum they gave their several promissory notes, according to their respective proportions, of which three, each for \$1,000, were payable on demand, and the residue were payable from one to five years, with annual interest at six per cent. These notes were retained by the attorney, under an agreement between him and the makers until after Asa F. Tift had received from the President a full pardon for offenses committed by participation in the rebellion, which was granted July, 1865. They were then delivered to him.

After the purchase made by the petitioners, the officers of the Quartermaster's Department at Key West desired possession of the wharf and its appurtenances, for the use of the United States, but the petitioners refused to lease the property. Thereupon the commanding officer at Key West, "For the purpose of effecting a lease of it (such is the language of the finding), issued an order for its seizure, for the use of the Quartermaster's Department of the United States Army." Under the pressure of this order, an agreement was concluded between Filor, one of the petitioners acting for all of them, and Lieutenant Gibbs, of the United States

Army, at the time Assistant Quartermaster, who assumed to act on behalf of the United States; which agreement purported to lease the property and various pieces of machinery, and other articles connected with it, to the United States for one year from January 1st, 1863, and as much longer as might be required by the Quartermaster's Department, at an annual rent of \$6,000, payable quarterly. This agreement was approved by the commanding officer at Key West, but was not approved by the Quartermaster-General, nor was it disapproved by him until Feb. 8, 1866. Under the agreement, the officers of the Quartermaster's Department at Key West entered upon and took possession of the premises, and used them in the service of the United States until the first of January, 1867.

No rent was ever paid to the petitioners under the agreement, nor for the use and occupation of the premises; and to recover the full amount stipulated for the five years, the present suit was brought.

When the agreement was made and possession of the premises was taken, the officers of the Quartermaster's Department at Key West had full knowledge of the fact that Asa F. Tift had adhered to Florida in her attempted secession from the Union, and had joined the Confederates in Georgia, and was, with them, in open war against the United States at the time the deed was executed to the petitioners.

The Court of Claims held that the deed was void as a contract between enemies, and that the officers of the Quartermaster's Department at Key West were not authorized to hire for the United States the premises, the title to which was invalid from the circumstances stated, which were known to them at the time.

The determination of this case does not depend upon the validity or invalidity of the title of the petitioners to the property in question. The difficulty with their claim does not arise, as the court below appears to have considered, solely from the supposed invalidity of their title. There is a difficulty from another quarter. We do not find, in any regulation of the army, or in any Act of Congress, that the acting assistant quartermaster at Key West was invested with power to bind the United States to the agreement or lease produced, even though his action was taken by direction of the military commander at that station, and the instrument was approved by him. No lease of premises for the use of the Quartermaster's Department, or any branch of it, could be binding upon the Government until approved by the Quartermaster-General. Until such approval the action of the officers at Key West was as ineffectual to fix any liability upon the Government as if they had been entirely disconnected from the public service. The agreement or lease was, so far as the Government is concerned, the work of strangers. The obligation of the Government for the use of the property is exactly what it would have been if the possession had been taken and held without the existence of the agreement. Any obligation of that character cannot be considered by the Court of Claims. The jurisdiction of that court, says the Act of Congress of July 4th, 1864, "shall not extend to, or include, any claim against the United States, growing out of the destruction or appropriation of, or

damage to, property by the Army or Navy, or any part of the Army or Navy engaged in the suppression of the rebellion, from the commencement to the close thereof. 13 Stat. at L., 881. The premises of the petitioners were thus appropriated by a portion of the Army. It matters not that the petitioners, supposing that the officers at Key West could bind the Government to pay a stipulated rent for the premises, consented to such appropriation. The manner of the appropriation, whether made by force or upon the consent of the owner, does not affect the question of jurisdiction. The consideration of any claim, whatever its character, growing out of such appropriation, is excluded. The term "appropriation" is of the broadest import: it includes all taking and use of property by the Army or Navy, in the course of the war, not authorized by contract with the Government. The use may be permanent or temporary, and it may result in the destruction of or mere injury to the property. If the right to the property, or to its use, is not obtained by valid contract with the Government, the taking or use of it is an appropriation within the meaning of the Act of Congress.

The learned counsel of the petitioners is correct in stating that leasing and appropriation are different acts, but he errs when he assumes that the instrument in this case has any greater validity as the act of the Government than if it had been signed by himself.

The doctrine of estoppel, which the counsel invokes, has no application. There is no place where the doctrine can come in. The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so. In signing the agreement, and in taking possession of the premises claimed by the petitioners, they acted on their own responsibility. Their unauthorized acts cannot estop the Government from insisting upon their invalidity, however beneficial they may have proved to the United States. If the petitioners are entitled to compensation for the use of the property they must seek it from Congress. The Court of Claims can award them none.

Judgment affirmed.

Cited—13 Wall., 631; 4 Hughes, 550.

JAMES HICKMAN, *Piff. in Err.*

v.

WILLIAM G. JONES, EDWARD C. BETTS,
THOMAS S. McALLEY, ET AL.

(See S. C., 9 Wall., 197-208.)

Bill of exceptions—rebellion only an insurrection—Confederate court a nullity—question for jury—erroneous instruction.

A bill of exceptions should not contain all the evidence adduced on both sides, and the entire charge of the court.

The rebellion was only an insurrection; there was no rebel government *de facto*, in such a sense as to give any legal efficacy to its acts.

For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms, but the recognition did not extend to the pretended Government of the Confederacy.

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An Act of the Confederate Congress creating a court was void; the court was a nullity and could exercise no rightful jurisdiction. It gave no protection to those who assumed to be its officers.

Where there is some evidence on a question of fact, it is error for the court to take the decision of the question from the jury.

The instruction, that if the plaintiff had himself been a traitor he could not recover against those who had been instrumental in his arrest, imprisonment, and trial for treason against the Confederacy, is erroneous.

[No. 75.]

Argued Nov. 22, 1869. Decided Jan. 24, 1870.

IN ERROR to the District Court of the United States for the Northern District of Alabama.

The plaintiff in error brought an action in the court below, for malicious imprisonment under pretended authority of the Confederate States, so called. The trial having resulted in judgment for the defendants, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Mr. R. Johnson, for plaintiff in error.

Messrs. Richard W. Walker, George A. Gordon and W. W. Boyce, for the defendants in error:

The admission of plaintiff, as well as the great historical circumstance of the war, of which the court will take judicial notice, shows that the act of the defendants, in finding an indictment against the plaintiff, was done during the existence of a civil war and in obedience to the laws of a government in fact.

Hale, P. C., 54; 3 Phillim. Int. Law, chap. 4, 5, 6, 7 of part 12, p. 718, 741; Law. Wheat. Int. L., 522; *U. S. v. Rice*, 4 Wheat., 246; *U. S. v. Hayward*, 2 Gall., 485; Grotius, War and Peace, book 1, ch. 4, sec. 15; Foster, Crown L., 188, 396; Halleck Int. L., 792; 1 Campbell, Lives of Chief Justices, 530; *Hughes v. Litzey*, Am. Law Rep., Jan., 1866, p. 148; *U. S. v. Grevier*, 24 Law Rep., 98; 1 Hale, P. C., 104; *Watson v. Stone*, 40 Ala., 451; *Cross v. Harrison*, 16 How., 164; *Leitensdorfer v. Webb*, 20 How., 176 (61 U. S., XV., 891); *Fleming v. Page*, 9 How., 603; *Ward v. State*, 2 Cold., 605; *Venable v. Cud*, 2 Head., 582; *Bell v. L. & N. R. Co.*, 1 Bush, 387, 404.

The authorities already cited establish, beyond the reach of controversy, that the late war was not a mere insurrection, but a territorial civil war, to which generally the rules applicable to foreign wars were rightfully applied, and in which each party was entitled to the rights of belligerents.

Prize Cases, 2 Black, 666 (67 U. S., XVII., 476); Law. Wheat., 520, and n.; 26 Law Rep., 589.

In a civil war both parties are subject to the laws of war.

The Crenshaw, 2 Black, 688 (67 U. S., XVII., 488); Law. Wheat., 520; 24 Law Rep., 151; Am. Law Reg., Jan., 1866, p. 153; 26 Law Rep., 541.

Belligerent occupation, because it excludes the protecting power of the lawful sovereign, suspends temporarily the allegiance to that sovereign, of the non-combatant inhabitants and imposes on them a temporary and fortified allegiance to the occupant.

Halleck, 791; Law. Wheat., 525; *U. S. v. Rice*, 4 Wheat., 246; 24 Law Rep., 48, 477.

His own government having been driven away, and being no longer able to protect and govern

him, cannot during its absence claim his obedience.

26 Law Rep., 542; 24 Law Rep., 98.

All the territory becomes enemy territory, and all the inhabitants enemies.

Price Cases, 2 Black, 674 (67 U. S., XVII., 478); *Mrs. Alexander's Cotton*, 2 Wall., 419 (69 U. S., XVII., 919).

The belligerent occupant may impose a government on the inhabitants, establish courts, create and punish offenses.

Halleck, 776; Law. Wheat., 526, n.; *U. S. v. Reiter*, 4 Am. Law Reg. (N. S.), 584.

A man cannot obtain legal redress for a wrong, however grievous, unless he is himself free from blame in the matter about which he complains.

Bish. Marr. and Div., sec. 888, and cases cited.

No polluted hand shall touch the pure fountains of justice.

Broom, Leg. Max., 575; *Colburn v. Patmore*, 1 Crompt., M. & R., 88; *Prole v. Wiggins*, 8 Bing. (N. C.), 280; *Munt v. Stokes*, 4 T. R., 564; *Campbell v. Campbell*, 7 Cl. & F., 166; *Yates v. Foot*, 12 Johns., 1.

The law leaves the parties as it found them. If either has sustained loss by bad faith of a *particeps criminis*, it is but a just infliction for premeditated fraud.

Bartle v. Nutt, 4 Pet., 184; *Nesmith v. Sheldon*, 4 McLean, 375; *Gray v. Sims*, 8 W. C. C., 276; *Randall v. Howard*, 2 Black, 585 (67 U. S., XVII., 269); *Fales v. Maybury*, 2 Gall., 560; 1 Bish. Cr. Law, sec. 6; *Gregg v. Wyman*, 4 Cush., 322.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the District Court of the United States for the Northern District of Alabama.

The plaintiff in error sued the defendants in error for maliciously causing him to be arrested, imprisoned and prosecuted for a criminal offense without probable cause.

The facts disclosed in the record, so far as it is necessary to state them, are as follows:

During the late civil war the rebel government established a court known as the "District Court of the Confederate States of America for the Northern District of Alabama." In that court the plaintiff in error was indicted for treason against the Confederate States. The indictment alleged that the troops of the United States were in the Northern District of Alabama engaged in a hostile enterprise against the Confederate States, and that Hickman "Did traitorously then and there assemble and continue with the said troops of the said United States in the prosecution of their said expedition against the the Confederate States; and then and there, with force and arms, and with the traitorous intention of co-operating with the said troops of the United States in affecting the object of the said hostile expedition, did array and dispose himself with them in a hostile and warlike manner against the said Confederate States; and then and there, with force and arms, in pursuance of such traitorous intentions, he, the said James Hickman, with the said persons, so as aforesaid assembled, armed, and arrayed in manner aforesaid, wickedly and traitorously did levy war against the said Confederate States." Upon this indictment a warrant was issued for the

arrest of Hickman. He was arrested and imprisoned accordingly. He applied to the defendant, Jones, who assumed to act as judge of the court, to be allowed to give bail. Jones rejected the application and remanded him to prison. He was subsequently tried, acquitted and discharged. He alleges that the proceeding was without probable cause and malicious. Moore was the clerk of the pretended court. The name of Regan is signed to the indictment as district attorney, and he conducted the trial. Robert W. Coltart was deputy-marshal, and Clay was the editor and publisher of the "Huntsville Confederate," a newspaper through which it was alleged he incited the prosecution by means of malicious attacks upon Hickman designed to produce that result. The other defendants were members of the grand jury by which the indictment was found. Testimony was given tending to show that the plaintiff sympathized with the rebellion and participated in it while the rebel power predominated in North Alabama, both before and after its first invasion by the forces of the United States. The court instructed the jury, among other things, as follows:

"If, in the case at the bar, you believe that the acts and speeches of the plaintiff, upon which the defendants rely to prove his complicity with the rebellion, were the result of anything less than a fear that if he did not so speak and act, his life or his liberty or his property would be sacrificed to his silence or his omission, you will find a verdict for the defendants.

If, on the other hand, you believe that these acts of apparent complicity with the rebellion were performed by the plaintiff under the influence of an honest and rational apprehension that to do otherwise would expose him to persecution or prosecution, or to loss of life, liberty or property, and that notwithstanding these acts of affiliation with the rebel community in which he lived, he was always at heart honestly and truly loyal to the government of his country, he is entitled to your verdict."

The jury were further instructed that it was their duty to acquit the defendants, R. W. Coltart and Clay. Exceptions were duly taken by the plaintiff, and the case is brought here for review.

We have to complain in this case, as we do frequently, of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides, and the entire charge of the court. This is a direct violation of the rule of this court upon the subject. We have looked into the evidence and the charge only so far as was necessary to enable us fully to comprehend the points presented for our consideration—thus in effect reducing the bill to the dimensions which the rule prescribes. No good result can follow in any case from exceeding this standard. Our labors are unnecessarily increased, and the case intended to be presented is not unfrequently obscured and confused by the excess.

The rebellion, out of which the war grew, was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the State to which it belonged. The proportions and duration of

the struggle did not affect its character. Nor was there a rebel government *de facto* in such a sense as to give any legal efficacy to its acts. It was not recognized by the national, nor by any foreign government. It was not at any time in possession of the Capital of the Nation. It did not for a moment displace the rightful government. That government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary States. The union of the States, for all the purposes of the Constitution, is as perfect and indissoluble as the union of the integral parts of the States themselves; and nothing but revolutionary violence can, in either case, destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended Government of the Confederacy. The intercourse was confined to its military authorities. In no instance was there intercourse otherwise than of this character. The rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress and downfall. The Act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted. In the case before us, trespass would have been the appropriate remedy; but the authorities are clear that case also may be maintained. Each form of action is governed by its own principles. It is needless to consider them, as none of the exceptions taken relate to that subject. Our opinion will be confined to those which have been specifically mentioned.

1. The court instructed the jury to acquit the defendants, J. W. Clay and R. W. Coltart.

There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions

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of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken. *Aylwin v. Ulmer*, 12 Mass., 22; *N. Y. Fire Ins. Co. v. Walden*, 12 Johns., 513; *Utica Ins. Co. v. Badger*, 8 Wend., 102; *Tufts v. Seabury*, 11 Pick., 140; *Morton v. Fairbanks*, Pick., 868; *Fisher v. Duncan*, 1 Hen. & Mun., 562; *Schuchardt v. Allen*, 1 Wall., 359 [68 U. S., XVII., 642].

2. The other instruction to be considered was, substantially, that if the plaintiff had himself been a traitor he could not recover against those who had been instrumental in his arrest, imprisonment and trial for treason against the Confederacy—the treason alleged to consist in the aid which he had given to the troops of the United States while engaged in suppressing the rebellion.

As matter of law, we do not see any connection between the two elements of this proposition. Giving aid to the troops of the United States, by whomsoever given, and whatever the circumstances, was a lawful and meritorious act. If the plaintiff had before co-operated with the rebels there was a *locus penitentia*, which, whenever he chose to do so, he had a right to occupy. His past or subsequent complicity with those engaged in the rebellion might affect his character, but could not take away his legal rights. It certainly could not, as matter of law, give impunity to those by whose instrumentality he was seized, imprisoned, and tried upon a capital charge for serving his country. Such a justification would be a strange anomaly. Evidence of treasonable acts on his part against the United States was alien to the issue before the jury. To admit it, was to put the plaintiff on trial as well as the defendants. The proofs upon the question thus raised might be more voluminous than those upon the issue made by the pleadings. The trial might be indefinitely prolonged. The minds of the jury could hardly fail to be darkened and confused as to the real character of the case and the duty they were called upon to discharge. The guilt of the plaintiff, if established, could in nowise affect the legal liability of the defendants; nor could the fact be received in mitigation of damages. It is well settled, that proof of the bad character of the plaintiff is inadmissible for any purpose in actions for malicious prosecution. *Greenl. Ev.*, sec. 55. All the evidence upon this subject disclosed in the bill of exceptions was incompetent, and should have been excluded from going to the jury. This instruction also was erroneous.

The judgment is reversed, and the cause remanded to the court below with an order to issue a venire de novo.

Cited—20 Wall., 87; 94 U. S., 284; 95 U. S., 238; 96 U. S., 195; 102 U. S., 418.

ISAAC N. SWAIN, *Appt.*,

v.

STEPHEN H. SEAMENS.

(See S. C., 9 Wall., 254-274.)

Agreement, fulfillment of—acquiescence in alterations—contract within Statute of Frauds, how varied—acceptance of performance.

Agreement to erect a building of certain dimensions is not satisfied by building one of other dimensions, though larger.

Acquiescence in the change of dimensions of the building may be shown by the party being present and not objecting and by his declarations.

A written contract, falling within the Statute of Frauds, cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.

Performance of an agreement, void by the Statute of Frauds, and acceptance of such performance is an answer to the statute.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct induced the other party to change his position, so that he will be peculiarly prejudiced by the assertion of such adverse claim.

[No. 20.]

Argued Dec. 14, 1869. Decided Jan. 24, 1870.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

This action was brought by the appellees in a state court of Wisconsin, to compel the defendant to cancel a certain mortgage.

Upon the petition of the defendant, a citizen of Michigan, an order was entered in said court for the removal of the action to the Circuit Court of the United States in and for the District of Wisconsin. A new petition was filed by the appellees in that court, and a decree entered therein in their favor.

The respondent thereupon took an appeal to this court.

The stipulation relied upon by the complainants indorsed on the back of the mortgage was as follows:

It is hereby stipulated and agreed by said party of the second part named within, that if within two years from this date the large saw-mill of fifty by one hundred feet in size shall be properly built and completed upon the foundation commenced last fall, by driving piles, which is on the premises described in mortgage mentioned as being executed by the said John W. Medbery and James F. Aldrich and their wives, to accept in place of the within mortgage security in proper fire insurance policy or policies on said large saw-mill, and thereupon to discharge the within mortgage; to which stipulation and agreement, well and truly to be complied with, he hereby binds and obligates himself his heirs, executors, administrators and assigns.

Dated, Apr. 14, 1865.

ISAAC N. SWAIN. (Seal).

A further statement of the case appears in the opinion of the court.

Messrs. J. M. Howard, Finche, Lynde & Miller, for appellant:

The first question that arises is, whether Swain in fact consented to the changes in the construction of the new saw-mill, and agreed to accept it thus constructed, as a compliance with his agreement indorsed on the Milwaukee mortgage, as averred in the bill.

The weight of evidence is against this averment.

One, and perhaps the leading, motive with Mr. Swain was to preserve undisturbed the shop of his deaf and dumb brother. This is plainly referred to in the agreement, when it fixes the size and foundation.

The evidence of this pretended parol agreement for a change in the size and dimensions of the new saw-mill, leaves the facts so uncertain that a court of equity will not attempt to enforce it.

Carr v. Duval, 14 Pet., 77; 11 Ves., 588.

Such a consent and verbal agreement are void by the Statute of Frauds of Wisconsin.

The Wisconsin Code of 1858, p. 618, declares that "No estate or interest in land other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same or his lawful agent thereunto authorized by writing." Sec. 8. "Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing and be subscribed by the party by whom the lease or sale is to be made."

The same Code, same title (p. 615, sec. 6), declares that the term "lands" as used in this title shall be construed as co-extensive in meaning with "lands, tenements and hereditaments," and the terms "estate and interest in lands," shall be construed to embrace "every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent in lands as above defined."

Stevens v. Cooper, 1 Johns. Ch., 425; *Boyd v. Stone*, 11 Mass., 342; *Castro v. Illies*, 13 Tex., 229.

In *Hunt v. Maynard*, 6 Pick., 489, the court says: "We are called upon to enjoin against the use of a mortgage deed, by verbal proof that the respondent had given up his estate. The proposition is self-evidently false."

Parker v. Parker, 2 Met., 481.

But in case Swain did agree to accept the new mill as changed, Medbury could not entitle himself to a discharge of the mortgage, without procuring and delivering to him the policies of insurance called for by his agreement. This was not done.

The agreement is to "accept, in place of the Milwaukee mortgage, security in proper fire insurance policy or policies, on said large saw-mill, and thereupon discharge the within mortgage."

Nothing can be more evident than that by the contract of sale the additional security was to be of the same duration as the main mortgage.

This mortgage was then as enduring a security for the payment of the principal debt as the main mortgage; and it is impossible to suppose that Mr. Swain, in granting by his agreement the privilege of substituting policies of insurance for the Milwaukee mortgage, intended that a policy running but for one year should

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operate as a complete extinguishment of his right to have additional security.

Mr. Matt H. Carpenter, for appellees:

This case depends upon the following questions:

1. Was the mill constructed in substantial conformity with the agreements?

2. If constructed differently, did Swain consent to or acquiesce in the departure from the original plan?

3. Did Swain, after its construction, accept policies on the mill, in pursuance of the agreement?

As the complainants do not claim that the mill was constructed in the precise form mentioned in the agreement, it becomes necessary to inquire what was the spirit of that agreement, and whether it has so far been observed as to entitle the parties interested to claim the benefit of the agreement against Swain. The agreement speaks of a mill to be constructed "fifty by one hundred and fifty feet in size;" the mill actually constructed was seventy-eight by one hundred. But the complainants contend that this was a substantial compliance with the agreement, and that Swain accepted it as such by accepting the policies of insurance obtained thereon; and that he is estopped to object to the dimensions of the mill, when called upon to cancel the mortgage.

The only general rule is, that the performance must be such as is required by the true spirit and meaning of the contract, and the intention of the parties as expressed therein. "A mere literal accurate performance may wholly fail to satisfy the true purpose of the contract." 2 Pars. Cont., 168.

The only interest Swain had in the agreement, was to obtain the security.

The precise dimensions of the mill were of no consequence to Swain; its value, everything; because upon its value depended his security, which was the subject of the agreement; yet the literal requirements of the agreement would have been satisfied by the construction of a mill of any value, or even of no value, provided it were fifty by one hundred feet, for this is the only specification in the agreement in regard to the mill.

The deposition of the defendant below, Swain, is conclusive of the intention of the parties in making the agreement on the back of the mortgage; that is, to give the defendant security by policies of insurance on the mill. He tries, as an afterthought, to make out that he had a purpose in drafting that agreement, which was not known to the other parties and, therefore, constituted a fraud upon them, if the contract is to be construed as he contends. He says:

"This defendant, then, knowing that he had failed to obtain in writing a recognition of their obligation to build the said saw-mill, and to confine them to both the size and particular location, as commenced the fall previous, etc., and thinking that this would be a good opportunity to do so, thereupon hastily wrote a conditional agreement, etc., which was indorsed on the mortgage, and executed and acknowledged by Swain. Swain does not pretend that the other parties to the agreement had any such thing in view. On the contrary, he now pretends that he was playing a trick and a fraud

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upon them, and thus incidentally binding them to do what they did not intend to be bound for."

In *Jordan v. Dyer*, 84 Vt., 106, the court says:

"We regard it as a rule of law, no less than of morals, that whatever is expected by one party to a contract, and known to be so expected by the other, is to be deemed a part or condition of the contract."

The testimony clearly shows that the mill which was constructed was more valuable than it would have been if constructed fifty by one hundred feet, and that the change in the form of the mill was made for that reason, upon the advice of mechanics and experts.

Swain consented to or acquiesced in the change that was made.

By the principal mortgage, Medbery & Aldrich agreed to keep the property—including the new saw-mill to be built—insured; and it was provided that in case they failed to do so, Swain might insure the same at the cost of Medbery & Aldrich, and the charges and premium should be added to and considered a part of the debt secured by the mortgage. By the contract indorsed on the Wisconsin mortgage, Swain agrees that, when the mill is completed, he will accept policies of insurance upon the mill and discharge the Wisconsin mortgage.

From these two provisions read together, the intention of the parties is plain. The Wisconsin mortgage was intended to remain until Swain should obtain his security upon the new mill; then it was to be canceled. Now, we submit that when the mill was completed and Swain had policies of insurance upon the mill, it became his duty to discharge the Wisconsin mortgage, without regard to whether Medbery & Aldrich had obtained the policies and assigned them to Swain, or Swain had obtained them himself, charging the costs and premium to Medbery & Aldrich, as he was authorized to do by the Michigan mortgage; because in either event Swain had the security upon which that mortgage was to be discharged.

Swain admits that in 1859 he procured \$6,000 insurance on the saw-mill in New York; and this account shows that Medbery & Aldrich paid the premium. He then had the security upon which he was bound to cancel the mortgage by his own testimony.

It is well settled that a written or sealed instrument may be varied as to the time or manner of its performance, or may be waived altogether by a subsequent parol agreement.

Goss v. Nugent, 5 B. & Ad., 65; *Keating v. Price*, 1 Johns. Cas., 22; *Cummings v. Arnold*, 8 Met., 486, and cases cited by the court; *Erwin v. Saunders*, 1 Cow., 249; *Blood v. Enos*, 12 Vt., 625; *Robinson v. Batchelder*, 4 N. H., 40; *Grafton Bk. v. Woodward*, 5 N. H., 99; *Richardson v. Hooper*, 13 Pick., 446; *Ratcliff v. Pemberton*, 1 Esp., 35; *Fleming v. Gilbert*, 3 Johns., 528, and cases cited by Thompson, J.; *Porter v. Stewart*, 2 Aik., 417; *Cabe v. Jameson*, 10 Ired., 193; *Reed v. McGrew*, 5 Ohio, 875; *Monroe v. Perkins*, 9 Pick., 298.

The doctrine of equitable estoppel, as applied in all the modern cases, precludes Swain, after standing by and witnessing the completion of the mill with its actual dimensions, from objecting to cancel the mortgage, upon the ground of changing the plan.

"Where a person tacitly encourages an act to be done or consents to it, he cannot afterwards exercise his legal right in opposition to such consent."

Morris Can. Co. v. Lewis, 1 Beas. (N. J.), 323; *Blackwood v. Jones*, 4 Jones, Eq. (N. C.), 54; *Chiappella v. Brown*, 14 La. Ann., 185; *Bleven v. Freer*, 10 Cal., 172; *Snodgrass v. Ricketts*, 18 Cal., 359; *Cochran v. Harrow*, 22 Ill., 345; *Davis v. Handy*, 37 N. H., 65; *Tilton v. Nelson*, 27 Barb., 595; *Corbett v. Norcross*, 35 N. H., 99; *Punk v. Newcomer*, 10 Md., 301; *Nixon v. Carco*, 28 Miss., 414; *Gatling v. Rodman*, 6 Ind., 289; *Wells v. Pierce*, 7 Fost. (N. H.), 508; *Strong v. Ellsworth*, 26 Vt., 366; *Cary v. Wheeler*, 14 Wis., 281, and cases cited in the opinion of the court.

Mr. Justice Clifford delivered the opinion of the court:

Subsequent to the removal of the case from the state court to the circuit court, a new bill of complaint was filed by the consent of the respondent, so that it is not necessary to refer to the proceedings in the suit before the petition for the removal was granted.

Swain, the appellant and respondent, owned certain real estate situated in the State of Michigan, and on the 14th of April, 1855, he sold the same to John Medbery and James F. Aldrich, for the consideration of \$53,000, as appears by the pleadings.

Pursuant to the terms of the sale, the purchasers paid \$10,000 in cash when the deed was executed, and gave back a mortgage on the same real estate to secure the balance of the purchase money, which was payable in installments at different times. Medbery at that time was the owner of an undivided third part of certain lots situated in Milwaukee, in the State of Wisconsin, together with a flouring-mill erected thereon, called the Empire Mill, and he and his wife, on the same day, and as a part of the same transaction, gave a mortgage of the same lots and mill to the appellant as additional security for the balance remaining unpaid of the purchase money of the first mentioned real estate.

Prior to the purchase and sale of the Michigan real estate, the foundation for a saw-mill, fifty feet by one hundred and fifty feet, to be erected on the premises, had been commenced, and the mortgagee, at the time the second mortgage was executed as additional security, stipulated and agreed with the mortgagors therein that if the mortgagors in the first mortgage built and completed the saw-mill there described, in a proper manner, upon the foundation so commenced, within two years from that date, he would accept as security in place of that mortgage, proper fire insurance policies on said saw-mill, and would thereupon cancel and discharge the said second mortgage. Reference is made to the stipulation for its exact phraseology, as more fully set forth in the record, and it will be seen that it was duly executed under the hand and seal of the appellant, and was indorsed at large on the second mortgage, which was given as additional security.

Substantial compliance on the part of the mortgagors in the first mortgage with all the conditions of that agreement, and within the time therein specified, is set up by the appellees

and complainants; and they also allege that the mortgagors in the second mortgage subsequently sold and conveyed, by deed of warranty, all their interest in and to the said lots and mill, and that they, the complainants, afterwards became the purchasers of the said lots and mill; and they allege that at the time the suit was commenced they were the owners of the same in fee, as alleged in the bill of complaint. They do not claim that the mill built and completed, as aforesaid, was of the precise dimensions mentioned in the agreement, but they allege that it was of larger dimensions and of greater value, and that it was better adapted to the purpose to be accomplished; and they aver that the mill as built and completed was recognized and accepted by the appellant as a compliance with that agreement.

Based on these and other allegations, the prayer of the bill of complaint is, that the mortgage of the lots and mill, called the second mortgage for the purpose of identification, may be ordered and decreed to be canceled and discharged, and that the complainants may have such other and further relief as the nature of the case shall require.

I. Special reference to the evidences of title exhibited by the complainants is unnecessary, as the parties before the hearing in the circuit court entered into a written stipulation that the complainants, at the time the bill of complaint was filed, were the owners in fee of the lots in question and of the flouring-mill located on the premises. Possessed of the title to the lots and mill as previously held by the mortgagors, the claim of the complainants is that the mortgage thereon held by the appellant should be cancelled and discharged, because, as they insist, the conditions of the stipulation and agreement indorsed on the same, providing for that result, have all been fulfilled.

Such is the claim of the complainants, but the respondent denies that proposition and every element of it, and he contends that the complainants have no claim to any relief, because he insists that the mortgagors in the first mortgage never fulfilled any of the conditions specified in that stipulation and agreement; that they never built and completed the saw-mill therein described; and he expressly denies that they ever procured the policies of insurance, as alleged, or that he ever accepted the mill which they did build on the premises as a compliance with that stipulation and agreement.

Both parties were fully heard in the circuit court, and a decree was entered for the complainants canceling and discharging the mortgage, and the respondents appealed to this court.

II. Relief cannot be decreed to the complainants on the ground that the mortgagors in the principal mortgage built and completed a saw-mill on the premises embraced in that mortgage, of the dimensions specified in the written stipulation and agreement which is indorsed on the second mortgage, as the bill of complaint concedes that they did not, in terms, comply with that condition, and the complainants do not claim in argument that the saw-mill which those parties built thereon was of that form or of those dimensions. Strict compliance, therefore, with the conditions of the stipulation cannot be maintained, as the proposition finds no

support either in the pleadings or proofs, but is contradicted by both in every part of the record.

Proof of strict performance failing, the next proposition of the complainants is: that the saw-mill which those mortgagors did build, constitutes a substantial compliance with the conditions of that stipulation, but it is not possible to decide as a conclusion of law that a saw-mill seventy-eight feet in width by one hundred feet in length is a substantial compliance with an agreement which required that the saw-mill to be constructed should be of the dimensions described in that instrument, even though it be shown that it cost more and was of greater value and better adapted to the purposes to be accomplished; as the appellant having stipulated that the saw-mill to be built should be fifty feet in width by one hundred and fifty feet in length, had a right to stand upon the contract and to insist that it should be fulfilled according to its terms.

Substantial performance, it is true, is all that is required to satisfy any such agreement, and it may also be conceded that in the adjudication of controversies growing out of building contracts slight differences in the dimensions between the building constructed and the terms of the contract may, under many circumstances, be overcome by a reasonable application of that rule, but the differences in the case before the court are far too great to fall within that principle, as the effect would be to make a new contract and substitute it in the place of the stipulation executed by the parties.

III. Suppose neither of those propositions can be sustained, still the complainants contend that the decree of the circuit court should be affirmed, because they insist that the appellant acquiesced in the departure from the plan and dimensions as specified in the written instrument, and that he expressly accepted the said mill which those parties built and completed as a compliance with that stipulation.

Considerable conflict exists in the proofs upon that subject, and in view of that fact it becomes necessary to examine with some care the circumstances attending the transaction as bearing upon the probabilities of the case. Duplicate agreements were executed between the parties to the before mentioned deed of conveyance for the purchase and sale of the lands therein described six months before the deed of the same and the mortgage back, as aforesaid, were signed and delivered, by which the appellant agreed to sell, and the grantees in the deed and the mortgagors in the mortgage back agreed to purchase those tracts of land, with certain exceptions, which are unimportant in this investigation, and also with certain reservations, of which two only need be noticed:

1. He reserved the house where he resided and the premises connected therewith for his benefit for one year from the date of the agreement.

2. Also the use and occupancy of the shop and fixtures connected with the same then in the possession of his brother, a deaf mute, together with the use of the water "as now used, or in a similar way," so long as the said brother chooses to occupy the same, "to be free of rent, let, or unnecessary hindrance, otherwise than in the way of other important improvements it may be removed" sufficiently to be out of the

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way, "and where he can have the same use and privileges as before."

By the terms of the agreement as amended the purchasers were to pay \$10,000 in cash, and they were to give their bond for \$42,000 for the balance of the purchase money, together with a mortgage back of the whole real estate purchased to secure the payments, and they also covenanted to give "good and satisfactory security upon other property" for the sum of \$8,666.66 $\frac{2}{3}$. They also agreed to keep an insurance in some safe insurance company upon the insurable property on the premises, to the amount of one third of its value, for the benefit and security of the mortgagee. No provision was made for any insurance upon the "other property" to be conveyed to the appellant as additional security, but when the mortgage back was executed, six months later, it was therein stipulated that the mortgagors should "well and truly keep the buildings erected, and the large saw-mill to be erected upon the premises," insured in some safely reputed fire insurance company or companies against loss by fire, and that they should assign the said policy or policies to the appellant or his assigns; and it contained the farther stipulation that in default thereof it should be lawful for the appellant or his assigns to effect the said insurance, and that the premiums paid for effecting the same and the costs and charges should be a lien on the said mortgaged premises.

Evidently the deed of conveyance and the two mortgages, together with the stipulation indorsed on the second mortgage, must be construed together, as they constitute parts of the same transaction; and reference may also be made to the written agreement for the purchase and sale of the real estate embraced in the deed, as that agreement remained in force when the other instruments were drafted and until the transaction was finally closed.

Security, it is stipulated, shall be accepted "in proper fire insurance policy or policies on said large saw-mill in place of the within mortgage," but the amount of the insurance to be procured as the substitute for the mortgage security is not specified, and without reference to the instrument which provided for the sale and purchase of the real estate included in the deed of conveyance it would be difficult if not impossible to define that amount, but when the several instruments relating to the transaction are considered together all ambiguity at once disappears.

Viewed in the light of those suggestions the intention of the parties appears to be plain, as it is quite evident that the second mortgage constitutes the "security upon other property" for the amount which the purchasers of the real estate agreed to give to the appellant as the seller thereof in addition to the mortgage back of the premises included in the deed of conveyance.

IV. Two conditions precedent are annexed to the supposed right of the mortgagors in the second mortgage to demand that the mortgage should be canceled and discharged, and unless it is shown that they were waived or modified by mutual consent they must both be fulfilled or the appellant must prevail: (1) That the large saw-mill, "fifty by one hundred and

fifty feet in size," was properly built and completed upon the foundation previously commenced, within two years from the date of the stipulation indorsed on the second mortgage; (2) That proper fire insurance policies on said saw mill to the amount of \$6,666.66½ were procured for the benefit of the appellant, in one or the other of the two modes provided in the instrument of mortgage.

Undoubtedly the obligation to procure the policies rested on the mortgagors, but authority to procure them in case of the default of the mortgagors was vested in the appellant, and if he exercised that authority and actually procured the policies to that amount as security for their indebtedness he cannot set up the non-performance of that condition as an answer to this suit. They might procure the policies, or if they did not he might procure them, and in that event the premiums paid and the costs and charges incurred were made a lien on the mortgaged lands, and if he exercised the privilege conferred and procured the policies he is bound by his own act.

1. Compliance with the first condition is not shown, as the mill actually built is seventy-eight feet in width by one hundred feet in length, and not one hundred and fifty feet in length as described in the written stipulation, and the decree therefore must be reversed unless it satisfactorily appears that the appellant acquiesced in the change made in the plan and dimensions of the mill or accepted it after it was completed, as contended by the complainants.

Constructed as the mill was, of different dimensions from the plan specified in the stipulation, it could not be erected throughout upon the foundation previously commenced, but it appears that it was erected on the same site, and that it is connected with the same water power, and that no greater alterations were made in the foundation previously commenced than the change in the plan and dimensions of the mill required; and the proofs show to the entire satisfaction of the court that the mill as constructed cost nearly twice as much as it would if the plan indicated in the stipulation had been followed, and that it is of greater value, and that in view of the site and surrounding circumstances, it is much better adapted to the purposes to be accomplished.

Intended for three gangs of saws with other machinery incident to such a saw-mill of modern construction, it seems reasonable to suppose that the increase in the width of the mill, as compared with the dimensions given in the stipulation, would much more than compensate for the diminution in the length of the structure, as the length is still sufficient, and the effect of the alteration is to give more space where it is most needed.

Even the answer alleges that the second mortgage was given as a performance of the agreement to furnish additional security, and the appellant admits that he agreed to accept the policies of insurance on the saw-mill in the place of the mortgage, provided the mill was built of the size specified in the stipulation and on the foundation commenced before the agreement for the sale and purchase of the real estate was executed, but he utterly denies that he acquiesced in the change made in the plan

and dimensions of the mill, or that he ever accepted or agreed to accept the mill as built and completed. Three witnesses, however, testify to the contrary, and a fourth testifies that the appellant was two or three times at that place and once in the mill "during the building of the mill," and that he never made any objections to him or in his presence as to the change in the dimensions of the mill. Two of these witnesses are the mortgagors in the first mortgage, who built and completed the saw-mill; the third was a partner with them in the lumber business, and the fourth is the millwright who superintended the construction of the saw-mill and put in the machinery, and in the judgment of the court they are entitled to credit. They speak of his presence at the mill during the progress of the work and after the mill was completed, and the first three give the details of the conversation they had with him, showing to a demonstration that, if they are to be believed, the appellant not only acquiesced in the change in the plan as proposed, but that he in terms accepted the saw-mill erected on the premises as built and completed.

Opposed to the statements of those witnesses is the negative averment of the answer and the positive denial of the appellant that any such interviews ever took place, or that he ever gave utterance to any such sentiments; but it is a sufficient response to those denials of the appellant to say that his testimony is not of a character to discredit the proofs introduced by the complainants. Attempt is also made to contradict the complainants' witnesses as to the time when they say they saw the appellant at the saw-mill or in that vicinity; but the error, if it be one, is not sufficient to discredit the witnesses, as it is quite immaterial whether the interview was at the time stated, or a week or two or even a month earlier. Other considerations, such as the necessity for the removal of the shop of the deaf mute brother, are also invoked as tending to show the improbability that the appellant should have assented to the alteration in the plan of the mill, but it is unnecessary to enter into the details, as the court is of the opinion that the allegations of the bill of complaint in that behalf are fully proved by the direct proofs.

Next objection of the appellant: is that the agreement to accept the mill as built and completed, even if made as supposed, was void as within the Statute of Frauds of that State, because it was not in writing; but it becomes necessary before considering that question to determine whether the second condition specified in the stipulation was fulfilled so that the mortgagors in the second mortgage, or those claiming under them, have the right, if the agreement to accept the saw mill as built and completed is operative, to demand that the second mortgage shall be canceled and discharged.

2. Whether the mortgagors in the principal mortgage kept the insurable property included in that mortgage insured or not is not a question in this case, nor is it a question at this time whether they kept the saw-mill insured as agreed in that instrument, but the question to be decided is: whether the mortgagors, within two years from the date of the stipulation, procured for the benefit of the mortgagee proper

fire insurance policies thereon to the requisite amount, or whether the mortgagee within that period procured the same for his own benefit, as required or permitted in the second condition of that stipulation, when construed in connection with the provision upon the subject contained in the principal mortgage. Proper fire insurance policies might be procured for the purpose, as before explained, by the mortgagors or by the mortgagee, and inasmuch as the premiums paid and the costs and charges incurred were, in the latter event, to be added to and considered a part of the debt secured by mortgage, it cannot make any difference whether they were actually obtained by the one or the other of those parties. Such being the rule to be applied, the question presented for decision is purely one of fact depending upon the proofs in the case, the results of which, as they appear to the court, will be briefly stated.

Three policies of insurance on the saw-mill were procured, in the year 1856, by the mortgagors for the benefit of the mortgagee, to wit: \$2,000 in the *Ætna Insurance Company*, \$2,000 in the *Washington Union Insurance Company*, and \$2,000 in the *Jackson Mutual Insurance Company*; and the proofs show that the policies were delivered to the appellant, and that he accepted them without objection. Added together, the sum is a fraction less than the required amount, but the policies were accepted without objection, and none is now made on that account.

Policies on the saw-mill were obtained, the succeeding year, by the appellant, for the same amount, to wit: \$1,500 in the *Phoenix Insurance Company*, \$3,000 in the *Washington Union Insurance Company*, and \$1,500 in the *Ætna Insurance Company*; and the proofs show that the premiums which he paid for the same were added to the mortgage debt, and were ultimately adjusted by the mortgagors.

Insurance on the saw-mill for the year 1858 was also obtained by the appellant for the same amount, and the exhibits in the record show that the money he paid for the premiums was repaid to him by the mortgagors. They also paid him at the same time \$14,673.43, which was indorsed on the bond given for the balance of the purchase money, and which was secured by the mortgage of the same real estate.

V. All of these policies, however, were for the term of one year, and the next objection is that they cannot be regarded as fulfilling the second condition of the stipulation on that account, as they would expire before some of the installments of the bond fell due; but the objection is not entitled to weight for several reasons: (1) Fire policies are usually issued for one year, and there is nothing in the stipulation to justify the conclusion that the policies were to be in any other than the usual form. (2) When the first three were obtained they were accepted by the appellant without objection. (3) He asked and obtained leave of the mortgagors to procure the future policies, and when he came to exercise that privilege he obtained them in the same form. (4) Because, having been entrusted, at his own request, with the business of procuring the requisite insurance, it was his own fault if the business was neglected or was not properly transacted. (5) He cannot impute fault to the mortgagors, as they paid on the

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mortgage a sum nearly equal to the anticipated cost of the saw-mill, especially as they had consented to leave the business of insurance to him, as he was expressly authorized to add the premium to the mortgage debt, and as all sums paid for that purpose were declared to be a lien on the mortgaged lands. (6) If he desired that the insurance should be continued, and did not wish to transact the business, he should have given notice to the mortgagors; but the probability is that he felt less interest in the subject on account of the large payment which had been made on the mortgage debt.

VI. 1. Although the fee of the mortgaged premises remains in the mortgagor, under the laws of that State, till after foreclosure and sale, still no doubt is entertained that the stipulation to accept proper fire insurance policies on the saw-mill in the place of the mortgage was an agreement providing for the surrender of an "estate or interest in lands" and, therefore, was an agreement within the Statute of Frauds of that State. *Rev. Stat.*, ch. 106, sec. 6 p. 615; *Wood v. Trask*, 7 Wis., 572; *Russell v. Ely*, 2 Black, 578 [67 U. S., XVII., 259].

Nothing is left for construction, as the subsequent Act provides that the term "lands" shall be construed as co extensive in meaning with lands, tenements and hereditaments, and that the terms "estate and interest in lands" shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. *Rev. Stat.*, 615, sec. 6; *Stevens v. Cooper*, 1 Johns. Ch., 425; *Hunt v. Maynard*, 6 Pick., 489; *Browne, Frauds* (2d ed.), sec. 480.

But the stipulation in this case to accept the policies of insurance on the saw-mill as security in the place of the second mortgage, and thereupon to cancel and discharge that instrument, is in writing, and having been executed as a part of the bargain of purchase and sale of the real estate, it rests upon a sufficient consideration, and is valid and binding. Argument upon that topic is unnecessary, as it is too plain for contention; but the suggestion which the appellant intends to make is that the agreement subsequently made to modify the stipulation as to the dimensions of the mill is within the Statute of Frauds of that State, and null and void. Views of the complainants are that an agreement, though in writing and under seal, may in all cases be varied as to time or manner of its performance, or may be waived altogether by a subsequent oral agreement; but the court is of a different opinion, if the agreement to be modified is within the Statute of Frauds.

2. Numerous authorities sanction the principle advanced by the complainants in cases not within the Statute of Frauds, and which fall within the general rules of the common law, and in such cases it is held that the parties to an agreement though it is in writing, may, at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve or annul the former agreement, if no part of it was within the Statute of Frauds. *Goss v. Nugent*, 5 Barn. & Ad., 64; *Harvey v. Graham*, 5 Ad. & Ell., 78; *Emerson v. Slater*, 23 How., 42 [63 U. S., XVI., 365]; *Brown, Frauds* (2d ed.), sec. 409.

Reported cases may also be found where that rule is promulgated without any qualification;

but the better opinion is, that a written contract falling within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall v. Lynn*, 6 Mee. & W., 109, is, that the terms of a contract for the sale of goods falling within the operation of the Statute of Frauds cannot be varied or altered by parol; that where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing. *Clarke v. Russel*, 3 Dall., 415; *Emerson v. Slater*, 22 How., 42 [68 U. S., XVI., 865]; *Goss v. Nugent*, 5 Barn. & Ad., 58; *Harvey v. Grabham*, 5 Ad. & Ell., 73; *Stowell v. Robinson*, 3 Bing. N. C., 928; *Stead v. Dauber*, 10 Ad. & Ell., 57; *Falmouth v. Thomas*, 1 G. & M., 109; *Hasbrouck v. Tappen*, 15 Johns., 200; *Blood v. Goodrich*, 9 Wend., 68.

Suggestion may be made that all the cases were cases at law; but the same rule prevails in equity, as appears by the highest authority. *Emmet v. Deshirst*, 8 Eng. L. and Eq., 88; S. C., 3 McN. & G., 587; *Stevens v. Cooper*, 1 Johns. Ch., 429; Browne, *Frauds* (2d ed.), sec. 422.

Regarded, therefore, as a mere executory agreement to accept the mill when built and completed, it is clear that the Statute of Frauds would be a good defense to a suit for a breach of it; but it cannot be viewed in that light, as it was fully executed on the part of the mortgagors, and was in fact fully executed on the part of the appellant.

8. He is not sued for a breach of the agreement to accept the mill as built and completed; but the suit is to compel him to cancel and discharge the mortgage as agreed in the written stipulation. Called upon to plead to the bill of complaint, he sets up the defense that the dimensions of the mill vary from those specified in the stipulation, to which the complainants reply that he acquiesced in the change at the time the work was done, and that he accepted the mill as built and completed, and they prove the allegations to the entire satisfaction of the court. They built and completed the mill seventy-eight feet in width by one hundred feet in length, at an expense exceeding \$30,000, and the appellant not only accepted it when completed as a compliance with the stipulation, but he also accepted the policies of insurance procured on it as security in the place of the second mortgage, and he cannot now be permitted to avoid the true issue, nor to devert the transaction of its real character in order that he may set up the Statute of Frauds.

VII. 1. Even part performance is often admitted in equity as an answer to the statute; but it is not necessary to invoke that principle in this case, as it is clear that the appellant acquiesced in the changes made in the plan, and that the mill, as built and completed, was accepted by him as a compliance with the stipulation. 1 Story, *Eq. Jur.* (9th ed.), secs. 759, 761; Browne, *Frauds* (2d ed.), sec. 463.

2. Estoppel is also set up by the complainants as an answer to the defense of the Statute of Frauds, and, in view of the facts, the court is of the opinion that it is a complete answer to that defense. He sold the real estate for

\$52,400, received in cash \$10,000, and the purchasers gave a mortgage on the same real estate for the balance of the purchase price. They paid towards the mortgage \$17,673, exclusive of \$576.73 for insurance premiums and for taxes, and erected the saw-mill at the cost of \$32,000, and the record shows that the appellant foreclosed the mortgage and, with two other persons, became the purchaser of the entire property and improvements, subject to the mortgage, for the sum of \$19,600, and has a decree for the deficiency of \$2,864.11, for which he purposes to foreclose the second mortgage now under consideration.

8. Beyond doubt the mortgagors in the first mortgage, one of whom was the principal mortgagor in the second mortgage, built and completed the saw-mill, in the full belief, induced by the conduct and declarations of the appellant, that it would be accepted as a compliance with the stipulation indorsed on the second mortgage. Taken as a whole, the proofs satisfy the court that his conduct and declarations led them to believe that he was content with the change made, and that he would readily acquiesce in their doings when the mill was completed, and, if so, he cannot be heard to allege or prove the contrary to the prejudice of their rights. *Pickard v. Sears*, 6 Ad. & Ell., 474; *Freeman v. Cooke*, 2 Exch., 654; *Foster v. Dauber*, 6 Exch., 864; *Edwards v. Chapman*, 1 Mees. & W., 281; *Morris Canal Co. v. Lewis*, 1 Beas., 323; *Cary v. Wheeler*, 14 Wis., 285.

Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be peculiarly prejudiced by the assertion of such adversary claim.

Decree affirmed.

Cited—23 Wall., 351; 92 U. S., 85; 98 U. S., 130; 96 U. S., 239; 98 U. S., 329; 100 U. S., 629; 14 Bank. Reg., 621; 15 Bank. Reg., 409; 36 N. J. L., 157; 24 Mich., 136; 26 Mich., 221.

JULIUS HORNTALL AND ALEXANDER KULEN, as J. HORNTALL & Co., *Appls.*

v.

MARTIN KEARY, COLLECTOR OF INTERNAL REVENUE, ETC.

(See S. C., 9 Wall., 560-567.)

Citizenship, when must be averred—parties to actions in internal revenue cases—where case is dismissed for want of jurisdiction, no costs allowed.

Citizenship of the parties to a suit, where it is the foundation of jurisdiction in the Federal Courts, must be distinctly averred, so as to show that they are citizens of different States, and that one of them is a citizen of the State where the suit is brought.

Where both parties reside in the same State, the circuit courts have no original cognizance of any case between them arising under the internal revenue laws.

Where a case is dismissed for want of jurisdiction on the face of the pleadings, costs will not be allowed in this court.

[No. 100.]

Decided Jan. 24, 1870.

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APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The bill in this case was filed in the court below, by the appellants, praying for an injunction against the collection of certain taxes.

A demurrer thereto was sustained, and the complainants' bill dismissed, whereupon the complainants took an appeal to this court.

The case is fully stated in the opinion.

Messrs. W. L. Sharkey and W. Brooks, for appellants:

It is understood that this case was decided on Acts of Congress which the court construed as prohibitory of any suit whatever against a collector. This was a total misapprehension of the law. The Commissioner of Internal Revenue is by one Act authorized to settle certain questions in regard to the collection of revenue. By the Act of the First Session of 1866, 14 Stat. at L., 98, section 9, the assessors are authorized to hear and determine appeals taken by parties who feel aggrieved by the assessment. But he must give notice of the time when, and the place where, he will hear such appeals. No such notice was set up in this case, and without it there was no opportunity to have the assessment corrected but in a court of law or equity. But none of these statutes apply to this case. There is no dispute about the assessment or the payment of the tax. The only question is: can a party be compelled to pay taxes twice? The demurrer admits that they had been paid once. And that provision of the Act of the Second Session of 1866, which provides that "No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court," besides being simply absurd, has no application to this case.

The respondent is not named in the bill as a citizen of Mississippi, but is sued in his official capacity, without naming his residence. He is sued as an officer of the United States, and had a right to have the suit transferred to the United States Court. The process was served on his deputy, and it does not appear that Keary is a citizen of Mississippi. But has not the federal judiciary jurisdiction in all revenue cases? It is supposed that the counsel below acted on this presumption.

Messrs. E. R. Hoar, Atty. Gen., W. A. Field, Asst. Atty. Gen., for appellee:

It does not appear by the bill that the complainants and respondent are citizens of different States of the United States; but it does appear with sufficient certainty, that they are all citizens of the State of Mississippi. The appeal must, therefore, be dismissed for want of jurisdiction. *Ins. Co. v. Ritchie*, 5 Wall., 541 (73 U. S., XVIII., 540).

2. This renders it unnecessary to consider whether any such case is stated as a court of general equity jurisdiction could take cognizance of, and whether the amendment of section 19 of the Internal Revenue Act of July 18, 1866, found in section 9, of chapter 169, Acts of 1867 (14 Stat., p. 475), in these words, to wit: "And no suit for the purpose of restraining the assessment or collection of tax, shall be maintained in any court," does not prohibit a Circuit

Court of the United States from take cognizance of any such case as is stated in this bill of complaint. That part of the original decree, which directs that "Complainants pay the cost of this cause to be taxed, for which execution may issue," is erroneous, because the bill should have been dismissed by the circuit court, for want of jurisdiction.

Mr. Justice Clifford delivered the opinion of the court:

Owners or holders of cotton, produced within the United States, upon which no tax has been levied, paid or collected, are required by the Act of the 18th of July, 1866, as amended, to pay a tax upon the same of two and one half cents per pound, and the provision is that such tax shall be and remain a lien thereon in the possession of any person whomsoever from the time the Act took effect, or the cotton was produced as aforesaid, "until the same shall have been paid." 14 Stat. at L., 98; 14 Stat. at L., 471. Due notice in writing was given by the appellee, as Collector of Internal Revenue for that district, on the 9th of May, 1866, to the appellants, that a tax on three hundred and forty-one bales of cotton, amounting to \$8,147.23, had been assessed against them under that Act as amended, by the assessor of that collection district, and that a list of the same in due form had been transmitted to him for collection. Payment of the tax having been delayed beyond the time allowed by law, they were also notified that they had become liable to pay five per cent. additional upon the amount of the same, together with interest from the first day of January preceding the date of the notice, and that, if the tax was not paid within ten days from the service of the notice, the same would be collected by distraint and sale of property. Before the ten days expired the appellants filed their bill of complaint in the Circuit Court for that district, praying that the appellee, as such collector, might be enjoined from enforcing the payment of the tax for several reasons, of which the following are the most material:

1. They admit that, during the winter preceding the filing of the bill of complaint, they shipped from that port three hundred and forty-one bales of cotton, but they allege that the internal revenue tax on the same was duly paid to the collector, or to his legally authorized deputy; that the permits for the shipment were duly issued by that officer, though they cannot be exhibited, as they still remain in his possession; and they also allege that the charge in the notice that the tax on the cotton is unpaid is a fraudulent and corrupt fabrication.

2. That the proceedings threatened by the collector are not authorized by the Acts of Congress providing for the collection of such taxes; that such proceedings are applicable only to the collection of taxes on incomes, licenses, and the like, and not to the collection of the cotton tax, as that is made a specific lien on the cotton, which cannot be removed from the district where it was produced until the tax is paid or a bond given to secure such payment.

Pursuant to the prayer of the bill of complaint an injunction was issued forbidding the collection of the tax until the further order of the court, but on motion of the district attorney

NOTE.—Jurisdiction of U. S. Circuit Court depending on parties and residence. See note to Emory v. Greenough, 3 U. S. (3 Dall.), 306.

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the injunction was subsequently dissolved. Required to plead, answer, or demur, the district attorney demurred specially to the bill of complaint, showing for cause: (1) That it was not the proper remedy for the alleged grievance; that the remedy, if any, was by appeal to the commissioner. (2) That the Circuit Court has no jurisdiction in equity to enjoin the collection of internal revenue taxes. Both parties were heard, and the court sustained the demurrer, dismissed the bill of complaint, and awarded costs to the respondent, and the complainants appealed to this court.

Jurisdiction of the Circuit Court in the case is denied in argument by the appellee upon two grounds: (1) Because the parties to the suit are citizens of the same State. (2) Because the Circuit Court has no power to afford a remedy by injunction for such a grievance; but in the view taken of the case it will not be necessary to examine the second proposition with much particularity, as the first is clearly correct and must prevail.

Controversies between citizens of different States are plainly within the judicial power of the United States, as conferred by the Constitution; and Congress provided in the 11th section of the Judiciary Act that the Circuit Courts should have original cognizance, concurrent with the courts of the several States, of suits between a citizen of the State where the suit is brought and a citizen of another State. 1 Stat. at L., 78. Citizenship of the parties to a suit, where it is the foundation of jurisdiction in the Federal Courts, must be distinctly averred, so as to show not only that they are citizens of different States, but also that one of them is a citizen of the State where the suit is brought. Conkl. Treat. (4th ed.), 844; *Bingham v. Cabot*, 3 Dall., 382; *Gassies v. Ballou*, 6 Pet., 761. Express allegation of the facts material to give jurisdiction is necessary, because such courts are courts of special and not of general jurisdiction and, consequently, there is no presumption in favor of their jurisdiction where the facts necessary to show it do not appear in the record. *Turner v. Bk. of America*, 4 Dall., 8; *Sullivan v. Steamboat Co.*, 6 Wheat., 450. Nothing of the kind is shown in this case, either in the pleadings or in any part of the proceedings in the suit. On the contrary, the complainants are described in the bill of complaint as partners in trade in the City of Vicksburg, State of Mississippi, and the respondent is therein described as the Collector of Internal Revenue of the United States for the second collection district of Mississippi, leaving it to be clearly inferred that both parties are citizens of the same State. But the matter is not left to inference, as the parties are in express terms described as citizens of Mississippi in the subpoena which was issued at the same time on motion of the complainants.

Unable successfully to deny that proposition, the next suggestion of the appellants is that all revenue cases are within the jurisdiction of the Circuit Courts, but the suggestion cannot be sustained, as will be seen by reference to the several Acts of Congress upon that subject. *Insurance Co. v. Ritchie*, 5 Wall., 541 [72 U. S., XVIII., 540]; *Philadelphia v. Collector*, 5 Wall., 728 [72 U. S., XVIII., 616].

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Provision was made by the 2d section of the Act of the 2d of March, 1833, that the jurisdiction of the Circuit Courts should extend to all cases in law or equity arising under the several laws of the United States for which other provisions were not already made by law. 4 Stat. at L., 632. Undoubtedly, the Act was passed for the protection of the officers charged with the collection of import duties, but the same provision was, by the 50th section of the Act of the 80th of June, 1864, extended to cases arising under the laws for the collection of internal duties. 13 Stat. at L., 241, sec. 50.

Strong doubts are entertained whether the Circuit Courts, even during the period when that provision was in force, were authorized to enjoin the collection of internal revenue taxes, but it is not necessary to decide the point, as Congress subsequently repealed the 50th section of the last named Act, and expressly enacted that the original Act should not be so construed as to apply to cases arising under the other sections of the Act, or to any Act in addition thereto, or in amendment thereof, nor to any case in which the validity or interpretation of said Act or Acts shall be in issue. 14 Stat. at L., 172, sec. 67.

Suits between citizens of different States may still be brought in the Circuit Courts, but where both parties reside in the same State the Circuit Courts have no original cognizance of any case arising under the internal revenue laws. Such cases, when commenced against an officer acting under those laws, in a state court may be removed, on petition of the defendant, into the Circuit Court for the district, and the jurisdiction of the court is clear beyond dispute, irrespective of the citizenship of the parties; but the Act of the 2d of March, 1867, provides that no suit for the purpose of restraining the assessment or collection of a tax shall be maintained in any court. 14 Stat. at L., 475; *Philadelphia v. Collector*, 5 Wall., 730 [72 U. S., XVIII., 616].

Viewed in any light the Circuit Court had no jurisdiction of this controversy and, consequently, this court has no power to grant the relief prayed for in the bill of complaint.

Costs were improperly allowed in the court below, as the case was dismissed for the want of jurisdiction on the face of the pleadings, and in such cases the general rule is that costs will not be allowed in this court. *McFer v. Wattles*, 9 Wheat., 650; *Strader v. Graham*, 18 How., 602 [59 U. S., XV., 464]; *Ingles v. Coolidge*, 2 Wheat., 363; *Montalet v. Murray*, 4 Cranch, 47; *Bradstreet v. Potter*, 16 Pet., 318. Sometimes an exception to that rule is admitted, as where the defendant in the court below is the defendant in this court, but inasmuch as the costs were improperly awarded in his favor by the Circuit Court, the better opinion is that he is not entitled to the benefit of that exception, as the decree in his favor must be reversed to correct that error. *Winchester v. Jackson*, 3 Cranch, 514.

Decree reversed, and cause remanded, with directions to dismiss the bill of complaint, but without costs.

Cited—9 Wall., 537; 12 Wall., 8, 135; 38 U. S., 225; 100 U. S., 208; 109 U. S., 284; 1 Wood, 622.

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THE BURLINGTON AND MISSOURI RIVER R. R. COMPANY, *Pff. in Err.*,

v.

FREMONT COUNTY, IOWA.

(See S. C., 9 Wall., 89-95.)

Grant of lands to Iowa—construction of Acts.

The reservations annexed to the Act of May 15, 1856, granting lands to the State of Iowa in aid of railroads, embraced the lands granted to the States by the Act of Sep. 28, 1850, known as the Swamp Land Grant.

Until the line of the railroad was definitely fixed upon the ground, the title to any particular section on the line of the road did not vest in the Company under the grant, but was subject to the confirming Act of 1857.

[No. 40.]

Submitted Nov. 8, 1869. Decided Feb. 7, 1870.

IN ERROR to the Supreme Court of the State of Iowa.

The petition in this case was filed by the defendant in error, in the District Court of Fremont County, Iowa, to obtain title to certain lands. A decree having been entered in favor of the plaintiff, the defendant took an appeal to the Supreme Court of the State. The said decree having been affirmed in that court, the defendant sued out this writ of error.

The case is fully stated by the court.

Mr. David Rorer and *H. Strong*, for plaintiff in error.

Mr. J. A. Harvey, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa.

The bill was filed in the court below by Fremont County, against the Railroad Company, to settle the title to some 12,754 acres of land situated in said County which was claimed as belonging to the Company. Both parties claim title under grants by Acts of Congress; the plaintiff under the Swamp Land Grant to the State of Iowa, September 29, 1850, 9 Stat. at L., 519; the defendants under a grant to the State for aid in the construction of railroads, May 15, 1856; 11 Stat. at L., 9.

The plaintiff's title is as follows:

By the 1st section of the Act of September, 1850, it is provided that, "To enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this Act, shall be, and the same are hereby granted to said State."

Section 2 provides that "It shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this Act, to make out an accurate list and plats of the land described as aforesaid, and transmit the same to the Governor of the State, and at the request of said Governor, cause a patent to be issued to the State therefor, and on that patent the fee simple to said land shall vest in the said State, subject to the disposal of the Legislature thereof; provided, however, that the proceeds of said land, whether from sale or by direct appropriation in time, shall be applied exclusively, as far as necessary, to the purpose of reclaiming

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said lands by means of the levees and drains aforesaid."

Section 3. "That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for' cultivation, shall be included in said list and plate; but when the greater part of the subdivision is not of that character, the whole of it shall be excluded therefrom."

Section 4. "That the provisions of this Act be extended to and their benefits be conferred upon each of the other States of the Union, in which such swamp and overflowed lands, known and designated as aforesaid, may be situated."

Under this last section the State of Iowa became entitled to the benefit of this Act. After its passage, the only important steps to be taken to perfect the title in the State, was the ascertainment and designation of the several subdivisions which fell within the description of swamp lands as described in the 3d section. This duty was devolved upon the Secretary of the Interior as the head of the Land Department.

On the 21st November, after the passage of the Act, the Commissioner of the Land Office issued instructions to the Surveyor-General of the State to make a selection of these subdivisions and report the same to the Department (see letters, 21st December, 1853; 22d January, 1859, *Lester's Land Laws*, pp. 543, 551, 559); and also to transmit copies to the local land office. This duty was performed in accordance with the instructions. The first list was returned and filed in the General Land Office, Sep. 20, 1854, and in the local office Oct. 23, 1854. The second and remaining list was returned and filed in the General Land Office Jan. 21, 1857, and in the local office Jan. 23, 1857. These two lists contained the whole of the lands in controversy. On the filing of the lists in the local office, the register was directed to make a note of the subdivisions in his plat book and to withdraw them from the market, which was done accordingly.

In this connection it may be proper to refer to the Act of March 2, 1855 (10 Stat. at L., 634), which is "An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands," and provides, in substance, that patents shall be issued to purchasers or locators who have made entries of the public lands claimed as swamp lands, prior to the issue of patents to the State under the 2d section of the Swamp Land Grant of 1850, and providing for an indemnity to the States. Conflicts had arisen between these purchasers and locators on the one side, and the States claiming the land under the Swamp Land Grant. As these lands were not withdrawn from sale until the filing of the lists in the local land offices, they were supposed to be open to entry or location, and a portion of them had been thus appropriated. On the other hand, the States claimed that the grant to them by the Act of Congress was a grant *in presenti*, and vested the title immediately. Such has been the opinion expressed by the Land Commissioner and also by the Attorney-General.

The embarrassments of the Land Department growing out of this controversy between the States and the settlers, was removed by this Act of 1855, which confirmed the title of the settlers and compensated the States for the land of which they were deprived.

The 2d section of the Act provided that compensation should be allowed to the States only in respect to subdivisions taken up by the settlers, which were swamp lands within the true intent and meaning of the Act of 1850—that is, where the greater part were “wet and unfit for cultivation.” And the Land Department, therefore, allowed parties to contest the claim of the States, and to give evidence before the proper officers that the subdivision was not of the character contemplated by law. As a consequence, under this construction of the Act, controversies increased between the settlers and the States, and as stated by one of the Commissioners of the Land Office, the contesting applications pending before the department involved, by estimate, three million acres, and on investigations being ordered, papers came into the office by bushels. Pending these proceedings, Congress intervened and passed the Act of March 8, 1857. 11 Stat. at L., 251. This Act was entitled “An Act to Confirm to the Several States the Swamp and Overflowed Lands Selected under the Act of Sep. 20, 1850, and 1849.”

There is but one section, and it provides that “The selection of swamp and overflowed lands granted to the several States by the Act of Congress, approved Sep. 20, 1850, and the Act of 2d March, 1849, heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing laws of the United States, be, and the same are hereby confirmed, and shall be approved and patented to the several States in conformity with the provisions of the Act aforesaid, as soon as may be practicable,” with a proviso saving the Act of March 2d, 1855, which is continued in force and extended to all locations claimed as swamp lands made since its passage. As we have already stated, the selections of the swamp and overflowed lands by the State of Iowa, under instructions from the Land Department, involved in this suit were made, and the lists returned and filed in the department September 20, 1854, and January 21, 1857, which was before the passage of this Act. And these are the selections referred to, confirmed and approved, and for which patents were directed to be issued as soon as practicable if the same were vacant and unappropriated, or not occupied by an actual settler under some law of Congress.

We will now examine the title of the defendants under the Act of May 15, 1856. That Act provides as follows:

“That there be, and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi River, to a point on the Missouri River, near the mouth of the Platte River (naming also several other lines of railroad) every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads;” and then provides that when the lines of the road shall be “definitely fixed,” if it shall appear that any of the land within these six sections shall have been “sold or otherwise appropriated,” alternate sections may be selected of equal quantity within fifteen miles of the road.

To this grant is the following proviso:

“That any and all lands heretofore reserved

to the United States by any Act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this Act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.”

It will be seen from an examination of this grant that the reservations annexed to it are very full and explicit. They are first found in the enacting clause itself, where provision is made for the selection of lands beyond the lines of these sections on each side of the road, in case any of the sections have been previously “sold or otherwise disposed of,” and then again in the general proviso of the grant. These reservations clearly embrace the previous grant of the swamp and overflowed lands for the purpose of enabling the States to redeem them and fit them for cultivation by levees and drains. At the time of the passage of this Act (May 15th, 1856), a moiety of the lands in controversy had been selected and reported to the Land Department; and the authorities of the State, under instructions from that department, were engaged in the selection of the remainder. The lands already selected and returned had been withdrawn from sale, and were not in the market at the time of the passage of the Act; and as soon as the remaining lists were returned, which was January 21, 1857, they were also withdrawn from the market. In the language of the Railroad Act, the whole of the lands in controversy were “otherwise appropriated” and were “reserved” for the purpose of aiding the States in their objects of internal improvements.

But there is still, if possible, a more decisive answer to the title set up by the defendants. Until the line of the railroad was definitely fixed upon the ground, there could be no certainty as to the particular sections of lands falling within the grant; nor could the title to any particular section on the line of the road vest in the Company. The grant was in the nature of a float until this line was permanently fixed. Now, the proofs show that the location of the road was not made on the ground and adopted by the Company till the 24th March, 1857, which was after the confirmatory Act of that year.

This, as we have seen, confirmed all the selections made at the time, and which included all in controversy in this suit, in the language of the section, “so far as the same shall remain vacant, and unappropriated, and not interfered with by actual settlement.” As the Railroad Company at this time, for the reasons above stated, had not perfected their grant so as to have become invested with the title to any of the sections included in the lists or sections of the swamp lands on file in the Land Department, they can set up no appropriation of any of these lands under their grant, which leaves them subject to the confirming Act of 1857, according to the very words of it.

The decree of the court below is affirmed.

Cited—9 Wall., 97; 2 McCrary, 554; 7 Sawy., 54; 53 Mo., 571; 65 Mo., 237; 28 Mich., 334; 31 Mich., 484; 94 Ill., 78.

THE BURLINGTON AND MISSOURI RIVER R. R. COMPANY, *Pf. in Err.*,

v.

MILLS COUNTY, IOWA.

Burlington & M. R. R. Co. v. Fremont County, ante, 568, followed.

The pleadings and proofs in this case present the same questions involved in the case of same plaintiffs against Fremont County, and they are decided in the same way.

[No. 39.]

Ordered to be submitted to abide decision of No. 40, Feb. 2, 1870. Decided Feb. 7, 1870.

IN ERROR to the Supreme Court of the State of Iowa.

See, the preceding case.

Mr. D. Rorer, for plaintiff in error.

Mr. T. Ewing, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa.

The pleadings and proofs present the same questions involved in the case of the same plaintiffs against Fremont County [ante, 568], and must be disposed of in the same way.

The decrees of the court below affirmed.

KENNETH H. WORTHY, *Pf. in Err.*,

v.

JOHN A. BARRETT, WESLEY F. SEWELL, CALVIN H. SMITH, JOHN KILTER AND ABSALOM KELLY, Commissioners of the COUNTY OF MOORE.

(See S. C., 9 Wall., 611-613.)

Jurisdiction over state judgment.

Where the right of the plaintiff here claimed under the U. S. Constitution, was not set up, or specially claimed in the state court, this court has no jurisdiction over the state judgment.

[No. 413.]

Argued Feb. 4, 1870. Decided Feb. 7, 1870.

ON MOTION to dismiss.

This was a petition for *mandamus*, filed in the Superior Court of Moore County, North Carolina, by the plaintiff in error against the County Commissioners, commanding them to allow him to qualify as sheriff of said County. The court having granted the writ according to the prayer of said petition, an appeal was taken to the Supreme Court of North Carolina, which reversed the order of the court below. Whereupon the petitioner sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. A. W. Shaffer, for plaintiff in error:

Cases involving rights that are protected only by the Courts of the United States, are within the appellate jurisdiction of the Supreme Court, no matter whence the rights may spring.

Worthy's rights were originated in the State Constitution, art. VI., sections 1, 4, 5, but are protected by the United States Court, section 1, of XIVth Amendment.

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The right of holding office is co-extensive with the elective franchise and, therefore, falls within the category of "immunities and privileges" of the citizens of the United States within this State.

See the well considered and often cited case of *Corfield v. Coryell*, 4 Wash. (C. C.), 880, apparently approved by Cooley, Const. Lim, 16, n.; Sedgwick, Stat. & Const. Law, 601, 1st ed., 1867, and 2 Kent, Com., 72.

Whatever the state law confers as a personal right upon citizens of the United States, whether it use the word "citizens," or only use terms which define that word; and whether it use such word or terms unqualifiedly or with limitations of detail, is protected by the XIVth Amendment in the same manner, state, quality and condition that it is given.

The North Carolina Supreme Court has decided in effect that the right to hold office by one formerly sheriff, is taken away by section 8, XIVth Amendment. This is an assault upon the immunity and privilege granted to us by section 1. We have a right to know how far this guaranty extends; to complain at Washington that it has been insufficiently administered at Raleigh.

Mr. W. W. Boyce, for defendants in error:

It is clear from the inspection of the transcript, that the plaintiff specially set up no claim under the Constitution. In his petition, no mention is made of any claim to his office arising out of the Constitution.

In this connection it is to be noted:

(a) That, by the rules of pleading, the greatest strictness is necessary in the statement of the relator's case on application for *mandamus*.

Selw. N. P., 828; 1 Chit. Pr., 808; *Hozie v. Co. Com'rs*, 25 Me., 838; *Moses, Mandamus*, 206.

(b) That, the 8d clause of the 25th section of the Judiciary Act requires that the title, right, privileges or exemption, "shall be specially set up or claimed."

Whatever right the plaintiff has to the office he claims, arises from the law of North Carolina, and is not protected by the Constitution; therefore the writ of error does not lie in his behalf.

"Where a right springs from any other source (than from federal authority), in order to gain the jurisdiction, it is necessary that it should be protected by the Constitution, or a treaty, or Act of Congress." *N. O. v. De Armas*, 9 Pet., 324, 333.

"Where one objected to the validity of the title claimed by defendants in error, but claimed no right under the United States, the decision of the state court in favor of defendant in error, gave no foundation for a writ of error.

Burke v. Gaines, 19 How., 839 (60 U. S., XV., 655).

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion to dismiss for want of jurisdiction. The writ of error was prosecuted under the 25th section of the Judiciary Act; and the ground assigned for dismissal is, that the record does not show that any question was made or decided in the state court, of which this court has jurisdiction under that Act.

It appears that the plaintiff in error, having

received a majority of the votes cast at an election for sheriff, held in Moore County, North Carolina, presented his bond to the defendants in error, who were Commissioners of the County, and offered to qualify under the laws of the State. A majority of the Commissioners refused to receive his bond or permit him to qualify as sheriff, on the ground that he was disabled from holding the office by the XIVth Amendment of the Constitution of the United States; and was, moreover, prohibited because of that disability, by an Act of the Legislature of North Carolina, from qualifying under that Act, and from holding office in that State.

Acts of 1868, ch. 1, sec. 8.

This decision of the County Commissioners was affirmed by the judgment of the Supreme Court of the State; to reverse which judgment, the plaintiff has prosecuted this writ of error.

It is manifest upon this statement, that the court has no jurisdiction of the cause. There was no decision by the Supreme Court of North Carolina, against the validity of any treaty or Act of Congress, or authority exercised under the United States; nor in favor of the validity of a statute or of authority exercised under a State, and alleged to be repugnant to the Constitution, treaties or laws of the United States.

It is true that, in the brief of the counsel for the plaintiff, it is urged that the right of the plaintiff is protected by the 1st section of the XIVth Amendment; but this right does not appear to have been set up, or specially claimed in the state court; and this is essential to jurisdiction here.

We have no authority, therefore, to examine the question presented by the record; but must allow the motion of the defendants in error, and dismiss the cause for want of jurisdiction.

Cited—16 Wall., 382.

THE PROVIDENCE RUBBER COMPANY,

Appt.,

v.

CHARLES GOODYEAR, Executor of
CHARLES GOODYEAR, Deceased, THE
UNION INDIA RUBBER COMPANY
AND THE PHOENIX RUBBER COM-
PANY.

(See S. C., 9 Wall., 788-804.)

Where one of three executors may maintain suit—patent issued to executor—equity pleadings and proofs—Goodyear's patent—construction of—frauds in issuing—master's account—new issue—rule of damages.

Though there are three executors appointed by a will, one may maintain a suit, if two of them have not qualified.

A patent, surrendered by an executor and re-issued to him in the same character, vested the legal title in him exclusively.

If his authority to sue in his representative character was intended to be questioned, it should have been done by plea or by the answer.

In equity the proofs and allegations must correspond. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them.

NOTE.—Distinction between inventions and processes; when latter patented. See, note to Corning v. Burden, 56 U. S. (15 How.) 252.

The claim of Charles Goodyear, Sr., that he was the original and first inventor of the patents for manufacturing rubber, is impregnable.

A patent should be construed in a liberal spirit, to sustain the just claims of the inventor.

It is the right of the patentee and his representatives to enlarge or restrict the claim, so as to give it validity and secure the invention.

Courts cannot go behind the action of the commissioner in extending a patent, and inquire into alleged frauds by which the extension was procured.

In taking the account the master is not limited to the date of the decree, but may extend the account down to the time of the hearing before him.

Where an issue is not made by the pleadings, it is too late for the defendants to raise the point before the master.

Where the conduct of defendants has not been such as to commend them to the favor of a court of equity, every doubt and difficulty should be resolved against them.

Profits made in violation of the rights of the complainants are to be computed and ascertained by finding the difference between cost and yield.

[No. 25.]

Argued Dec. 14-18, 1869. Decided Feb. 7, 1870.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The history and facts of the case fully appear in the opinion of the court.

Messrs. James H. Parsons, C. Cushing, J. S. Black, J. A. Garfield, Abraham Payne and W. W. Boyce, for appellant.

Messrs. E. W. Stoughton, Wm. E. Curtis, Wm. M. Everts and J. H. Ackerman, for appellees.

(The case was very thoroughly argued, there being about seven hundred pages of printed argument alone. No abstract of the argument is here attempted, as it is very largely occupied with the facts of the case, and space does not permit a fair and comprehensive abstract. However, the court discusses the case so fully, that it is believed this omission will not impair the value of this report).

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the decree of the Circuit Court of the United States of the District of Rhode Island. The appellees were the complainants in the court below. The defendants were the appellants, and William W. Brown, Edwin M. Chaffee and Augustus O. Bourn. The bill alleges that a patent for "a new and useful improvement in India rubber fabrics" was originally granted to Charles Goodyear, deceased, on the 15th of June, 1844; that this patent was surrendered, and that on the 15th of June, 1849, a patent was re-issued to the original patentee, "for a new and useful improvement in processes for the manufacture of India rubber;" that it was extended by the Commissioner of Patents on the 14th of June, 1858; that this patent was surrendered by Charles Goodyear, Jr., executor of Charles Goodyear, deceased, and re-issued to him as executor on the 20th of November, 1860, in two patents, one entitled, "for improvement in the manufacture of caoutchouc," and the other "for improvement in the art of preparing caoutchouc;" that the complainants, other than Charles Goodyear, Jr., are the assignees of licensees of Charles Goodyear, deceased; that the complainants have the exclusive right to manufacture and sell army and navy equipments made of vul-

canized India rubber, including vulcanized India rubber blankets, coats, clocks, cloth, clothing, ponchos for army, navy, and other purposes, and also of vulcanized India rubber bulbs, to be used in the manufacture of syringes; and that the defendants have infringed the patents by the manufacture and sale of these articles.

The prayer of the bill is for an injunction and an account.

The answer denies that Goodyear was the original and first inventor of the improvement described in the original patent. It denies, also, the infringement alleged in the bill. It sets up as special defenses that only one of the persons named in the will of Charles Goodyear, deceased, as executors, is made a party complainant; that the original patent is invalid; that all the re-issues are void, even if the original patent were valid, because the claims are broader than the claim in the original patent; and that they are not, nor is either of them, in fact, for the same invention as that for which the original patent was granted; and that the extension of the patent in June, 1858, by the Commissioner of Patents, was procured "by fraud and collusion, by fraudulent suppressions and concealments from, and by false and fraudulent representations to," that officer. The answer also claims that the defendants are not infringers, because they have manufactured their goods under a license from the original patentee to E. M. Chaffee, dated June 25th, 1848, which they insist is valid and outstanding, and a complete defense to this suit.

A large mass of testimony was taken by the parties. The record covers nearly one thousand two hundred printed pages. The court decreed in favor of the complainants. The defendants have brought the case here for review.

It has been argued in this court on both sides with great learning and ability. The propositions to which our attention has been called as grounds for the reversal of the decree are not numerous, and the scope of our remarks will not be extended beyond them.

Charles Goodyear, deceased, by his will appointed his son, Charles Goodyear, Jr., his wife, Fanny Goodyear, and James A. Dorr, his executors. The will provided that a majority of the executors should decide all questions that might arise; that the acts of a majority should be as binding as the acts of all; that if at any time there should be but two, they might appoint a third; and that if there should be but one, he might appoint another. The manner of appointment in both cases was specified.

It is insisted that Charles Goodyear, Jr., alone, as executor, cannot maintain this suit, and that his co-executors named in the will are necessary parties. The evidence in the record shows that the testator was domiciled and had property in the City of New York. This gave the surrogate there jurisdiction to take the probate of the will, and to issue letters testamentary. Charles Goodyear, Jr., alone proved the will, and received such letters. The other persons named as co-executors have taken no step in that direction. They have never at any time assumed to do any act or claimed any right by virtue of their nomination in the will.

At the place where the letters testamentary See 9 WALL.

were issued the common law relied upon by the appellants was in conflict with the statutory provisions of the State, and was, therefore, abrogated. It could no more be recognized in the Federal than in the state tribunals. Nor is the rule in courts of equity different from the rule in the courts of law. Neither can recognize the authority of an executor any more than that of administrator, and neither will aid him to obtain possession and control of the estate, until he has fulfilled the conditions and given the guaranties of fidelity and solvency prescribed by the local law. A different rule could hardly fail to be followed by the most mischievous consequences.

If, however, the question were to be settled by the rules of the common law, we should be of the opinion, upon the facts of the case as disclosed in the record, that the suit was well brought by Charles Goodyear, Jr., alone. But there are other considerations bearing upon the subject which are still more satisfactory to our minds.

The patent law of the United States authorizes an executor to surrender a patent and take a re-issue. Act of July 4, 1886, sec. 18. In this case the patent was surrendered by Charles Goodyear, Jr., as executor, and the re-issues were to him in the same character. This was a specific grant by the government, and vested in him exclusively the legal title. The suffix of "executor" signified the trustee character in which he assumed to act, and in which he was recognized and dealt with by the commissioner. The designation, and the trust which it implied, did not prevent the passage of the legal title nor qualify the estate which accompanied it. It follows from this view of the subject that the grantee can sustain a suit on the patent in all respects, as if he had been designated in it as trustee instead of executor.

But, conceding, for the purposes of the argument, that he occupies the same relation to the patents re-issued to him as to the one re-issued to the testator, and which he surrendered, then he was a foreign executor in the forum where the suit was instituted.

The bill alleges that he was the executor of Charles Goodyear, deceased. His rights as such in that forum depended upon the local law of Rhode Island. If his authority to sue there in his representative character was intended to be questioned, it should have been done by plea or by the answer. Not having been done in that way, the defendants are concluded, and the question is no longer open in the case. The answer is silent upon this point. Its averments touching the jurisdiction of the surrogate of the City of New York are effectually disposed of by the complainants' proofs.

In any view which can be taken of the subject the objection is untenable.

The proposition that the patent is fatally defective, because it is impossible to make merchantable goods according to the directions contained in the specifications, cannot be entertained. The answer contains no averment upon the subject. No such issue was tendered to the complainants, and they have had no notice that such a defense was intended to be relied upon. In equity, the proofs and allegations must correspond. The examination of the case, by the court, is confined to the issues

made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them. *Poster v. Goddard*, 1 Black, 518 [66 U. S., XVII., 282]; *Tripp v. Vincent*, 8 Barb. Ch., 618; *Boone v. Chiles*, 10 Pet., 178; *Harrison v. Nixon*, 9 Pet., 483.

It is alleged in the answer that the testator was not the original and first inventor of the process described in his patents.

The original patent was issued in 1844. The invention has since been covered by a succession of patents, the last of which, the re-issues in question, are still unexpired, and are the foundation of this litigation. The discovery was one of very great value. It is a mine of wealth to the possessors. Since the first patent was issued there have been numerous cases of litigation involving its validity. They were earnestly contested. In every instance the patent was sustained. This litigation was remarked upon by the counsel for the appellants, and it was added that this question is now, for the first time, presented to this court for consideration. It is a just commentary to say that such a litigation is always to be expected in cases like this. There are always those who are ready to gather where they have not sown. The number and ardor of the conflicts is usually in proportion to the value of the prize at stake. The validity of the claim of the testator was never shaken by any adjudication. It has been uniformly affirmed and sustained. If the subject was never brought here before, it was, doubtless, because those who were defeated elsewhere saw no ground for the hope of a more favorable result in this court. These considerations are very persuasive to the presumption that the claim of Charles Goodyear, the elder, that he was the original and first inventor, is impregnable. If it were not so, we cannot doubt that it would have been overthrown in the numerous and severe assaults which have been made upon it. We have, however, examined the question by the light of the evidence found in the record, and in the absence of the adjudications referred to should have had no difficulty in coming to the same conclusion. We entertain no doubt upon the subject. The point was not very earnestly pressed upon our attention in the argument at the bar. We deem what we have said in regard to it, sufficient.

The patents re-issued to the executor upon the surrender of the patent re-issued to the testator were numbered respectively 1084 and 1085. The one numbered 1085 is for the process by which vulcanized India rubber is manufactured. The other one is for the result of the process in the form of the article produced.

It is contended by the appellants that both these patents are invalid, for two reasons: 1, because they are broader than the claims of the patent surrendered by the executor; and, 2, because one is for a process, and the other for the product of that process. The court below held the objection to the patent for the process—that it is too broad—fatal to its validity, because the claim embraced “other vulcanizable gums” besides India rubber as articles to which the process was to be applied. From this part of the decree below no appeal was taken

by the complainants. It is, therefore, final and conclusive in its effect, and the patent to which it relates must be laid out of view. It remains, therefore, to consider only the patent No. 1084, which is for the product.

The claims of the patent re-issued to Charles Goodyear, deceased, in 1849, are as follows:

“What I claim as my invention and desire to secure by letters patent is the curing of caoutchouc, or India rubber, by subjecting it to the action of a high degree of artificial heat, substantially as herein described, and for the purposes specified.

“And I also claim the preparing and curing the compound of India rubber, sulphur, and a carbonate or other salt, or oxide of lead, by subjecting the same to the action of artificial heat, substantially as herein described.”

The claim of the patent for the product is thus expressed:

“What is claimed as the invention of Charles Goodyear, deceased, is the new manufacture of vulcanized India rubber (whether with or without other ingredients), chemically altered by the application of heat, substantially as described.”

The specification, among other things, contains these clauses:

“For many purposes the manufacture is improved by the addition of other substances than sulphur, among which white lead is one of the best, and which, when used, may be combined in the mixture above described, in the proportion of seven parts by weight, thereby forming a triple compound. Other salts of lead may be used with advantage, and coloring matter may be also incorporated with the mixture for the purpose of imparting colors to the product.

“And other materials, such as cotton, silk, wool, or leather, may be incorporated or combined with the India rubber and sulphur, thereby modifying the strength, elasticity, or other qualities of the new manufacture for particular purposes; as it is found that the new substance or product will be produced whenever the essential elements of rubber, sulphur and heat are used, whether such other materials are incorporated or not.”

A patent should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and his labors. *Corning v. Burden*, 15 How., 269; *Battin v. Tuggert*, 17 How., 74 [58 U. S., XV., 37]. The surrender was made by the executor, for the reason that the specification was defective and required amendment. This the law permitted, if the facts brought the case within the provisions of the statute. The commissioner was charged with the duty of examining the facts and deciding upon the application. His judgment is shown in the results. Upon comparing the context of the specifications of the surrendered and of the re-issued patent, and giving to each a reasonable interpretation, we are satisfied that the decision was correct, and we see no reason to reverse it.

It is the right of the patentee and his representatives to enlarge or restrict the claim, so as to give it validity and secure the invention. *Battin v. Taggart*, 17 How., 84 [58 U. S., XV., 41].

Patentable subjects, as defined by the patent law (Act of 1836, sec. 6), are "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter."

A machine may be new, and the product or manufacture proceeding from it may be old. In that case the former would be patentable and the latter not. The machine may be substantially old and the product new. In that event the latter, and not the former, would be patentable. Both may be new, or both may be old. In the former case, both would be patentable; in the latter, neither.

The same remarks apply to processes and their results. Patentability may exist as to either, neither, or both, according to the fact of novelty, or the opposite. The patentability, or the issuing of a patent as to one, in nowise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts. Such is the sound and necessary construction of the statute.

This objection to the patent, we think, is also not well taken.

Can we go behind the action of the commissioner in extending the patent and inquire into the frauds by which it is alleged that the extension was procured?

The 5th section of the Act of 1790 (1 Stat. at L., 109, chap. 7) provided for the repeal of patents under the circumstances and in the manner specified. This Act was repealed by the Act of 1793. 1 Stat. at L., 818, chap. 2. The 10th section of that Act re-enacted the 5th section of the Act of 1790. The 5th section of the latter Act authorized substantially the same defenses in suits upon patents which are allowed by the 15th section of the Act of 1836, with the further provision, that if the facts touching either defense were established, "judgment shall be rendered for the defendant with costs, and the patent shall be declared void." This Act continued in force until it was repealed by the Act of 1836. These provisions were not then, and they have not since been re-enacted.

The 16th section of the Act of 1836 authorizes a court of equity, in cases of interference, to take jurisdiction and annul the patent issued to the party in the wrong. Beyond this the patent laws are silent upon the subject of the exercise of such authority.

This review furnishes a strong implication that it was the intention of Congress not to allow a patent to be abrogated in any collateral proceeding, except in the particular instance mentioned, but to leave the remedy in all other cases to be regulated by the principles of general jurisprudence. To those principles we must look for the solution of the question before us.

The subject was examined by *Chancellor Kent* with his accustomed fullness of research and ability, in *Jackson v. Lawton*, 10 Johns., 23. He there said: "Unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was

prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity, or mistake is regularly put in issue. The principle has been frequently admitted, that the fraud must appear on the face of the patent to render it void in a court of law, and that when the fraud or other defect arises on circumstances, dehors the grant, the grant is voidable only by suit. 1 Hen. & Munf., 19, 187; 1 Munf., 184. The regular tribunal is chancery, founded on a proceeding by *scire facias* or by bill or information." The patent in that case was for land, but, as regards the point here under consideration, there is no distinction between such a patent and one for an invention or discovery. If there be, the case is stronger as to the latter. In the case of *Field v. Seabury*, 19 How., 832 [60 U. S., XV., 654], the patent was also for land. This court ruled the point in like manner, and the same remarks apply. Viewing the subject in the light of the principle involved, we can see no defect in the parallelism between that case and the one before us.

The extension was granted by the commissioner pursuant to the 1st section of the Act of 1848 and the 18th section of the Act of 1836. The latter declares that upon the making and recording of the certificate of extension "the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years." The law made it the duty of the commissioner to examine and decide. He had full jurisdiction. The function he performed was judicial in its character. No provision is made for appeal or review. *Foley v. Harrison*, 15 How., 448. His decision must be held conclusive until the patent is impeached in a proceeding had directly for that purpose according to the rules which define the remedy, as shown by the precedents and authorities upon the subject. We are not, therefore, at liberty to enter upon the examination of the evidences of fraud to which we have been invited by the counsel for the appellants. The door to that inquiry in this case is closed upon us by the hand of the law.

The rule which we have thus laid down is intended to be limited to the class of cases to which, as respects the point in question, the one before us belongs. We decide nothing beyond this.

The proof of infringement makes a case so clear for the appellees, in our judgment, that it is deemed unnecessary to extend this opinion by discussing the subject.

It is unnecessary to consider the respective rights of the several corporation complainants in this litigation, because it is clear that such as do not belong to them are vested in Charles Goodyear, the executor, by virtue of his holding the entire legal title of the patent.

The appellants meet the case in the aspect of infringement, by setting up a license from Charles Goodyear, deceased, to E. M. Chaffee, bearing date on the 25th of June, 1846, which they insist is a complete bar to the relief sought by the bill. This instrument gives to Chaffee, "his executors, administrators and assigns, a free license to use the said Goodyear's gum elastic composition for coating cloth for the purpose of japanning, marbling, and variegated japanning, at his own establishment, but not to be disposed of to others for that purpose without

the consent of the said Charles Goodyear; * * * the right and license hereby conferred being limited to the United States, and not extending to any foreign country, and not being intended to convey any right to make any contract with the Government of the United States."

There are several objections to the view taken of this license by the counsel for the appellant. It authorizes Chaffee to use it himself. It gave him no right to authorize others to use it in conjunction with himself, or otherwise, without the consent of Goodyear, which is not shown, and not to be presumed. It was to be used at his own establishment, and not at one occupied by himself and others. Looking at the terms of the instrument, and the testimony in the record, we are satisfied that its true meaning and purpose were to authorize the licensee to make and sell India rubber cloth, to be used in the place, and for the purposes, of patent or janned leather. In our judgment it conveyed authority to this extent and nothing more. The practical construction which the parties themselves have given to a contract by their own conduct is, in cases of doubt, always entitled to great weight. That this practical construction, in the case before us, was in accordance with that which we have given to the instrument, is clearly shown by the following facts: The defendants, Chaffee, Bourne and Brown, were hostile to the extension, and collected evidence to defeat it. If they had understood the license then, as they construe it now, their interest would have prompted an opposite line of conduct. In 1856, Goodyear, the elder, and others, sued Brown, Bourne and Chaffee for an infringement of the patent re-issued to Goodyear—by manufacturing India rubber shoes. In September of that year, they filed their answer. The license, as they now construe it, would have been conclusive against the complainants. The answer is long and elaborate. It makes no allusion to the license. An absolute injunction was decreed. The Chaffee license bears date in 1846. In 1858, the same defendants procured a license to manufacture rubber shoes from Haywood. The terms were stringent and onerous. This license would have been useless, if their present construction of the license to Chaffee is correct. It is not clear that any interest was conveyed by Chaffee to the other parties, if ever, until since the commencement of this suit. The claim was not heard of before the conflict began. The license sets forth, in express terms, that it was not intended to give any authority to contract with the United States. All the articles to which this controversy relates were manufactured for the United States, under contracts with the Quartermaster-General. This defense cannot avail the defendants.

Upon looking further into the record we find that the complainants took seven exceptions, and the defendants twenty-eight, to the master's report in the court below, all of which, on both sides, were overruled. The complainants not having appealed, their exceptions are not open to examination. Our attention, therefore, will be confined to those taken by the defendants, who have brought them before us by this appeal. Many of them relate to the findings of the master upon questions of fact. Others are predicated of facts which, upon examination, are not found to be as the exceptions assume.

In all these cases we are satisfied with the master's conclusions, and do not propose to review them. We shall dispose of such other points arising upon the report as we deem it proper to remark upon, without adverting particularly to the exceptions by which they are raised.

In taking the account the master was not limited to the date of the decree. In such cases, it is proper to extend the account down to the time of the hearing before him, unless the infringement ceased prior to that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. The practice saves a multiplicity of suits, time, and expense, and promotes the ends of justice. We see no well founded objection to it.

The 18th section of the Act of March 2d, 1861, requires "that every article made or sold under the protection of a patent shall have fixed upon it the word 'patented,' and the day and year when the patent was granted; and when, from the character of the article, that may be impracticable, a label on which a notice to the same effect is printed shall be attached;" and if this be not done it is declared "that in case of suit for infringement, brought by the person failing so to mark the articles, no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make and vend the articles patented," etc. It is said that the bill contains no averment on this subject, and that the record is equally barren of proof that any such notice was ever given to the defendants, except by the service of process, upon the filing of the bill. Hence, it is insisted, that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendants is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was too late for the defendants to raise the point before the master. They were concluded by their previous silence, and must be held to have waived it. It cannot be considered here. We refer to the authorities cited in an earlier part of this opinion, in support of the rule upon this subject.

The circuit court decreed that the Providence Company was liable "for all the profits made in violation of the rights of the complainants, under the patent aforesaid, by respondents, by the manufacture, use, or sale of any of the articles named in said bill." This was in accordance with the rule in equity cases established by this court. *Livingston v. Woodworth*, 15 How., 546; *Dean v. Mason*, 20 How., 198 [61 U. S., XV., 876]. It was not objected to in the argument here, but it was strenuously insisted that the master had erred in his application of the rule, and the court in confirming his conclusions. We have examined the report and are satisfied that he discharged his duty with exemplary care and diligence. The report is characterized by unusual ability. He has stated two accounts: one against the Providence Company and the other against the Columbian Company, which he finds to be the Providence Company under another name.

The Providence Company manufactured ar-

ticles covered and articles not covered by the patent in question. No separate account was kept as to their respective cost and profit. The business as to both was so intermingled and confused that approximate results only were possible, and these were attainable by but one process. He applied the principle of apportionment as follows:

The gross amount of sales of articles of both classes was \$3,648,181.49. The gross amount of sales of articles covered by the patent, \$1,809,696.78. Gross amount of profits, \$849,520.02. Proportion of profits due to articles covered by the patent, \$250,757.72. The master reports that this result approaches exactness, and that it is favorable to the defendants. The Columbian Company manufactured only patented articles. Its books were properly kept. The data were clear and certain, and he had no difficulty in reaching a satisfactory conclusion. He found the amount of profits to be \$60,000.

Profits of the Providence Com-	
pany.....	\$250,757 72
Profits of the Columbian Com-	
pany.....	60,000 00

Total for which the defendants
are liable.....\$310,757 72

In making up the account the master allowed deductions from profits, for bad debts, for rents, and interests paid—debiting rents and interest received; he allowed for the market value of the materials on hand when the infringement began, for the cost of those acquired afterwards to carry on the business, and for the usual salaries of the managing officers. In this connection we take the following paragraph from the report:

"Large amounts appear by the books to have been expended in repairs of building and machinery, and in the purchase of new machinery, tools and fixtures. No further allowance is made by the master for wear and tear, and depreciation."

He refused to allow the extraordinary salaries which it appeared by the books had been paid, being satisfied they were dividends of profit under another name, and put in that guise for concealment and delusion. The allowance for repairs and other items mentioned in this connection doubtless exceeded the wear and tear which could have occurred during the time of the infringement. He refused to allow the value, at the time they were used, of materials bought for the purposes of the infringement. The market was a rising one. The defendants had the benefit of it as to those which were untainted by dishonesty. Those bought later stand upon a different footing. The claim is entitled to no special favor. There must be a fixed rule. There can be none better than the cost as to those to which that principle was applied. The articles might have fallen in value instead of rising. The defendants cannot complain, as they are held liable only for the ultimate profits of the piracy.

He refused to allow the profits due to elements not patented, which entered into the composition of the patented articles. There may be cases in which such an allowance would be proper. This is not one of them. The manner in which the books of the Providence Company

were kept renders such an account impossible as to the business done in their name.

The conduct of the defendants in this respect has not been such as to commend them to the favor of a court of equity. Under the circumstances, every doubt and difficulty should be resolved against them. *Lupton v. White*, 15 Vesey, 432; *Copeland v. Crane*, 9 Pick., 79; *Dexter v. Arnold*, 2 Sumn., 109; *Miller v. Whittier*, 36 Maine, 585. The allowance was properly denied.

He refused to allow manufacturer's profits and interest on the capital stock. This was correct. "The profits made in violation of the rights of the complainants" in this class of cases, within the meaning of the law, are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost, the elements of price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and bad debts, are to be taken into the account, and usually nothing else. The calculation is to be made as a manufacturer calculates the profits of his business. "Profits" is the gain made upon any business or investment, when both the receipts and payments are taken into the account. *People v. Super. Niag.*, 4 Hill, 23. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is, that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression.

The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume; and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender.

We find no error in the record, and the decree of the Circuit Court is affirmed.

Cited—11 Wall., 492, 543, 545; 12 Wall., 64; 91 U. S., 190; 97 U. S., 139; 100 U. S., 107; 101 U. S., 641; 104 U. S., 134; 105 U. S., 197, 208; 8 Blatchf., 515, 523; 9 Blatchf., 27; 15 Blatchf., 130; 19 Blatchf., 58; 2 Sawy., 84; 5 Sawy., 172; 1 Holmes, 216, 219; 4 Cliff., 246; 30 N. J. Eq., 309; 38 N. J. L., 465; 3 Wood, 154; 4 Hughes, 343; 30 Hun, 376; 69 Ind., 465.

JOHANNES JECKER, XAVER HAVER,
JOHANNA HAVER, FRANZ HAVER,
JOHANN RUMPEL AND JACOB RUM-
PEL, heirs of PETER YAKER, Deceased,
Plffs. in Err.,

v.

DEAN MAGEE, Administrator, AND JANE
YAKER, Widow of PETER YAKER, De-
ceased.

(See S. C., "*Haver v. Yaker*," 9 Wall., 32-35.)

*Treaty, from what date binding—ratification of
—devesting title.*

A treaty is considered as concluded and binding from the date of its signature, as respects the rights of either government under it.

So far as it affects individual rights, it is not con-

NOTE.—Construction and operation of treaties. See note to U. S. v. *Amistad*, 40 U. S. (15 Pet.), 518.

sidered as concluded until there is an exchange of ratifications.

To make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust and cannot be sanctioned.

[No. 46.]

Argued Feb. 3, 1870. Decided Feb. 14, 1870.

IN ERROR to the Court of Appeals of the State of Kentucky.

A petition was filed in the Woodford Circuit Court of Kentucky, by the Commonwealth of Kentucky, to declare certain personal property and land of Peter Yaker, deceased, escheated to the said plaintiff, for the want of legal heirs. Answers were filed both by the plaintiffs in error and by the defendants in error. The said court entered a judgment in favor of the widow, Jane Yaker, for all the lands in question, and for a share of the personal estate, and in favor of the foreign heirs for the balance of the personal estate. The foreign heirs took an appeal to the Court of Appeals of Kentucky, which confirmed the judgment. Whereupon the said heirs sued out this writ of error.

The case is fully stated by the court.

Messrs. J. M. Carlisle, and J. D. McPherson, for plaintiffs in error:

A treaty may enable heirs to take, notwithstanding their alienage.

Harden v. Fisher, 1 Wheat., 300; *Jackson v. Clarke*, 3 Wheat., 2; *Fairfax v. Hunter*, 7 Cranch, 603.

By the Treaty of 1848, the plaintiffs in error had three years from July 30, 1853, the date of Peter Yaker's death, to sell and withdraw the proceeds of the land. This term would have expired July 30, 1856; but before that time, the Treaty of 1850 came into operation and extended the term indefinitely.

By the force of the Treaty itself the right was accorded, and no term is designated within which it shall be asserted. This is left to the discretion of the estate or canton where the land lies, but this discretion must necessarily be exercised in such manner as not to defeat the Treaty; the limitation must leave a reasonable time within which the right may be claimed.

Messrs. James B. Beck, Thomas P. Porter and Blair, for defendants in error:

The first Treaty between the United States and Switzerland was ratified May 3, 1848; the second was made in Nov., 1850, nearly three years before the death of Peter Yaker, but not ratified until Nov., 1855, more than two years after said Yaker's death.

It has been held that "A treaty binds the contracting parties from its conclusion, and that is understood to be from the day it was signed."

1 Kent, Com., 170; *U. S. v. Reynes*, 9 How. B. C., 148.

This doctrine is well settled, we believe, at least so far as the contracting parties, the governments making the treaties are concerned. But the rule, so far as individual rights are to be affected, is different (*U. S. v. Arredondo*, 6 Pet., 749); and for this distinction there seems to us a good reason.

A treaty is, in its nature, a contract between two nations; not a legislative Act. But in the United States a different principle is established. Our Constitution declares it to be "the law of the land." *Foster v. Nelson*, 2 Pet., 814.

A treaty, to be valid, must be made by and

with the consent of the Senate, provided two thirds of the senators present concur. Until consent is given by the Senate, no one is bound by it as a law; it is until then subject to amendment or modification, and can be rejected entirely.

To construe the law so as to make the ratification of the Treaty relate back to its signing, thereby divesting the widow of her vested rights, would be making it a law before it really became such. It would be taking private property under the pretense of a law, when in fact no law existed at the time to authorize it.

Mr. Justice Davis delivered the opinion of the court:

This is a writ of error to review the judgment of the Court of Appeals of Kentucky, under the 25th section of the Judiciary Act, on the ground that the court decided adversely to the right which the plaintiffs in error set up under a Treaty with a foreign power, and could not have rendered its judgment without deciding the question. The point of jurisdiction being therefore unquestioned, it is necessary to dispose of the case on its merits. It seems that Peter Yaker, of Swiss birth, many years ago migrated to this country and settled in Woodford County, Kentucky, where he became a naturalized citizen of the United States. He died there in July, 1853, intestate and without children, leaving a widow who was a resident and citizen of Kentucky, and real and personal property in the locality of considerable value. The plaintiffs in error in this cause, who are foreigners and citizens of Switzerland, are his next of kin, and asserted their right to his property by a proper proceeding commenced in the local Circuit Court of the State. That court conceded their claim to the personality, but decided that, by the law of Kentucky, they had no interest in the realty, and that the widow of Peter Yaker became invested with the title to all the lands which he owned at his death. This judgment was affirmed by the Court of Appeals, and this contest concerns that part of the judgment which relates to the real estate. By the common law of England, aliens are incapable of taking by descent, or inheriting lands (Co. Litt., 8; 2 Bl. Com., 249), and this rule of the common law was in force in Kentucky when Peter Yaker died.

Hunt v. Morris, Hardin, 61; *White v. White*, 2 Met. (Ky.), 187. It is true the rigor of this rule was relaxed at an early date (1 R. S. of Ky., 239, ch. 15, art. 3, sec. 1), so as to permit resident aliens, after they had actually resided in the State two years, to inherit real estate in the same manner as if they were citizens of the State; but as it is conceded that these plaintiffs in error never lived in Kentucky, this provision of law cannot inure to their advantage. Nor can they avail themselves of the Act of the Kentucky Legislature of March 21, 1861, which conferred on non-resident aliens the right to acquire real estate by descent or devise, because it was passed after the rights of Jane Yaker, the widow, had become vested under the laws of the State.

As, therefore, these plaintiffs were not capable, by the law of Kentucky, of inheriting real estate there, it follows that they cannot succeed in this suit, unless they are protected by a law

which is paramount to the law of the State. This protection they claim by virtue of a Treaty made between the United States and the Swiss Confederation, which, on the subject to which it relates, is the supreme law of the land. There are two Treaties between this government and Switzerland bearing on this case, and although the plaintiffs base their claim on the one which was signed in November, 1850, and ratified in November, 1855, it is, nevertheless, necessary to consider both in this connection. The first Treaty of May, 1848, among other things, provides that if, by the death of a person owning real property in the territory of either of the contracting parties, such property should descend to a citizen of the other party who, on account of his being an alien, could not be permitted to retain the actual possession of the property, he should be allowed a term of three years to dispose of it, and to collect and withdraw the proceeds. 9 Stat. at L., 908.

This Treaty was in force until suspended by the one of November, 1850, 1855, and these plaintiffs in error were within its terms and could have succeeded in securing the inheritance they seek, if they had made their claim in proper time; but as they failed to do this, and did not assert their rights until more than six years after the death of their deceased relative, it is manifest that, under no possible construction, can they derive any benefit from it.

As Peter Yaker died on the 30th of July, 1853, the term allowed to sell and withdraw the proceeds of the land would have expired July, 30th, 1856; but before that time, it is contended, the Treaty of 1850, ratified in 1855, came into operation and extended the term indefinitely. 11 Stat. at L., 587. It is, therefore, important to ascertain at what time this Treaty, as it regards private rights, became a law. Was it when it bore date, or when the ratifications were exchanged between the parties to it? If not until it was ratified, we are relieved of the necessity of deciding whether, by its terms, the plaintiffs in error have any just claim to the real estate, because in no aspect of the case can the Treaty have a retroactive effect, so as to defeat the title of Jane Yaker, the widow, which vested in her by the law of Kentucky of 1853, on the death of her husband.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. Wheat. Int. Law, by Dana, 336. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's* case, reported in 6 Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not re-

quired to adopt or reject it as a whole, but may modify or amend it, as was done with the Treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the Treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this Treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Peter Yaker at his death.

We see no error in the judgment of the Court of Appeals of Kentucky, and it is accordingly affirmed.

Cited—7 Sawy., 251.

JOHN GUT, *Plff. in Err.*,

v.

THE STATE OF MINNESOTA.

(See S. C., 9 Wall., 35-38.)

State decision upon state law, when binding—state law, when not ex post facto.

The ruling of a state court upon the point that a state law does not violate the State Constitution is conclusive upon this court.

A state law changing the place of trial from one county to another county in the same district, or to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment.

[No. 831.]

Submitted Feb. 1, 1870. Decided Feb. 14, 1870.

IN ERROR to the Supreme Court of the State of Minnesota.

The plaintiff in error was indicted and convicted of murder in the first degree, in one of the state courts of Minnesota. On appeal to the Supreme Court of the State, that judgment was affirmed. The case is now here on a writ of error, to determine whether the Act under which the court was held, in which the said indictment and conviction were had, was in effect an *ex post facto* law.

The case is further stated in the opinion of the court.

Mr. E. M. Wilson, for plaintiff in error.

Mr. F. R. E. Cornell, *Atty Gen.* of the State of Minnesota, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

A statute of Minnesota in force in 1866, required that criminal causes, with some exceptions not material to the present inquiry, should be tried in the county where the offenses were committed. The offense charged against the defendant was committed in December of that year, in the County of Brown, in that State. At that time, four other counties which were unor-

Constitutionality of ex post facto laws. See note to *Calder v. Bull*, 3 U. S. (3 Dall.), 386; and note to *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.), 122.

ganized, were attached to Brown County for judicial purposes. In 1867, a Statute was passed by the Legislature of the State, authorizing the judge of the district court in cases where one or more counties were attached to a county for judicial purposes, to order, whenever he should consider it to be in furtherance of justice or for the public convenience, that the place of holding the court should be changed from the county then designated by law, to one of the other counties thus attached.

Under this Act, the judge of the district embracing Brown County, ordered that the place of holding the court should be changed from that county to the County of Redwood within the same district, and the change was accordingly made. The court subsequently held its sessions in Redwood County, where the defendant, in September, 1867, was indicted for murder in the first degree. The plea of "Not guilty" not having been interposed, the case was transferred, on his motion, to Nicollet County, in an adjoining district, where he was tried, convicted and sentenced. On appeal to the Supreme Court of the State, the judgment was affirmed.

It was contended in the court below, and is very earnestly pressed in the printed argument of counsel in this court, that the Act of Minnesota under which the court was held in Redwood County and the grand jury were summoned, was unconstitutional, so far as it authorized an indictment or trial there of an offense previously committed in Brown County, that it was in effect an *ex post facto* law and, therefore, within the inhibition of the Federal Constitution.

The objection to the Act, if there be any, does not rest on that ground. It must rest, if it has any force, upon that provision of the State Constitution which declares that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." But the Supreme Court of the State has held that the Act in question is not in conflict with this provision; that the Act does not change the district, but merely the place of trial in the district, which is not forbidden. And it appears that jurors for the trial of criminal offenses committed in one of the counties of the several attached together for judicial purposes, are chosen from all the counties; and that this was the law before, as it has been since the passage of the Act which is the subject of complaint. Therefore, the defendant, had he not secured, by his own motion, a change of venue, would have had a jury of the district in which the crime was committed, and which district was ascertained by law.

The ruling of the state court is conclusive upon this court, upon the point that the law in question does not violate the constitutional provision cited. *Randall v. Brigham* [ante, 285]; *Prov. Inst. v. Mass.*, 6 Wall., 630 [73 U. S., XVIII., 913].

Undoubtedly the provision securing to the accused a public trial within the county or district in which the offense is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district,

at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character; but its enforcement in cases arising under state laws is not a matter within the jurisdiction of the Federal Courts.

A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission. It is defined by Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 138, to be a law, "which renders an act punishable in a manner in which it was not punishable when it was committed;" and in *Cummings v. Missouri*, 4 Wall., 326 [71 U. S., XVIII., 364], with somewhat greater fullness, as a law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required."

The Act of Minnesota under consideration has no feature which brings it within either of these definitions.

Judgment affirmed.

Cited—95 U. S., 500; 107 U. S., 241.

UNITED STATES, *Pff.*,

v.

ORESTES A. KEEHLER AND THEODORE F. KEEHLER AND M. M. KEEHLER,
Executor and Executrix of C. D. KEEHLER,
Deceased.

(See S. C., 9 Wall., 83-89.)

Defense to official bond—Confederate Statute—
officer of U. S. cannot turn over government
property to Confederate Government—Acts of
Congress.

A voluntary payment to a creditor of the United State is no defense to a suit on an official bond.

A Statute of the Confederate States, or the order of its Postmaster-General, cannot have any legal effect in making such payment valid.

An officer of the government who holds its money or property, is not at liberty to turn it over to an insurrectionary government, which exercises no force or threat or personal violence against him.

By the Acts of Apr. 29, 1864, and Mar. 3, 1865, providing for the relief of postmasters, relief is extended in such cases to losses by any Confederate armed force, either by robbery or burning.

The court is not authorized to make other exceptions to statutes than those made by the statutes themselves.

[No. 22.]

Submitted Dec. 14, 1869. Decided Feb. 14, 1870.

CERTIFICATE of division in opinion between the Judges of the Circuit Court of the United States for the District of North Carolina.

This is an action of debt brought in the court below, by the plaintiffs, upon an official bond of O. A. Keehler, as postmaster.

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The history and facts of the case are fully stated by the court.

Messrs. E. R. Hoar, Atty Gen., and W. A. Field, Asst. Atty-Gen., for plaintiff:

The defendant, Keebler, was liable to the United States for the public moneys that came into his hands, not as bailee, but on his official bond; and nothing but the transfer or payment thereof, pursuant to the order of the Postmaster-General or other competent authority, could relieve him from that liability.

See sec. 6, Act Aug. 6, 1846, 9 Stat. at L., 60; *U. S. v. Prescott*, 3 How., 588; *U. S. v. Morgan*, 11 How., 162; *U. S. v. Dashiell*, 4 Wall., 185 (71 U. S., XVIII., 321).

The Act of the so called Confederate Congress, sequestrating or confiscating the balances due from postmasters to the United States, and the order of the so called Confederate Government, made in pursuance thereof, directing the defendant, Keebler, to pay over the public moneys in his hands, did not discharge the bond.

Keppell v. Petersburg R. R. Co., 3 Am. Law Rev., 389; *Shortridge v. Mason*, 2 Am. Law Rev., 95.

The circumstance that the payment was made to a creditor of the United States is immaterial.

U. S. v. Hawkins, 10 Pet., 132.

(No counsel appeared in this court for defendants.)

Mr. Justice Miller delivered the opinion of the court:

This case comes here by a certificate of division of opinion between the Judges of the Circuit Court for the District of North Carolina.

It is a suit upon the official bond of a postmaster for a balance found to be in his hands, belonging to the Government, at the time that State passed under the rule of the insurrectionary power calling itself Confederate States of America.

An agreed statement of facts was submitted to the circuit court, and the division arose on the question whether the law on these facts was for the plaintiff or defendant.

In this statement it is admitted that the principal defendant (the others being sureties on the bond) had, at the time mentioned, the sum of \$330.03, which had been received by him as postmaster, belonging to the Government of the United States.

The defense, which the facts of the statement seek to set up to this action, will be noticed under three heads:

1. He paid the amount to one Clemmens, who was a mail-carrier on the route which embraced the postoffice of Keebler, and to whom Keebler had been directed to pay the money he might have as postmaster upon the production by said Clemmens of proper orders from the Postoffice Department. It was admitted that the Government, at the commencement of the rebellion, owed Clemmens more than this sum, but it is not claimed that he had any orders for the money from the Postoffice Department of the United States.

Can this voluntary payment to a creditor of the United States be pleaded to a suit on the bond?

It is hardly necessary to say that such a payment is no compliance with the condition of See 9 WALL.

the bond. It is, therefore, not good under a plea of covenants or conditions performed. Nor can it be used as an equitable set-off, because it would produce endless confusion in the accounts of the department, and lead to double payments and serious embarrassments in its business, if every postmaster who had government money could select a creditor of the United States and pay what he might suppose the government owed him.

2. It is stated that the Confederate Congress passed an Act appropriating balances of this kind to the payment of claims against the United States for postal service, where the parties resided within the limits of the States in rebellion, and that under this Act an order was drawn by the Postoffice Department of the Confederate States on Keebler, directing him to pay this money to Clemmens, and that on this order it was paid.

It certainly cannot be admitted for a moment that a statute of the Confederate States, or the order of its Postmaster General, could have any legal effect in making the payment to Clemmens valid. The whole Confederate power must be regarded by us as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an Act of its Congress or an order of one of its departments, any right or property of the United States. Whatever weight may be given under some circumstances to its acts of force, on the ground of irresistible power, or whatever effect may be allowed in proper cases to the legislation of the States while in insurrection—questions which we propose to decide only when they arise—the Acts of the Confederate Congress can have no force, as law, in divesting or transferring rights, or as authority for any Act opposed to the just authority of the Federal Government. This statute of the Confederate Congress and this draft of its Postoffice Department are not, therefore, a sufficient authority for the payment to Clemmens.

3. But it is further stated (this payment being made on the 10th April, 1862), that throughout the year 1862 the so called Confederate Government had force sufficient to enforce its orders, and did enforce them in that part of North Carolina where defendant resided, and that no protection was afforded to the citizens of that part of the State by the United States Government during that period.

It will be observed that this statement falls far short of showing the application of any physical force to compel the defendant to pay the money to Clemmens. Nor is it in the least inconsistent with the fact that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the Government, to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the insurrectionary Postoffice Department on him. We cannot see that it makes out any such loss of the money, by inevitable overpowering force, as could even on the mere principle of bailment discharge a bailee. We cannot concede that a man, who, as a citizen, owes allegiance to the United States, and as an officer of the Government holds its money

or property is at liberty to turn over the latter to an insurrectionary government, which only demands it by ordinances and drafts drawn on the bailee, but which exercises no force or threat of personal violence to himself or property in the enforcement of its illegal orders.

But this court has decided more than once that in an action on the official bonds of such officers the right of the Government does not rest on the implied contract of bailment, but on the express contract found in the bond, to pay over the funds. And on this principle it was held, in *U. S. v. Prescott*, 3 How., 578, that a plea which averred positively that the money was stolen from the officer, without any fault or negligence on his part, was no defense. It would be difficult to find a stronger case for relief from a contract to keep safely and pay over the public money than this. But the court held that the contract was one which the defendant had voluntarily undertaken, and which he must at his own peril perform. This ruling was repeated in *U. S. v. Dashiell*, 4 Wall., 185 [71 U. S., XVIII., 321], also in *U. S. v. Morgan*, 11 How., 162. Such was the law as declared by this court long before the rebellion broke out, and however hard it may be in some of its aspects, the court has no option but to act on it.

But Congress seems not to have been inattentive to the injustice which the rule might work in some cases, and has, by the Act of April 20, 1864 (13 Stat. at L., 62), provided for the relief of postmasters situated like defendant, who have manfully done their duty. That Act provides that in all cases where loyal postmasters have been robbed by Confederate forces or rebel guerrillas, without fault or neglect of such postmaster, the Postmaster-General may credit them in settlement with the amount lost by the robbery, and if the officer had settled and paid the amount before the law was passed, it should be paid back to him. And by the Act of March 8d, 1865, the relief is extended to losses by any armed force whatever, either by robbery or burning. These statutes recognize the rule laid down by this court, and provide for such exceptions as can be brought within their terms. For other cases, which present peculiar claims for relief, as this may do if it shall be shown that the claim of Clemmens would be a just subsisting demand against the Government but for this payment, the parties must resort to Congress. The court is not authorized to make other exceptions than those made by the statutes.

Our answer to the question certified to us by the Circuit Court is, that, on the facts stated, the United States is entitled to a judgment.

Cited—13 Wall., 24; 8 Biss., 263; 20 Am. Rep., 643 (32 Mich., 140); 29 Am. Rep., 514 (67 Mo., 397); 31 Am. Rep., 290 (69 Me., 357); 40 Am. Rep., 678 (15 S. C., 1); 41 Am. Rep., 324 (74 Mo., 413).

THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, *Plffs. in Err.*,

ISAAC WALKER AND PATRICK RYAN.

(See S. C., 9 Wall., 282-290.)

School lots—Act of 1812—survey not conclusive.
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The Act of 1831 relinquished the title which remained in the United States to the same lots and lands which had been reserved for the support of schools by the Act of 1812, and it relinquished title to nothing else.

No land rightfully claimed by a private individual was so reserved by the Act of 1812.

Congress, by the Act of 1832, intended to remove the restriction on the right to assert these claims imposed by the Act of 1824.

The survey of the Surveyor-General, and his certificate that a lot was one of those reserved for public schools by the Act of 1812, is not conclusive, but may be disputed.

[No. 29.]

Argued Jan. 21, 1870. Decided Feb. 27, 1870.

IN ERROR to the Supreme Court of the State of Missouri.

This case arose upon a petition filed in the St. Louis Land Court, by the plaintiff in error, for the possession of certain lands, to which they claimed title. Judgment having been given for the defendants, the plaintiffs took an appeal to the Supreme Court of the State, by which the said judgment was affirmed; whereupon the said plaintiffs sued out this writ of error.

The case is fully stated by the court.

Messrs. M. Blair and F. A. Dick, for plaintiffs in error:

The plaintiffs' title is complete under the Acts of Congress of June 18, 1812, May 26, 1824, and Jan. 27, 1831, and is a final and valid grant against the government and all persons not holding a better title from the government.

Kissell v. The Schools, 18 How., 25 (59 U. S. XV., 327); S. C., 16 Mo., 553; *Jones v. Soulard*, 24 How., 41 (65 U. S. XVI., 604); *Trotter v. Schools*, 9 Mo., 69.

The certificate of the Surveyor-General is evidence of the facts therein recited, by which the government and School Board "are mutually bound and concluded."

"And as this instrument declares that the land described was reserved for the support of schools, the courts of justice have no power to revise the Acts of the Surveyor-General as respects the school lands, and it is not open to inquire whether the lands set apart were or were not lots of the description referred to in the statute.

Kissell v. Schools (*supra*); S. C., 16 Mo., 553; *Jones v. Soulard* (*supra*).

The confirmation of 1836 is a title only from the date, and cannot relate back. Through the failure of Brazeau to present his claim under the Act of May 26, 1824, in the United States District Court, it stood barred from May 26, 1829, and so remained barred until the Act of July 9, 1832, was passed. *LeBois v. Bramell*, 4 How., 458. During that interval, by the cessation of the reservation, Brazeau's claim was extinguished, so that the grant to the Town of St. Louis, of Jan. 27, 1831, was clear of all adverse claims. *LeBois v. Bramell*, 4 How., 449. There being no claims existing but those of the United States and the schools in 1831, the action of the Surveyor-General setting apart the land to the schools is final and conclusive evidence of title.

Kissell v. Schools (*supra*); *Stark v. Starrs*, 6 Wall., 402 (73 U. S., XVIII., 925).

Messrs. A. Todd, Louis Janin and Grover & Shepley, for defendants in error:

The land sued for was "rightfully claimed" by the representatives of Joseph Brazeau, when

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the Act of June 12, 1813, was passed and, therefore, was not reserved for the support of schools under said Act. The Act of Jan. 31, 1831, operated only on the lands reserved by said Act of 1812, at the time said Act of 1812 was passed.

In 1806 due notice of Brazeau's claim was filed for confirmation, as required by law.

By sec. 10 of the Act of Mar. 3, 1811 (p. 662, 2 Stat. at L.), the land of such a claim is reserved from sale, until the final decision of Congress thereon.

This reservation was in existence when the said Act of 1812 was passed, and continued, with only one brief interruption, until July 4, 1836, when by the Act of Congress of this date (p. 127, 25 Stat. at L.), this claim was confirmed to said Brazeau's representatives.

This was the final decision of Congress on this claim, meant in said Act of 1811. *Ham v. Mo.*, 18 How., 134 (59 U. S., XV., 337).

This decision proved Brazeau's claim to have been "rightful," and, therefore, not subject to said Act of 1812 in behalf of schools. All incomplete dealings and transactions and obligations of the government relative to the lands within said purchase, were subject to this duty and power.

West v. Cochran, 17 How., 413 (58 U. S., XV., 114); *Lafayette's Heirs v. Kenton*, 18 How., 199, (59 U. S., XV., 847).

Mr. Justice Miller delivered the opinion of the court:

This is one of those controversies quite numerous in this court, growing out of the various Acts of Congress intended to settle the land titles originating in the Territory of Louisiana, prior to its purchase by our government from France.

The case comes here by writ of error to the Supreme Court of Missouri; but, as both parties claim under Acts of Congress, and their conflicting claims must be determined by a construction of those Acts, there can be no doubt of the jurisdiction of this court.

The title of plaintiffs, who represent the Common Schools of St. Louis, rests on two Acts of Congress. The first of these is the Act of June 13, 1812 (2 Stat. at L., 749), the 1st section of which, after confirming the common field lots and commons, to certain towns and villages, of which St. Louis is one, directs the Deputy-Surveyor of the Territory to survey and mark the out-boundary lines of several towns so as to include the out-lots, common field lots and commons thereto, respectively belonging.

The 2d section under which plaintiffs' claim arises, enacts that all towns or village lots, out-lots or common field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid; provided, that the whole quantity of land contained in the lots reserved for the support of schools in any one town or village, shall not exceed one twentieth part of the whole lands included in the general survey of such town or village.

The other Act is that of Jan. 27, 1831. 4 Stat. See 9 WALL.

at L., 435. The 2d section of this Act, referring to the section just cited from the Act of 1812, declares that "The United States do hereby relinquish all their right, title and interest in and to the town and village lots, out-lots, and common field lots in the State of Missouri, reserved for the support of schools in the respective towns and villages aforesaid, by the 2d section of the above recited Act of Congress, and that the same shall be sold or disposed of or regulated for the said purposes, in such manner as may be directed by the Legislature of the State."

It is conceded that by the survey made under the 1st section of the Act of 1812, the lot in controversy was found to be within the out-boundary of the Town of St. Louis and its common field lots, commons, etc. It is also admitted that, by appropriate legislation of the State, the plaintiffs had become invested with such rights as the State could give by virtue of the last recited Act of Congress. The Surveyor-General at St. Louis, on demand of plaintiffs, on the 8d of June, 1861, caused this lot to be surveyed and certified to them as a lot embraced within and covered by the reservation for school purposes, and on this survey and certificate and the Acts aforesaid, they rest their title.

It is not to be denied that if the lot in question was one of the class which, by the Act of 1812, was reserved for the support of schools, that the title was vested in the State by the Act of 1831, and by the State in the plaintiffs.

On the other hand, if the lot in question was not of the class reserved for support of schools by the Act of 1812, then nothing in the Act of 1831 has any effect upon it, and whoever may be the true owner, neither the State or school directors acquired any interest by the Act of 1831.

Nothing can be plainer than that the Act of 1831 was intended to relinquish the title which remained in the United States to the same lots and lands which had been reserved for the support of schools by the Act of 1812, and it relinquished title to nothing else. The one Act is the exact complement of the other. The one reserved a class of lots, fields and commons for the support of schools; the other relinquished to the State the title of the lands and lots so reserved for the same purpose. We are compelled, then, to look to the Act of 1812 to ascertain precisely what was reserved.

This presents no patent ambiguity, for "all town or village lots, out-lots, or common field lots," included in such surveys, are so reserved, with the exception of three classes. These are:

1. Such as are rightfully owned or claimed by any private individuals.
2. Or held as commons belonging to such towns or villages.
3. Or that the President may think proper to reserve for military purposes.

If the lot in question was covered by either of these exceptions, then it was not reserved by the Act of 1812, and was not relinquished to the State by the Act of 1831.

The inquiry is still further narrowed in the present case by the fact that it is only claimed to be excluded from the class reserved, because it was rightfully claimed by a private individual.

The defendant, who had been in possession

by himself and those under whom he claimed, from 1844 to the beginning of this suit in 1864, now asserts that this land was, at the time the Act of 1812 was passed, rightfully claimed by Joseph Brazeau.

In support of this assertion he shows that, long before the Act of 1812, Brazeau had filed with the Board of Commissioners organized under the Act of 1805 to report on such cases, his claim and the evidences of it furnished him by the colonial authorities. Though this first Board of Commissioners reported against the claim, because he had not proven inhabitancy and cultivation prior to 1803, which the Act of 1805 required; yet Congress, which had never made the reports of the commissioners final, but in all the numerous Acts regulating the various commissions appointed for this purpose, had reserved to itself the power to confirm or reject their reports, did by the 8d section of the Act of 1812, provide for a further hearing on this question of inhabitancy and cultivation. It also, in every Act on the subject, reserved from sale the land for which claims had been filed with the recorder of land titles, whether confirmed or not.

See sec. 5, Act, 1805, 2 Stat. at L., 327; sec. 5, Act, 1806, 2 Stat. at L., 392; sec. 8, Act, 1807, 2 Stat. at L., 442; secs. 6, 10, Act, 1811, 2 Stat. at L., 644, 645.

Several changes were made in the tribunals authorized to act on these claims, and for a time there was none with such authority; but finally, by the Act of 1832 (4 Stat. at L., 565), another commission was organized, which did pass favorably on Brazeau's claim, the necessary proof of occupancy and cultivation having been made and reported to Congress, and that body confirmed the claim by the Act of July 4, 1836. 5 Stat. at L., 127.

It will be seen by this statement that at the time the Act of 1812 made an exception of lots rightfully claimed by private individuals, Joseph Brazeau was asserting a claim before the proper tribunal for this land; that his claim was never abandoned; and that, finally, a competent tribunal, authorized by Congress, decided his claim to be a rightful one, and that Congress, by statute, confirmed this decision.

Unless it is shown in some other way that Brazeau's claim was not a rightful one, we think the plaintiffs have no title; for it is too clear for argument that no land was relinquished to the State by the Act of 1831 which was not reserved for schools by the Act of 1812, and is equally clear that no land rightfully claimed by a private individual was so reserved.

Two propositions are urged with zeal and ability, as counteracting the effect of Brazeau's claim on the rights of plaintiffs.

1. It is said that, by virtue of the Act of Congress of 1824 (4 Stat. at L., 52), and other amendatory Acts, his claim was barred.

The Act of 1824 directed that all such individual claims should be presented before the court of the United States, and that unless presented to the court within two years they should be barred; and though the time was subsequently extended, Brazeau did not present his claim within it.

It may be conceded that between this time and the passage of the Act of 1832 organizing another Board, Brazeau had no claim which

he could lawfully assert to this land; and it is said that while his claim was in this condition, the Act of 1831 vested the title in the State for the use of schools.

But as the Act of 1831 only relinquished the title to lots reserved by that of 1812, and as that reserved none rightfully claimed by private individuals, we must inquire whether the fact that Brazeau had failed to assert his claim within the time limited by Congress, proved that his claim was not rightful. For as a Board of Commissioners has said that it was rightful, and as Congress has also said it was, this proposition can only be refuted by holding that his failure to assert it for a time, and the declaration of Congress that he could not be heard to assert it afterwards, proved that it was not rightful.

We do not think it had this effect. If it be treated as a statute of limitation, it is not the doctrine on which such statutes are founded, that lapse of time proves the wrongfulness of the claim. They are made for the repose of society and the protection of those who may, in that time, have lost their means of defense. It is a mere declaration of the law-making power to the plaintiff, that having voluntarily slept so long upon his rights, he shall not now be permitted to assert them, to the injury of individuals and the disturbance of society.

In the class of cases before us, the Act was nothing more than the declaration of the sovereign power, who at the same time held the fee of the land, that if you establish your equitable claim to the land within a certain time, I will confer the title; if you do not, I will not afterwards hear you assert it. But it was competent for the sovereign, after this forfeiture had occurred by laches, to release it, to consent to hear the claimant, and to give him another chance to prove the rightfulness of his claim. And this is what Congress did by the Act of 1832.

It is a little remarkable that Congress did not require in this Act that these parties who had been barred by the former Acts, should now appear and renew their claim, but it directed the recorder of land titles, in whose office all the old cases like Brazeau's still remained on file, and two other commissioners, to examine all those unconfirmed claims and classify and report them to Congress. They were to report what claims would have been confirmed under Spanish laws and usages, and what were, in their opinion, destitute of merit under that rule. And while no new claim was to be admitted, they might receive new testimony, in addition to that already on file in such cases.

It is very clear that Congress, by this Act, intended to remove the restriction on the right to assert these claims imposed by the Act of 1824, so far as it concerned those that had been filed in due time with the recorder. We can entertain no doubt of their right to do this, and we do not see that they lost this right by a gratuitous relinquishment of the interest of the United States in lots not rightfully claimed by any private individual. They still had, as we think, the right to ascertain whether these old claims, long known and on the public files, were rightful claims or not.

2. It is said that the survey made for plaintiffs of this lot by the Surveyor-General, and

his certificate that the lot was of those reserved for public schools by the Act of 1812, is conclusive, and cannot be disputed.

We do not know of any statute or of any rule of law which should give it this effect. The survey is made *ex parte* by an officer who has no control of the evidences of claims filed with the recorder of land titles.

Being an officer of the government, it is possible that this certificate of a survey, which he is authorized to make, may bind the United States, but we cannot see how it can determine, conclusively, the rights of private persons, which are not considered by him, and still less the rightfulness of a claim submitted by Congress to other tribunals for investigation, and reserved to itself for final approval or rejection.

The case of *Kissell v. Public Schools*, 18 How., 24 [59 U. S., XV., 326], is very much relied on to establish the conclusiveness of this certificate. That was a contest between the public schools and a person claiming under the preemption laws. The court, in discussing the effect of a certificate of survey in favor of the schools, precisely like the one in the present case, said that, as to the public schools, they were bound by it, and so was the government. "The parties interested," says the court, "have agreed that this land was a school lot, and here the matter must rest, unless some third person can show a better title." The court held, in that case, that Kissell did not show a better title, by a common entry and purchase as preemptor, because the land, being within the limits of the Town of St. Louis, was reserved from sale. The clear implication here is, that when there is a better title, the certificate of survey is not conclusive against that title.

The judgment of the Supreme Court of Missouri is affirmed.

JACOB D. COX, SECRETARY OF THE INTERIOR, *Plff. in Err.*,

THE UNITED STATES, *ex rel.* WILLIAM MCGARRAHAN.

(See S. C., 9 Wall., 298-315.)

Lands containing mines, purchase of—mandamus, in what cases issued—not to control discretion—service upon Secretary of Interior will not bind his successor—compelling issue of patent—application to purchase lands.

A claimant of the right to purchase lands at the minimum price, whose Mexican title has been rejected, does not bring his case within the Act of Congress, unless he alleges and proves that the lands contain no mines.

He must also show that his purchase of the donee of the tract was made in good faith and for a valuable consideration. He should also prove that he continued in the actual possession of the land, and that it was free from any adverse private right or title.

The writ of *mandamus* cannot issue to an executive officer, where discretion and judgment are to be exercised by the officer. It can only issue in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy.

Service upon the Secretary of the Interior will not support a judgment against his successor, for the judgment was rendered against him without notice and without any opportunity to be heard.

NOTE.—*Mandamus, when will issue.* See note to McCluney v. Stillman, 15 U. S. (2 Wheat., 399.) See 9 WALL.

No proceeding to compel either the Commissioner of the General Land Office or the Secretary of the Interior to issue a patent can be sustained while the patent is required to be assigned by the President and countersigned by the Recorder.

Application to be allowed to purchase the land embraced in such rejected claim, should be made to the Commissioner, and not to the Secretary of the Interior.

[No. 337.]

Argued Jan. 19, 1870. Decided Feb. 4, 1870.

THIS was a petition filed December 3, 1868, in the Supreme Court of the District of Columbia, praying for the issue of a *mandamus*, commanding O. H. Browning, then Secretary of the Interior, to issue or cause to be issued a patent to the relator, for a certain tract of land in California.

The claim to said tract has been before this court on three previous occasions, reported in 23 How., 326 (64 U. S., XVI., 552); 1 Wall., 690 (68 U. S., XVII., 677); 3 Wall., 752 (70 U. S., XVIII., 212).

July 8, 1869, the court below issued a *mandamus* to the said O. H. Browning, or his successor in office, commanding the issue of a patent according to the prayer of the petition. The writ was served on the plaintiff in error, the successor of the said Browning in office, who had not been made a party to the proceeding.

A further statement of the case appears in the opinion of the court.

The case is now here on a writ of error.

Mr. E. R. Hoar, *Atty-Gen.*, and J. Hubley Ashton, for plaintiff in error:

The case presented by the record is:

First. A peremptory *mandamus*, issued against the head of a department in a suit instituted against his predecessor, to which the incumbent had never been made or become a party.

Second. A peremptory *mandamus* awarded against the head of a department in a case arising under laws which it was his duty to administer and execute, upon an *ex parte* statement of a claimant before his department, without any exhibition on the part of the government he represents of the truth of the matter in controversy, and without any opportunity being afforded by the court for such exhibition of the matter thus sought to be subjected to judicial determination.

Third. The judicial order to the head of a department, to issue a patent for lands which the facts officially known to him might show to be lands that Congress had expressly excepted from the grant made in the 4th section of the Act of July 23, 1866, under which the relator claimed.

We think that no instance of judicial usurpation of authority quite so palpable and bold, has ever been brought to the attention of this court.

It was only a short time before the court below awarded this *mandamus* against the Secretary of the Interior, that this court decided the case of *Gaines v. Thompson* (*ante*, 62), in which Mr. Justice Miller, in delivering the opinion of the court, took occasion to review the previous adjudications upon this subject, and to expound in terms even clearer than had been before employed, the doctrine they all enunciate, that "An officer to whom public duties are confined by law, is not subject to the control of the courts, in the exercise of the judgment and dis-

cretion which the law reposes in him, as part of his official functions.

The reports of this court contain eight cases in all, in which heads of departments and other executive officers were sought to be controlled by this prerogative writ of *mandamus*.

These cases came up from this court. In two of them only—*Kendall v. U. S.*, 12 Pet., 524, and *The Commissioner v. Whiteley*, 4 Wall., 522 (71 U. S., XVIII., 385)—the court below issued writs of *mandamus*.

In the first, this court affirmed the judgment; and in the others, reversed the decision of the court below.

Of these eight cases, one was against the Postmaster General, *Kendall's case*, 12 Pet., 524, two were against the Secretary of the Treasury, *Reeside v. Walker*, 11 How., 272; *U. S. v. Guthrie*, 17 How., 284 (58 U. S., XV., 102); two cases against the Secretary of the Navy, *Decatur v. Spaulding*, 14 Pet., 497; *Brashear v. Mason*, 6 How., 92; one case against the Public Printer, *U. S. v. Seaman*, 17 How., 280 (58 U. S., XV., 227); one against the Commissioner of Patents, *Commissioner v. Whiteley (supra)*; and one against the Commissioner of the Land Office, *U. S. v. Commissioner*, 5 Wall., 568 (72 U. S., XVIII., 692).

In all these cases, the doctrine is enforced, that the judiciary is forbidden to interfere with the exercise of executive discretion; or, as *Mr. Justice Swayne* expresses it, writ of *mandamus* lies only where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. *Commissioners v. Whiteley (supra)*.

The duty imposed upon the executive officer charged with the execution of the statute under which the relator claimed, is not ministerial in its character, but is in the highest degree executive, as that term is defined by the *Chief Justice* in the case of *Mississippi v. Johnson*, 4 Wall., 498 (71 U. S., XVIII., 440).

In the case of *U. S. v. Guthrie (supra)*, *Mr. Justice Daniel* says:

"Whenever the right of judgment or discretion exists in him (the officer), it is he, not the courts, who can regulate its exercise."

Such claims cannot be allowed under the statute, nor can any entry be allowed until the proper officers are satisfied that the conditions and requirements of the statute have been duly fulfilled. It may well be said that an application under this statute, "calls for the exercise of the judicial functions of the officers, and these of no ordinary character." See *U. S. v. Com. of Land Office*, 5 Wall., 568 (72 U. S., XVIII., 692).

Mr. Browning's return was intended to raise a simple question of jurisdiction upon the face of the 7th section of the Act of 1866. The facts of the case of this relator were not disclosed. Upon that return the court awarded a peremptory *mandamus*—a final judgment upon a plea in abatement. The court, without being informed as to the actual situation of the land, assumed not only that the facts were as the statute required in law, to give a right under it, but that upon those facts nothing was left to the judgment of the Land Department, and mere ministerial duty devolved upon it to issue a patent to the relator.

Such a judgment is without warrant of law and void.

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Mr. Cox was not in any way made a party to the proceedings, or served with any notice of its pendency.

That such a proceeding must necessarily abate, upon the retirement from office before the judgment, of the responsible defendant, clearly appears from two considerations that may be briefly indicated.

The first is, the imperative rule of the law of *mandamus*, that previously to the making of the application to the court—for a writ, to command the performance of any particular act an express and distinct demand or request to perform it must have been made by the prosecutor, to the defendant, who must have refused to comply with such demand.

Tapping, *Mandamus*, 288.

The second is, the doctrine of this court, which has limited the power of the courts to issue this writ to cases of acts required by law of individual, rather than of the functionary—a doctrine explained by the court in *U. S. v. Guthrie*, 17 How., 284 (58 U. S., XV., 102), and in *Kendall's case*, 12 Pet., 614.

A demand on *Mr. Browning* was not, in fact nor in law, a demand upon his successor, who must equally with his purchaser have the option of doing or refusing to do that which is required of him, before any application to compel him shall be made.

The law entitles the successor to the same opportunity to comply or refuse, as was given to the incumbent against whom the suit is brought.

We understand this court to have, in effect, determined that the duty and power of issuing patents does not devolve upon the Land Department, nor upon the Secretary of the Interior, who is vested with supervisory and appellate authority over that department, in such a sense as to render the Commissioner of the Land Office or the Secretary of the Interior liable in any case to be proceeded against in this form of action. This view we suppose to be expressed in the decision in the case of *U. S. v. Com. of Land Office (supra)*.

Messrs. A. L. Merriman and P. Phillips, for defendant in error:

It is complained that the judgment was entered upon the merits in a case where the defendant had, in his return to the alternative writ, only set up a plea to the jurisdiction of the court. The alternative writ was in the nature of a rule to show cause why a peremptory writ of *mandamus* should not issue. Upon the coming in of the return to such rule, all the court can do is, to determine whether, upon the petition and return, the writ shall issue. And what is not answered in the return made, must be looked upon as admitted to be true.

12 Petersd. Abr., 523; *Reg v. Buckingham*, 10 Mod., 174; *Reg v. Mayor of Norwich*, 3 Ld. Raym., 1244, 1267; *Reg v. Shaw*, 12 Mod., 113, 208; *Reg v. Owen*, 5 Keim, 669.

If the return be adjudged insufficient, a peremptory writ of *mandamus* issues. *Moses, Mandamus*, 233.

If judgment be given for a party suing out a writ of *mandamus* upon demurrer, plea or traverse, a peremptory writ will issue without delay.

Commonwealth v. Allegheny Co., 33 Pa., 218, 221; *People v. Steele*, 2 Barb., 397, 554.

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The petition sets forth the facts entitling the relator to a patent for the land claimed, that these facts had been proven to the satisfaction of the Secretary of the Interior; that those facts had been determined by him, but that the Secretary refused to issue the patent without any just cause. This was not denied by the Secretary, but he simply interposed a denial to the jurisdiction of the court in the matter.

The act to be performed under the writ being an official act and not a personal act, such judgment was equally obligatory upon the successor in office of the defendant in the judgment, and the writ might properly issue, directed to the officer without naming him.

See *People v. Collins*, 19 Wend., 56, 68, in which case the doctrine is clearly stated and the grounds thereof; that court saying in conclusion in that case: "The obligation sought to be enforced devolves upon no particular set of commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present Commissioners of Smyrna and their successors, and the peremptory writ may be directed to and enforced upon the Commissioners of the Town generally. To say otherwise, would be a sacrifice of substance to mere form."

The heads of the several departments act under the supposed authority of the President in all cases when not expressly authorized to act by statute, and all such acts are binding, unless expressly countermanded by the President; and when certain duties thereby devolve upon the President, the heads of the departments are by law the ministerial agents in the performance of such duties.

Little v. Barreme, 2 Cranch, 170; *Lockington v. Smith*, 1 Pet. (C. C.), 466; *Parker v. U. S.*, 1 Pet., 293-296; *Wilcox v. Jackson*, 13 Pet., 498; *U. S. v. Eliason*, 16 Pet., 291, 302; *Williams v. U. S.*, 1 How., 290.

Mr. Justice Clifford delivered the opinion of the court:

Land grants purchased of Mexican grantees or their assigns in good faith and for a valuable consideration, where such grants have subsequently been rejected or where the lands so purchased have been excluded from the final survey of the grant, may be purchased of the United States by such prior purchasers, after the same are surveyed under existing laws, at the minimum price established by law, in cases where there is no valid adverse private right or title; and where such prior purchasers have used, improved and continued in the actual possession of the premises according to the tenor of their original purchase, they first making proof of those facts as required in the 7th section of the Act to quiet the title to such grants, under regulations to be prescribed by the Commissioner of the General Land Office, as provided in the same section of that Act. 14 Stat. at L., 220.

Annexed to that right, however, are three other conditions, one of which it becomes important to notice. They are in the form of provisos, and the one to be noticed is that the right to purchase, as given in the body of the section, "shall not extend to lands containing mines of gold, silver, copper or cinnabar."

By the record it appears that the relator, on

the 5th of October, 1858, addressed a communication to O. H. Browning, Secretary of the Interior, in which he represented that he, the relator, on the 22d of December, 1857, purchased of Vincente P. Gomez, the *ranchito* situated in California, and known as Panoche Grande, and that the claim to the same had since been rejected by the decree of the Supreme Court reversing the decree of the district court confirming the claim, and prayed that he, by virtue of the provision contained in the 7th section of that Act, might be allowed to purchase the same of the United States, supporting his alleged right to do so by the following representations:

That the land embraced in the claim was a Mexican grant; that he purchased it of the original donee in good faith and for a valuable consideration; that the land, since the claim was rejected, has been regularly surveyed under existing laws; that there is no valid adverse private right or title to the same, and that he has continued in the actual possession of the tract since the claim was rejected, as required by law; but he did not allege that the land did not contain mines of gold, silver, copper or cinnabar, nor did he offer any other proof of the facts set forth than what is contained in the exhibits annexed to the communication.

Prior to the date of that paper, to wit: on the 14th of August preceding, the Secretary of the Interior addressed an official letter upon the subject to the Commissioner of the General Land Office, in which he adverted to the fact that a bill was pending in the Senate relating to the claim, and stated that in his judgment it would be highly improper for the department to do anything to affect the title to the land until Congress should dispose of the claim. Pursuant to that view he, at the same time, directed the commissioner to instruct the local officers to suspend action in all such cases until they should receive further orders. Correspondence ensued between the Secretary and the counsel of the relator, but the Secretary, on the 28th of November following, informed the counsel that he adhered to the views expressed in the directions which he gave to the Commissioner of the General Land Office.

Dissatisfied with the decision of the Secretary, the relator, on the 3d of December of the same year, presented a petition to the Supreme Court of this district, in which he prayed that a *mandamus* might issue directing "O. H. Browning, Secretary of the Interior," to issue or cause to be issued a patent for the land described in the petition, and for such other or further relief as may seem meet and proper. Service was duly made, and on the eighth of the same month a rule was issued commanding the Secretary to show cause, on the third Monday of January following, why the writ of *mandamus* should not be issued as prayed in the petition. He appeared, as commanded, and pleaded that the court had no jurisdiction to grant the writ, for the following reasons: (1) Because the subject-matter of the petition is purely of executive cognizance, resting in the judgment and discretion of executive officers in the ordinary discharge of their official duties. (2) Because the subject-matter is one in which judgment and discretion are to be exercised. (3) Because the issuing of

patents for lands is, by the Act of Congress, the duty of the President.

On the 5th of February following the parties filed a stipulation in the case, agreeing that the cause "be submitted to the court upon briefs and arguments, and that the said court may render its judgment in vacation as of the present term and of the day of such submission." Submitted, as aforesaid, the case was held under advisement until the 8th of July following, when the court, two justices signing the decree, determined that the prayer of the petition be granted, and that a writ of *mandamus* issued directed to the said O. H. Browning, Secretary of the Interior, or to his successor in office, commanding him, upon payment of the sum therein specified, to issue or cause to be issued to the relator a patent from the United States of the tract of land described in his petition.

Four months before that judgment was rendered, the Secretary of the Interior, who was the party respondent in the litigation, resigned his office, and J. D. Cox, the present Secretary of the Interior, had not only been appointed his successor, but was in the regular discharge of all its duties.

Although none of these facts are disputed, still the record shows that the writ of *mandamus* was addressed to the predecessor of the present incumbent, or his successor in office, and that the writ on the 8th of July in the same year, was served on the present Secretary, who was not named in the writ, was never a party to the suit, and never had any notice of the proceedings. Judgment having been rendered without notice to the present Secretary, and without a hearing on his part, or any opportunity to be heard, he sued out a writ of error and removed the cause into this court.

Founded, as the proceeding in this case is, upon a claim to land which has been three times under examination in this court before the present writ of error was sued out, it is deemed necessary and proper to advert to the views expressed by the court on those occasions in respect to the validity of the claim and the means adopted to procure its confirmation. Reference to the docket entries will show that the case was first presented here at the December Term, 1858, by the claimant, as an appeal not prosecuted; and it also appears that a copy of the record having been produced by him, and the certificate of the clerk that the appeal had been duly prayed and allowed, the case on his motion was docketed and dismissed, in conformity to the ninth rule of the court, for want of prosecution. Such a proceeding when *bona fide* has the effect to vacate the appeal and leave the decree of the subordinate court in full force, and the docket entries also show that the mandate was issued in pursuance of that order, and that it was subsequently delivered to the assignee of the claimant.

Nothing further was done in the cause during that term, but at the succeeding term the Attorney-General filed a motion to rescind the decree of the preceding term dismissing the case, and to revoke the mandate, alleging for cause that the decree and mandate had both been procured by misrepresentations and fraud. Affidavits were filed by the Attorney-General showing that the cause was still pending in the district court; that no appeal had been granted; that the cause,

when the claimant made his motion to docket and dismiss it, was not legally before this court. Pending that motion three motions for *mandamus* were filed by the claimant: First, to compel the district court to file the mandate and to execute their decree. Second, to compel the district court to dismiss the application of the United States to open the decree and grant a new trial. Third, to compel the Surveyor-General to survey the land confirmed to the claimant by the decree of the district court.

Both parties were heard, and the court overruled the several motions filed by the claimant, but granted the motion of the Attorney-General upon the ground that the allegations of the motion were fully proved. *U. S. v. Gomez*, 23 How., 880 [64 U. S., XVI., 553].

Attempts were subsequently made by the claimant to enjoin the clerk and district attorney from furnishing a certified copy of the record to enable the United States to appeal, but the injunction was refused, and the appeal was perfected and duly entered here; and the next step of the claimant was to file a motion to dismiss the appeal, alleging that the court had no jurisdiction of the case, but the court unanimously overruled the motion for the reasons expressed in the opinion. *U. S. v. Gomez*, 1 Wall., 690 [68 U. S., XVII., 877].

Subsequently the cause was heard upon the merits, and the court held that the claim was invalid and fraudulent, and reversed the decree of the district court, and remanded the cause, with directions to dismiss the petition. *U. S. v. Gomez*, 3 Wall., 766 [70 U. S., XVIII., 316].

Unless, therefore, the claim of the petitioner is brought within the terms of the Act of Congress referred to in his petition, he has no right whatever to a patent for the land in controversy.

Suppose everything which he alleges in his petition is true, still it does not bring his case within the Act of Congress, as the petition does not allege that the land does not contain mines of gold, silver, copper or cinnabar; and the record furnishes evidence tending strongly to the conclusion that such an averment, if made, could not be supported, as the statement of the land commissioner is that the land embraced in the claim does contain "valuable quicksilver mines."

Mere allegation, however, is not sufficient, but the condition is that the claimant shall make proof of the facts required under regulations to be provided by the Commissioner of the General Land Office. His application to be allowed to purchase the land was made to the Secretary of the Interior, and he was as much bound to prove that the land did not contain mines of the description mentioned as he was to show that his purchase of the donee of the tract was made in good faith and for a valuable consideration, as he was not entitled to a patent if the lands contained mines of gold, silver, copper or cinnabar, any more than if he had made the purchase in bad faith and without consideration.

Argument to show that he did not bring his case within that condition is unnecessary, as the point is clear to a demonstration. He did allege that he purchased the lands in question of the donee in good faith and for a valuable consideration, but he offered no proof of the alleged fact, except what may be inferred from the deed annexed to the petition, bearing date December

22, 1857, and which purports to have been executed by the original claimant.

Special reference is made in the petition to the deed of release given by the occupants of the land to the relator as supporting the allegation of good faith, but it is entitled to very little weight, if any, as it bears date six years subsequent to the alleged purchase of the grant.

Evidence was exhibited in the case tending to show that the lands were surveyed subsequent to the decree of the court rejecting the claim, but it is not proved that the present claimant thereafter continued in the actual possession of the land, nor that it was free from any adverse private right or title. Such allegations are set forth in the petition, but the record contains no proof to support the first allegation, and nothing to support the second, except what is derived from the statement of the Commissioner of the General Land Office, that no report of any individual adverse interests was found on the files of his office. Tested solely by the merits, therefore, it is quite clear that the application of the relator could not have been properly granted, as the proofs before the department were not sufficient to warrant a decision in his favor.

Adjudged invalid and fraudulent, as the claim had been by the unanimous decision of this court, it was quite proper that the Secretary should require satisfactory proof that the case as presented came within the terms of the Act of Congress relied on, before consenting to give the claimant the benefit of its provision; and when it appeared that the petition addressed to him was deficient in allegation, and that the proofs were insufficient in all particulars, except, perhaps, one, he was entirely justified in rejecting the application.

Evidently the case, if examined upon the merits, was not made out by the claimant, but the more decisive objection to the judgment of the court below is that the case, from its very nature, is one which was exclusively within the jurisdiction of the executive officers of the government, because it was one requiring proofs, hearing and decision, and involved the exercise of judicial judgment and discretion and, consequently, was not one where the action of the Department of the Interior is subject to re-examination by the Supreme Court of this district.

Since the decision of this court in the case of *McIntire v. Wood*, 7 Cranch, 504, it has been regarded as the settled law of the court that the Circuit Courts of the United States in the several States do not possess the power to issue writs of *mandamus*, except in cases in which it may be necessary to the exercise of their jurisdiction. *Riggs v. Johnson Co.*, 6 Wall., 198 [73 U. S., XVIII., 777].

Authority to that effect might doubtless be given to those courts by an Act of Congress; but the insuperable difficulty at present is, that neither the Judiciary Act nor any other Act of Congress has conferred upon them any such power. Antecedent to the decision of this court in the case of *Kendall v. The United States*, 12 Pet., 608, grave doubts were entertained whether any court established by an Act of Congress possessed any such jurisdiction; but the majority of this court came to the conclusion in that case, that the Circuit Court of

this district might issue the writ of *mandamus* to an executive officer residing here, commanding him to perform a ministerial act required of him by law, and it is not denied that the court below possesses all the power in that behalf which the Circuit Court of the district possessed at that time. Subsequent decisions of this court have affirmed the same principle; but in all of the subsequent cases the principle is strictly limited to the enforcement of mere ministerial acts, not involving the necessity of taking proofs, and it has never been extended to cases where controverted matters were to be judicially heard and decided by the officer to whom the writ is required to be addressed. *Decatur v. Paulding*, 14 Pet., 497; *Brashear v. Mason*, 6 How., 99.

Though *mandamus* may sometimes lie against an executive officer to compel him to perform a mere ministerial act required of him by law, yet such an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions. *Gaines v. Thompson* [ante, 62]; *Reeside v. Walker*, 11 How., 289.

Discussion of the principle, however, seems to be unnecessary, as all of the cases appear to affirm the same rule, that the writ cannot issue where discretion and judgment are to be exercised by the officer, and only in cases where the act required to be done is merely ministerial, and where the relator is without any other adequate remedy. *U. S. v. Seaman*, 17 How., 230 [58 U. S., XV., 227]; *U. S. v. Guthrie*, 17 How., 304 [58 U. S., XV., 106]; *Commissioner of Patents v. Whiteley*, 4 Wall., 522 [71 U. S., XVIII., 385]; *U. S. v. Commissioner*, 5 Wall., 563 [72 U. S., XVIII., 692].

Even if it could be shown that the court below possessed the power to issue the writ in such a case, still it is clear that the judgment in this case would be erroneous, as the case upon the merits was not submitted to the court under the stipulation. Undoubtedly, the appearance of the respondent was general, but he pleaded only to the jurisdiction of the court, and it appears that the question of jurisdiction was the only point argued and submitted for decision. But the court decided the whole case without proofs, and without any further hearing. Taking the record as it is exhibited, such certainly is the clear inference from it, and it is not suggested that it does not correctly represent what occurred. Assuming the record to be correct, comment upon the proceeding is unnecessary, as, in the view of this court, it is clearly erroneous.

Several other objections are also taken to the proceedings by the Attorney-General, which are equally decisive that the judgment of the court below must be reversed, one or two of which will be briefly noticed.

Service was made upon O. H. Browning, Secretary of the Interior; but the fact is conceded, or not denied, that he had resigned and gone out of office four months before the decision of the court was announced. When he resigned, of course, the suit abated, but the court gave judgment against him as if he were still in office, and decreed that the writ of *mandamus* should be directed to him and to

his successor in the office. Complaint may well be made by that party that he no longer possesses the power to execute the commands of the writ, and the present Secretary may well complain that he is adjudged to be in default though he never refused to allow the relator to purchase the land, and that the judgment was rendered against him without notice and without any opportunity to be heard.

Notice to the defendant, actual or constructive, is essential to the jurisdiction of all courts, and the better opinion is, that a judgment rendered without notice may be shown to be void when brought collaterally before the court as evidence. *Nations v. Johnson*, 24 How., 203 [65 U. S., XVI., 631].

Patents for land are required to be signed by the President in person, or in his name by a secretary under his direction, and they are to be countersigned by the Recorder of the General Land Office. 4 Stat. at L., 668; 5 Stat. at L., 417.

Such patents cannot be issued and delivered to any party without the signature of the President, and no proceeding to compel either the Commissioner of the General Land Office or the Secretary of the Interior to issue such a patent can be sustained while that provision of law remains unrepealed. *U. S. v. Land Com.*, 5 Wall., 563 [72 U. S., XVIII., 692].

Congress may so provide, and in that event it would be the duty of the Secretary to carry the provision into effect; but the Act of Congress referred to in the petition as the source of power in this case, gives the Secretary of the Interior no authority upon the subject. On the contrary, the express provision is, that the regulations for executing the law shall be provided by the Commissioner of the General Land Office, and the better opinion is, that the application to be allowed to purchase the land embraced in such rejected claim should be made to the Commissioner, and not to the Secretary of the Interior, as the right to purchase of the United States will never vest until the land is surveyed under existing laws.

It appears by the record in this case that a survey of some kind was presented to the Secretary, but whether it was one made under existing laws or not is not sufficiently shown.

Viewed in any light, the Secretary of the Interior has no original cognizance of applications of this description. He may, perhaps, as the head of the department, exercise an appellate and supervisory power over the doings of the Commissioner, but the original application should have been made to the Commissioner of the General Land Office. 9 Stat. at L., 395.

Judgment reversed, and the cause remanded, with directions to dismiss the petition.

Mr. Justice Miller: In this case I agree to the judgment of the court, on the ground set forth by this court in the case of *Gaines v. Thompson* [*ante*, 62], that the courts have no jurisdiction to control the actions of the departments in such cases.

I do not think that the merits of the present claim were before the court, and I decline to express any opinion upon it.

Cited—9 Wall., 577; 13 Wall., 249; 17 Wall., 609; 19 Wall., 660; 93 U. S., 173; 101 U. S., 475; 103 U. S., 435; 1 Hughes, 587.

UNITED STATES, *Appt.*,

v.

THEODORE ADAMS.

(See S. C., 9 Wall., 554-560.)

Mistake in finding of facts, when corrected—former adjudication.

Where the Court of Claims falls into a mistake as to the finding of the facts, this court may remit the case back for correction prior to the hearing, if it be shown satisfactorily that a mistake has been committed.

The court will not allow either party to lie by till the cause is decided, and the opinion delivered, and then to apply for the correction.

Where a person made himself a party to the proceedings before, and took the benefit of the adjustment of his accounts, by a Board, he cannot claim an additional amount before the Court of Claims. [No. 124, December Term, 1868.]

Motion argued Nov. 25, 1869. Decided Feb. 14, 1870.

A PPEAL from the Court of Claims.

On motion to amend decree, etc. The history and facts of this case are fully stated by the court.

Messrs. J. A. Wills and B. R. Curtis, for appellee.

Mr. E. R. Hoar, Atty-Gen., for appellant.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion on the part of Adams, the appellee, to amend the decree of the court rendered in this cause at the last term against him, reversing a decree of the Court of Claims, and for a stay of the mandate, in order to enable him to obtain a correction of the record from that court, and that the cause may be again heard. The case, as already decided, is reported in 7 Wall., 468 [*ante*, 249].

The ground of the motion is, that the record from the Court of Claims is erroneous in a material fact therein stated, and upon which it is supposed this court mainly placed its judgment of reversal. The fact alleged to be untrue is stated in the 18th paragraph of the record. The petition of Adams before the Court of Claims sets forth a claim against the United States, of some \$112,748.76. One of the defenses relied on against it was, that the Government had appointed a Board of Commissioners to hear and determine this claim, among others: that the petitioner had presented it before that Board, who heard the same and awarded a balance due him, and which had been paid. In finding and stating the facts in the record on the appeal from its decree, that court stated, in the 18th paragraph, the following as proved: "That on December, 1861, the petitioner presented to said Commission his claim for said mortar-boats, tug-boats, cabins, etc., in two accounts" setting forth the same. It is now insisted that this is an erroneous statement; that the petitioner did not present his claim before that Board, but, on the contrary, the accounts were referred to it by Gen. Meigs, at the head of the Bureau, before whom this class of accounts had to be presented for adjustment; and that it was heard *ex parte*.

The materiality of the fact has been discovered since the delivery of the opinion of this court on the appeal, reversing the judgment of

the court below. The main ground of that opinion is as follows: "In the view we have taken of the case, the giving of this receipt is of no legal importance. The bar to any further legal demand against the Government does not rest upon this acquittance, but upon the voluntary submission of the claims to the Board; the hearing and final decision thereon; the receipt of the vouchers containing the sum or amount found due to the claimant; and the acceptance of that amount under an Act of Congress providing therefor."

The court agree, in that opinion, that the creditors of the Government were not bound to present their claims before that Board, but might withhold them, and seek relief (as the Secretary of War had refused to recognize them) before Congress or the Court of Claims.

This presents, substantially, the case before us, upon which the motion is founded. It appears from the affidavit of the appellee in support of it, that this error in the record was observed by him and known to his counsel, at the argument on the appeal; but no steps were taken to have it corrected, upon the belief that the action of the Board of Commissioners could have no binding effect upon the rights of the claimant.

The court is of opinion that a case has not been presented by the appellee which would justify it in the exercise of its equitable powers to grant this relief.

The second rule of this court on appeals from the Court of Claims, in respect to making up the record, is as follows: "A finding of the facts in the case by the said Court of Claims, and the conclusions of law on the facts on which the court founds its judgment or decree. The finding of the facts and the conclusions of law to be stated separately, and certified to this court as part of the record."

The remedy, in case the Court of Claims falls into a mistake as to the finding of the facts, is familiar. It is by an application to this court to remit the case back for correction, if it be shown, satisfactorily, that a mistake has been committed.

In the case before us, it is admitted that the mistake was known to the party and his counsel in season to have had it corrected before hearing; but, relying on its immateriality, no step was taken to have the correction made. We do not doubt but that this opinion was honestly entertained, and that this motion is made in good faith; but it is impossible not to see that, if granted, the precedent might lead to great abuse and delay in the hearing of these cases. We should allow either party to lie by till the cause was decided and the opinion delivered, and then to apply for the correction, as the exigency of the case might require, or as the materiality of the fact might appear from the ground upon which the decision was placed. On an appeal, the parties were entitled to have all the facts proved in the case before the court below, in the judgment of the court, truly found, and stated in the record, that either deemed material to the decision; and, as we have seen, the remedy is ample to correct any mistakes committed, if applied for prior to the hearing in this court. The court are not willing to go further, and permit the remedy to be applied after the case is heard and decided, as

we fear that such a precedent would work greater injustice and hardship, in its general use and application, than that which may exist in any particular case.

There is another view also, arising out of the facts upon which this motion is founded, which should be stated.

Accompanying the petition and affidavit of the appellee is the original record of the evidence before the Court of Claims. The Secretary of War, in October, 1861, suspended the payment of the present claims, among many others originating in the then Western Military District, upon charges of fraud alleged against them, and appointed a Board of Commissioners to hear and pass upon the same before payment. After the appointment of this Board, and when General Meigs was pressed to pay this claim with others, he constantly advised the claimants that the claims must be heard and adjusted before the Board, and until then, they would not be recognized or paid; and, on the 4th January, 1862, the papers upon which the claims of the appellee were founded, were, by direction of the General himself, placed before the Board, with a request to hear and determine the amount justly due.

This step taken by General Meigs was well known to the appellee, who was present in St. Louis at the time, where the Board sat. It is true that there is no proof in the records to show that he presented his claims before the Board, or that he procured any witnesses who appeared before them in the course of their investigations. Four witnesses were examined on the part of the Government on the subject of the reasonableness of the prices charged for the mortar-boats, gun-boats, and other work. They proved, if not mistaken, a considerable overcharge in the work and materials. No witnesses were produced on the part of the appellee, nor were those on the part of the Government cross-examined; but, on the 18th of January, 1862 (it is 1861 in the record, but manifestly an error), he addressed a letter to the Board, dated at St. Louis, expressing a desire to submit to them some facts in relation to the construction of the mortar-boats, which constituted the principal items in his accounts. In that letter he states the history of his communications with the Navy Department and with General Meigs, on the subject of his plans for the construction of the mortar boats, and of the adoption of the same by General Frémont, and of the contract for building the same, and closes it by saying that "When this contract was made, I supposed I would have to pay much higher for materials and labor than I have and, therefore, the job has been more profitable in figures than I expected. To do this work I had to contract debts to workmen and all classes who have furnished me materials; and claim, as I have in no respect been remiss on my part, the Government should deal promptly and liberally with me."

The Board adjusted his accounts and allowed a balance due to him of \$95,655.24, for which he accepted a voucher and gave a receipt in full; and the payment of which he accepted under a Resolution of Congress, passed soon afterward, for the payment of claims, audited and allowed by this Board of Commissioners.

Although it is true that the appellee did not present his claims before the Board as stated in the finding in the record on appeal, it cannot well be denied but that he made himself a party to their proceedings, and took the benefit of the adjustment of his accounts by them, which brings the case within the principle decided in 7 Wallace [*ante*, 249].

The motion is denied.

S. C.—7 Wall., 463.

Cited—12 Wall., 243; 14 Wall., 550.

JAMES S. WILKINS, Surviving Partner of
F. H. CLARK & Co., *Plff. in Err.*,

v.

SEMPLE ELLETT, Administrator of THOMAS
U. QUARLES, Deceased.

(See S. C., 9 Wall., 740-743.)

Payment to executor, out of his State, good.

A payment at the place of his residence by a foreign debtor to an administrator, who had been appointed at the domicile of the intestate, is good as against an ancillary administrator appointed at the place of debtor's residence.

[No. 282.]

Submitted Jan. 25, 1870. Decided Feb. 14, 1870.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

This suit was brought in the court below by Ellet, administrator of one Quarles, deceased, to recover a debt due the intestate, which the defendant had previously and voluntarily paid to the administrator of the said Quarles, appointed in a foreign jurisdiction.

A further statement of the case appears in the opinion of the court.

The verdict and judgment in the court below having been in favor of the plaintiff, the defendant sued out this writ of error.

Messrs. Humes and Poston, for plaintiff in error:

The question presented for the decision of the court in this case is, whether voluntary payment to a foreign administrator effectually discharges the home debtors.

In *Thorne v. Watkins*, 2 Ves., 85, Lord Hardwicke said that all debts follow the person, not of the debtor, in respect to the right of property, but that of the creditor to whom due.

In case of *Parsons v. Lyman*, 20 N. Y., 112, the court says: "Personal property has no locality. It is subject to the law which governs the person of the owner, as well in respect to the disposition of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon the owner dying intestate."

The legal title to all the personal property of the deceased, including choses in action, rests in the legal representative.

Beecher v. Buckingham, 18 Conn., 110; *Shultz v. Pulver*, 11 Wend., 363; *Perkins v. Stone*, 18 Conn., 270; *Rand v. Hubbard*, 4 Met., 252; *Hutchins v. Bk.*, 12 Met., 421; *Suarez v. Mayor of N. Y.*, 2 Sandf. Ch., 173; *Brown v. Brown*, 1 Barb. Ch., 189; *Evans v. Tatem*, 9 Serg. & R., 258.

An executor or administrator represents the person of the intestate, and so far as the title of

personal property is concerned, stands in his stead.

Co. Litt., 209 a; *Shultz v. Pulver* (*supra*); *Rand v. Hubbard* (*supra*); *Brown v. Brown* (*supra*); *Whyte v. Rose*, 3 Adol. & E. N. S., 498; *Petersen v. C. Bk.*, 32 N. Y., 41, 45.

True, the personal representative cannot sue in the courts of another State, without taking out letters of administration or letters testamentary there; but this want of power arises, not from want of title, but because of the policy adopted by the States, to secure creditors and legatees resident within their borders.

Doolittle v. Lewis, 7 Johns. Ch., 51; *Parsons v. Lyman*, 20 N. Y., 112; Co. Litt., 209 a; *Schuls v. Pulver*, 11 Wend., 363; *Vroom v. Van Horn*, 10 Paige, 549; *Williams v. Storrs*, 6 Johns. Ch., 853; *Trecothick v. Austin*, 4 Mas., 33.

The want of power to sue, in the foreign representative, is mere matter of form.

Thorne v. Watkins, 2 Ves., 85; *Doolittle v. Lewis*, 7 Johns. Ch., 51.

In *Nisbett v. Stewart*, 2 Dev. & B., 24, the Supreme Court of North Carolina declared a voluntary payment to a foreign administrator ineffectual as a discharge.

Mr. D. K. McRae, for defendant in error:

The appellant relies on the decisions in New York.

It is unquestionably true, that the judicial opinion in New York adopts the view of the appellant; but this opinion is derived from *dicta* and not from any adjudication of the direct question.

See *Parsons v. Lyman*, 20 N. Y., 103.

Judge Story's opinion is also relied on (*Trecothick v. Austin*, 4 Mas., 16-33); but this also was mere *dictum*, and has been directly controverted by the author in the "Conflict of Laws," where the question is properly presented with its qualifications.

Conflict of Laws, secs. 514, 514 a, 514 b, 515.

The identical question in this case has been presented in Tennessee, and the law of that State settled.

It is there taken for granted as a settled doctrine, both in England and America, that an executor or administrator appointed in one country is not, by virtue of such appointment, entitled to sue, or liable to be sued, in his official capacity, in any other country. Therefore, he acquires no interest in the assets, and has no responsibility. He is a stranger to the debt, without authority to receive or give acquittance.

Young v. O'Neal, 3 Sneed, 55.

The statute law of Tennessee forbids any one to enter upon the administration of any deceased person's estate, until he has obtained letters of administration. And these letters are to be granted by the county court where deceased resided; or, where there are *bona notabilia*, or where any debtor of the deceased resides.

Code, 2201, 2202, 2208.

This statute and the decision of the Supreme Court referred to above, is such local law settling the rights of property in the State, as the Federal Courts are bound to adopt, for the administration cases settle the rights of persons and property, both real and personal.

Swift v. Tyson, 16 Pet., 1; 8 Pet., 270; 1 Wheat., 361; 13 Pet., 45; 1 Pet., 360-476; 2 Pet., 492; 6 Pet., 291; 2 Pet., 675; 5 Pet., 151.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Western District of Tennessee.

The suit was brought by Ellett, administrator of Quarles, deceased, against Wilkins, in the court below, to recover a debt due to the intestate.

The case is this: Quarles died in the State of Alabama, the place of his domicile, where letters of administration were taken out by William Goodloe, of that State. The defendant, a resident of Memphis, Tennessee, was indebted to the estate in the sum of \$3,455.22, who, being called upon at Memphis by the administrator, paid the debt and took a receipt, for which sum the administrator duly accounted before the Probate Court in Alabama. Afterwards, Ellett, a citizen of the State of Virginia, and claiming to be next of kin to the deceased, took out letters of administration in Tennessee, and brought this suit against Wilkins to recover the same debt, in favor of whom a judgment was rendered for the amount, in pursuance of the instructions of the court. There were no creditors or distributees of the intestate in the State of Tennessee. The court held that the voluntary payment by Wilkins to the Alabama administrator was in his own wrong, and that the plaintiff was entitled to recover.

It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places, where the property happened at the time to be situated. 2 Kent, Com., 429; Story, Conf. of Laws, sec. 879. The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased for the purpose of collecting the effects of the estate, paying the debts; and making distribution of the residue, according to the law of the place, or directions of the will, as the case may be.

It is true, if any portion of the estate is situated in another country he cannot recover possession by suit without taking out letters of administration from the proper tribunal in that country, as the original letters can confer upon him no extraterritorial authority. The difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its home creditors. These letters are regarded as merely ancillary to the original letters, as to the collection and distribution of the effects; and generally are simply made subservient to the claims of the domestic creditors, the *residuum* being transmitted to the probate court of the country of the domicile, for the final settlement of the estate. It is upon this qualification of the law of comity and consequent inability of the original administrator to sue in the foreign country, upon which the

See 9 WALL.

objection is founded to the validity of the voluntary payment by the foreign debtor to him.

There is, doubtless, some plausibility in it, growing out of the interest of the home creditors. But it has not been regarded of sufficient weight to carry with it the judicial mind of the country. With the exception of the cases in the State of Tennessee, none have been referred to, nor have our own researches found any, maintaining the invalidity of the payment. The question has been directly and indirectly before several of the courts of the States, and the opinions have all been in one direction—in favor of the validity. *Williams v. Storrs*, 6 Johns. Ch., 353; *Doolittle v. Lewis*, 7 Ib., 51; *Vroom v. Van Horne*, 10 Paige, 549, 557, 816, 182; *Schultz v. Pulver*, 11 Wend., 361; *Trecothick v. Austin*, 4 Mas., 83; *Stevens v. Gaylord*, 11 Mass., 256; *Nisbet v. Stewart*, 2 Dev. & Battle, 24; *Parsons v. Lyman*, 20 N. Y., 108.

Mr. Justice Story, in his Conflict of Laws, sec. 515 a, has expressed a doubt as it respects the soundness of the doctrine upon principles of international law, and which is mainly relied on in the present case by the defendant in error. He had affirmed it in *Trecothick v. Austin* (4 Mass., 16, 28); and he admits in a note, p. 432, that if a debtor be found in a foreign country where the creditor died, and where he had his domicile, and was sued by the administrator, he could not protect himself by a plea that he was liable to pay only to an administrator appointed at the place of his (the creditor's) domicile. All debts follow the person, not of the debtor in respect of the right or property, but of the creditor, to whom due. *Thorne v. Watkins*, 2 Ves., Sen., 85.

The judgment of the court below reversed.

Cited—108 U. S., 269; 100 U. S., 856; 2 McCrary, 624; 5 Sawy., 500.

THE PROVIDENCE RUBBER CO. ET AL.,
Appts.,
v.

CHARLES GOODYEAR'S EXECUTOR
AND THE UNION INDIA RUBBER CO.
ET AL.

(See S. C., 9 Wall., 807-811.)

Cross bill, what is—when proper—substituted service.

A cross-bill is brought to obtain a discovery in aid of a defense to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill.

If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject.

When the bill was not auxiliary to the original suit or in continuation of it, the case was not proper for substituted service.

[No. 35.]

Argued Jan. 26, 1870. Decided Feb. 14, 1870.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

The history and facts of the case appear in the opinion of the court. See, also, the report of the case between these parties, of which this is a branch, as decided by this court (*ante*, 566).

Messrs. J. H. Parsons, Abraham Payne, C. Cushing, J. A. Garfield and W. W. Boyce, for appellants.

1. As to the motion to dismiss for want of jurisdiction:

We claim that the granting of this motion by the court below was erroneous.

The parties, the subject-matter, all the essentials of jurisdiction were before the court. The bill was filed after the final hearing it is true, and after the exceptions to the master's report had been argued, but before the entry of any final decree in the original suit.

Process was not served until after the final decree in the original suit, but the motion for substituted service was heard and granted in part, Nov. 28, 1866, the day the court delivered its opinion in the original suit.

Goodyear, one of the defendants, voluntarily appeared without being served with process, and filed his demurrer Feb. 1, 1867, his own solicitor also appearing.

As to the demurrer:

It is claimed that the cross-bill contains matters and allegations separate and distinct from and independent of the matters in litigation in the original suit.

We were sued by three different parties. The master reported that we were to pay a large sum. He refused to ascertain in the proportion due to each. We had a judgment against one of the parties, the existence of which was made known to the master. We desired that the proportions due to each should be ascertained, in order that we might claim the benefit of that judgment in reducing the amount ascertained to be due to one of the parties. That party appeared before the master and claimed that he was entitled to a large portion, if not the whole, of the damages. He appeared before the court making the same claim by elaborate petitions. Now, we submit that the setting up of the judgment in our cross-bill, was not only not introducing anything foreign, distinct and independent, but it was essential that we should set it up. It was setting up a perfectly proper, legitimate defense in the form of a cross-bill. The motions and petition of Goodyear show his distinct interest. They were part of the proceedings in the original suit, and if he has a claim by himself to a large portion if not the whole of these damages, we have a right to set up his diverse claim; our judgment; and the fact that his proportion is to be reduced by the amount of this judgment.

Messrs. William E. Curtis, J. H. Ackerman and E. W. Stoughton, for appellees:

1. A cross-bill is matter of defense. It cannot embrace new and distinct matter not embraced in the original suit; and if it does so, no decree can be founded on those matters, and the cross-bill is open for a demurrer for this cause.

Story, Eq. Pl., sec. 681; *Galation v. Erwin*, Hopk., 48; *Galation v. Cunningham*, 8 Cow., 361.

Nothing can be more entirely foreign to the original suit than the matter set up in the cross-bill respecting the alleged judgment against Charles Goodyear, deceased, and the accounting and relief prayed for in the cross-bill.

The settled rule of courts of equity in respect to a cross-bill like the one demurred to in this case, is stated by Judge Story, thus: "A cross-bill being, as has been already said, a matter of

defense, is confined to the matters in litigation in the original suit and, therefore, if it seeks to bring before the court other distinct matters and rights, it is no longer entitled to be deemed a cross-bill, but is an original suit, without such a restriction, new matters might be introduced into litigation by cross-suits without end." Story, Eq. Pl., sec. 681.

A cross-bill is a mere auxiliary suit and a dependency of the original, and it must be confined to the matters in question in the bill. *Cross v. Del Valle*, 1 Wall., 5 (68 U. S., XVII, 515).

2. The cross-bill is filed for a discovery and an account when the subject is matter of set-off of a judgment, and where the plaintiff can have as effectual and complete a remedy in a court of law as in a court of equity, and it is clearly demurrable.

2 Dan. Ch. Pr. (ed. 1846), marg. p. 28; *Dinwiddie v. Bailey*, 6 Ves., 136; Story, Eq. Pl., sec. 482.

The proper way to set off one judgment against another, is by motion. Judgments, not only in the same court, but in different courts, may be set off against each other at law and the power of courts of law in allowing such set-offs does not depend upon statute, but on the general jurisdiction of the court over its suitors.

Barker v. Braham, 2 W. Bl., 869; *Simpson v. Hart*, 1 Johns. Ch., 94.

Courts of equity follow the law in matters of set-off, unless there is some equity attaching to the transaction between the parties.

3. It appears that the alleged judgment against defendant's testator was a proceeding by attachment of certain personal property found in the State of Rhode Island; that there was no service of process upon him, and that he never appeared or contested the suit.

It was a mere proceeding *in rem*, and not personally binding on the party as a judgment *in personam*. It affected the property attached to the extent thereof, but was in no sense a judgment binding the party beyond that property.

McVicker v. Beedy, 31 Me., 814; Story, Conf. L., sec. 549; 6 Am. Law Reg. (N. S.), 5, 8; *D'Arcy v. Ketchum*, 11 How., 165.

It follows that a bill—like the one in question, seeking to convert a proceeding or judgment *in rem* into a judgment *in personam*, or to establish a set-off of a judgment *in rem*—cannot be sustained. It would be attended with great injustice and confusion, and is without precedent.

4. Even if the alleged judgment against the defendant's testator was a judgment *in personam*, the complainants jointly owning it cannot offset it against this claim of Charles Goodyear's executor against the Providence Rubber Company, one of their number.

It is an elementary principle, that the debt sued for, and the debt intended to be set off, must be mutual and due in the same right.

1 Wheat. Selw., sec. 150; *Jackson v. Robinson*, 3 Mas., 188; *Cobb v. Haydock*, 4 Day, 472.

Joint debts cannot be set off against separate debts, or separate debts against joint debts, either at law or in equity, as where there is a separate debt due from a partner, and a joint debt due by a partnership. *Hove v. Sheppard*, 2

Sumn., 409; *Palmer v. Green*, 6 Conn., 19; *Ladue v. Hart*, 4 Wend., 583.

Mr. Justice Swayne delivered the opinion of the court:

After the interlocutory decree was entered in the case of Charles Goodyear, executor of Charles Goodyear, deceased, and others, against The Providence Rubber Company and others, in the Circuit Court of the United States for the District of Rhode Island, and while the case was before the master to whom it had been referred, the complainants filed this bill. It alleges that they hold a judgment against the estate of Charles Goodyear, deceased, in favor of E. M. Chaffee & Co. for the sum of \$48,215.20, amounting, with interest thereon, to \$72,215.20, or thereabout, which they insist ought, in equity and good conscience, to be offset against such portion of the damages to be recovered in the suit first mentioned, as may be due and payable to Charles Goodyear, the executor. An exhibit is annexed to the bill and made a part of it, by which it appears that the judgment was recovered against Charles Goodyear, deceased, in his lifetime, by attachment; that process was not served upon him; that he did not appear; that he made no defense; that the cause of action was the alleged breach of a contract; and that the court assessed the damages for which the judgment was rendered.

It further appears by this exhibit that the firm of E. M. Chaffee & Co. consisted of Edwin M. Chaffee, George O. Bourn and William W. Brown. The sheriff's return upon the writ of attachment is as follows:

"For want of the body of the within named defendant to be by me found in my precinct, I have this day, at 11 o'clock A. M., made service of this writ by attaching two pieces grass cloth, one piece red fitting, six rolls cotton batting, one piece of perforated rubber cloth, one roll grass cloth, one roll sheeting covered with cotton batting, two bundles wadding, one piece bagging, set forth to me by the plaintiffs as the property of the defendant, and have left a true and attested copy of this writ, with my doings hereon, with Messrs. Bourn and Brown, in whose hands or possession I found said goods and chattels, the defendants having no last and usual place of abode within my precinct whereat to leave a copy."

The bill further sets forth that the Union India Rubber Co. claims to be a Corporation of the State of New York, having its principal place of business in the City of New York, and that the Phenix Rubber Company claims to be a Corporation of the State of Connecticut, having its principal place of business also in the City of New York.

The prayer of the bill is, that the defendants set forth and discover what share of the damages to be recovered in the prior suit they respectively claim; that the judgment may be set off against that portion which shall belong to Charles Goodyear, as executor of Charles Goodyear, deceased; and for other and proper relief. There is a further prayer that service of process may be made upon the Corporation defendants, by serving it upon their solicitor of record, and that service may be made upon Charles Goodyear, the executor, by some disinterested person in the State of New York. Substituted service

was made upon the Corporations accordingly, pursuant to an order of the court. Charles Goodyear entered his appearance, and demurred. The Corporations appeared specially, and moved to dismiss the bill. The demurrer and the motion were both sustained, and the bill was dismissed. The complainants thereupon appealed to this court.

In the argument here, the counsel for the appellants have endeavored to support the bill, upon the ground that it is a cross-bill, having for its object to enforce an offset arising under such circumstances as give a court of equity jurisdiction of the case, and authority to give the relief for which the bill specifically prays. A cross-bill is brought to obtain a discovery in aid of a defense to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross-bill, though it may have a connection with the same general subject. *Mitford*, Pl., 80, 81; *Ayres v. Carver*, 17 How., 591 [58 U. S., XV., 179]; *Cross v. Del Valle*, 1 Wall., 5 [68 U. S., XVII., 515]. Here the original suit was for the infringement of a patent. The defenses were invalidity of the patent and a license. Neither the case made by the bill nor the defenses set up in the answer had the slightest relation to the judgment in question. It is entirely foreign to the grounds of the controversy. Its only connection with the parties was that it belonged to the defendants, and was against the testator of one of the complainants. Any discovery in relation to it could not give or help any defense to the original suit. It was simply a fact affecting personally a portion of the parties, but no more affecting the litigation than would any other controversy between them as to lands, stocks, or other property. We, therefore, hold the bill to be an original and not a cross-bill.

Can it be sustained as such? When it was filed, no decree had passed in the original suit for the payment of damages. *Non constat* that such a decree would ever be made. It was possible that the court might annul the interlocutory order, decree for the defendants, and dismiss the bill. The bill before us was, therefore, prematurely filed. The judgment which it seeks to enforce was recovered in a proceeding by attachment. It did not affect the defendant personally, and bound no property but that upon which the grasp of the court was fixed by the service of the writ of attachment. Beyond that it was ineffectual for any purpose. An execution could not be issued upon it to reach other property, and it would not be *prima facie* evidence against the defendant in another suit upon the same cause of action. To enforce the contract against the testator while living, or his executor after his decease, it was necessary to sue, procure personal service, and make the same proofs as if the judgment in attachment had not been rendered. Such a judgment has no more efficacy and can no more be enforced in equity than at law. The demurrer of the executor was well taken and properly sustained. *D'Arcy v. Ketchum*, 11 How., 165; *McVicker v. Beedy*, 31 Maine, 814; *Story*, Conflict of Laws, sec. 814.

The motion to dismiss was made by the foreign Corporations. The bill, being in nowise auxiliary to the original suit nor in continuation of that proceeding, the case was not one proper for substituted service. *Dunn v. Clarke*, 8 Pet., 1. They were not bound to appear. They entered their appearance specially, and appeared only to object to the jurisdiction of the court.

The learned judge who heard the case below was correct in ordering the bill to be dismissed.

The decree of the Circuit Court is affirmed.

JOHN E. NEALE, *Appt.*,

v.

BENJAMIN I. NEALE AND MARY H. NEALE, HIS WIFE.

(See S. C., 9 Wall., 1-12.)

Amendments to pleadings, when allowed an hearing—parol gift of land—when valid—when enforced in equity—degree of proof.

A court of equity has power to grant amendments of the pleadings after the cause has been heard and before the decree is passed.

Equity protects a parol gift of land, if accompanied by possession, and if the donee has made valuable improvements on the property.

This is particularly true where the donor stipulates that the expenditure shall be made, and makes it a consideration or condition of the gift.

A parol agreement—to give an intended daughter-in-law a lot of land as a home for the family, if, with her means, a suitable dwelling-house was erected on it, which has been done—will be enforced in equity by a decree of specific performance.

That a case of this kind be made out with reasonable certainty, is all that is required.

[No. 33.]

Argued Jan. 25, 1870. Decided Feb. 21, 1870.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below, by the appellees, to enforce a certain alleged contract for the transfer of a certain lot of land. The contract was void as not being in writing, but the bill prayed for its enforcement upon the ground of performance by the complainants. The original bill alleged, among other things, that the respondent promised to give said lot to one or the other of the complainants in consideration of their marriage, and also alleged that the complainants did intermarry, "partly in consideration of said promise." The bill, as subsequently amended by leave of the court, varied from the original form chiefly in alleging the promise to have been to give said lot to the complainant, Mary H. Neale, and in omitting the clause which stated the marriage to have been made "partly in consideration of such promise." The court below having entered a decree in favor of the complainants, the respondent took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. W. D. Davidge and P. Phillips, for appellant:

To take a case out of the Statute of Frauds upon the ground of part performance, it is not only indispensable that the acts done should be referable exclusively to the parol contract, but

the contract must also establish, by competent proofs, to be clear, definite and unequivocal in all its terms. If the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance cannot be decreed.

King v. Thompson, 9 Pet., 204; *Colson v. Thompson*, 2 Wheat., 386; 2 Story, Eq. Jur., sec. 764; *Phillips v. Thompson*, 1 Johns. Ch., 131. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 273.

Now, what are the terms of the contract, as averred in the original bill? They are to give and convey, in consideration of the marriage of complainants, to both of them, or one or the other of them, one or part of one of the lots whereof defendant was seised, to the end that with money then belonging or expected to belong to the oratrix, they might erect thereon a dwelling-house for their habitation and home.

How can such a contract be specifically performed?

King v. Thompson (supra.)

A bill cannot "Be amended after publication, in any other respect than by making parties; and no new change can be introduced nor material fact put in issue which was not so before; but a supplemental bill must be preferred."

1 Dan. Pl. & Pr., 478.

It is a settled rule of practice that a bill, defective in its charges, cannot be amended after publication and cause set down, and especially after hearing, by adding new charges. Such defects can only be supplied by supplemental bill.

Chancellor Kent, Shepherd v. Merri, 3 Johns. Ch., 422.

See, also, *Story Eq. Pl.*, 886; *Bowen v. Idley*, 6 Paige, 46; *Wilbur v. Collier*, 1 Clark, Ch., 315.

The order, it will be observed, did not give leave to withdraw the replication.

2 Dan., 970; *Vermilyea v. Odell*, 4 Paige, 122.

But further, the amended bill makes a new case. The original bill averred a contract, in consideration of marriage, to convey to both the complainants, or to one or the other. The amended bill expressly abandons any consideration or any contract, whether for a valuable or meritorious consideration, and proceeds entirely upon an alleged parol gift, followed by possession and improvement.

Shields v. Barrow, 17 How., 130 (58 U. S., XV., 158); 1 Dan. Ch., Pl. & Pr., 54, n. 2.

The true rule on this subject is laid down by the *Vice-Chancellor in Verplanck v. Merc. Ins. Co.*, 1 Edw. Ch., 48.

Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet new allegations in the answer.

See, also, the authorities there referred to, and *Story, Eq. Pl.*, 884; see *Mayor v. Dry*, 3 Sim. & S., 118.

Messrs. J. C. Kennedy and W. B. Webb, for appellees:

It was argued by the appellant's counsel in the court below, and again here, that—

"After publication has passed, and the case has been set down for hearing, the bill can be amended in no other respect than by making new parties."

Such, it is respectfully submitted, is not the rule, so far as the power of a court of equity to grant leave to amend in a case where justice requires amendment, is concerned.

Although courts of equity have prescribed forms of proceeding, the latter are flexible and may be suited to the different posture of cases.

1 Story, Eq. Jur., sec. 28; Mitf. Ch. Pl., 326, 331; Story, Eq. Pl., sec. 905; Dan. Ch. Pr. & Pl., 463.

If a plaintiff takes advantage of an order to amend, so as entirely to change his case and to make the bill a perfectly new one, he will be ordered, upon motion, to place the defendant in the same position with regard to costs that he would have been in had the plaintiff, instead of amending, dismissed his original bill with costs, and filed a new one.

Dan. Ch. Pr. & Pl., 463.

In *Smith v. Babcock*, 8 Sumn., 583, the court, among other things, said: "The whole matter (the matter of amendments) rests in the sound discretion of the court."

Dan. Ch. Pl. & Pr., 481.

The parties, the subject-matter, the scope, object and prayers of the one bill, are essentially the same as those of the other.

It was argued in the court below by the appellant's counsel, that the amended bill does not aver any contract nor any consideration to support a contract.

A contract, it is submitted, is "an agreement upon sufficient consideration to do or not to do a particular thing."

2 Bl. Com., 442.

And according to this definition, three things must concur to constitute a contract: First, there there must be an agreement (i. e., a mutual bargain or convention, between two or more persons competent to contract); second, a sufficient consideration; and third, a thing to be done or omitted.

"Expenditure for valuable improvements, induced by parol contract and in execution of it, is regarded in equity as a valuable consideration for the purposes of a specific execution of such contract."

Am. Note to *Lester v. Foxcroft*, 1 Lead. Cas., in Eq. 569; *King v. Thompson*, 9 Pet., 219.

In almost every State of this Union, the rule is well settled that, in equity, part performance takes a parol agreement out of the operation of the Statute of Frauds.

Am. Note to *Lester v. Foxcroft* (*supra*).

Admission into possession having unequivocal reference to the contract, has always been considered an act of part performance.

Am. Note to *Lester v. Foxcroft*, 1 Lead. Cas., in Eq., 567.

It is enough that the court can ascertain the terms of the promise with reasonable certainty from the whole evidence.

Am. Note to *Lester v. Foxcroft* (*supra*); *Parkhurst v. Van Cortlandt*, 14 Johns., 31.

Mr. Justice Davis delivered the opinion of the court:

The appellees commenced a suit in equity in the court below, to enforce against the ap-

pellants a parol contract concerning real estate, on the grounds that, by act of part performance, it was taken out of the operation of the Statute of Frauds. After the cause had been heard, the court of its own motion gave the complainants leave to amend their bill on the payment of cost. The reason for this action of the court is not given, and we are left to infer what it was from the subsequent proceedings in the case. It appears that all the pleadings were amended and the cause heard a second time, on substantially the same evidence on which it was first heard, when the court rendered a decree in favor of the complainants. It would, therefore, seem clear that the court of the original hearing was satisfied the evidence made out a case for relief, but different from the case stated in the bill, and, as the pleadings must correspond with the evidence, it was necessary either to dismiss the bill without prejudice, or to give the leave to amend. The court adopted the latter alternative, doubtless with a view to save expense to the parties, and because such a course could not, by any possibility, work any harm to the defendant.

It is insisted that this proceeding was erroneous; that after a cause has been heard, the power of allowing amendments ceases, or if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject-matter, as, it is contended, was done in this instance under the leave to amend.

This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities. Mitf. Ch. Pl., pp. 326, 331; Story, Eq. Pl., secs. 904 and 905; Dan. Ch. Pr. & Pl., pp. 463, 466; *Smith v. Babcock*, 8 Sumn., 583; *McArtes v. Engart*, 13 Ill., 242.

Necessarily, in a federal tribunal the matter of amendment at this stage of the progress of a cause rests in the sound discretion of the court. At an earlier stage, this discretion is controlled by the rules of equity practice adopted by this court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point. As, therefore, the leave to amend in this instance was within the discretion of the court, we will proceed to dispose of the case on its merits.

It is unnecessary, in the view we have taken

of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject matter of both bills is the same, and that the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision and, if supported by proof, entitle the complainants to the relief which they seek at the hands of a court of equity. The Statute of Frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the rigidity of this rule, and hold that a part performance removes the bar of the Statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed. And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true, where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift. *Amer. Note to Lester v. Foxcroft*, 1 Lead. Cas., in Eq., 625.

Was this gift in question made to Mary H. Neale and her children, and has the condition on which it was given been performed so as to make it inequitable for the donor to escape from his engagement? We do not propose to discuss the evidence at length, in order to vindicate the conclusion we have reached in regard to it. It is in many respects conflicting and contradictory, and it is to be regretted that the contest over this property, like all contests between near relations, has elements of bitterness in it. It is enough to say, for the purposes of this suit, that on the whole evidence it is reasonably certain that John E. Neale agreed to give to Mary Hamilton, who was about to marry his son, in furtherance of the marriage, the lot in controversy, for the benefit of herself and children, and for a home for the family, if, with her means, a suitable dwelling-house was erected on it, and that this has been done. On no other theory of this case are the undisputed facts reconcilable with the conduct of the parties. There is no dispute that the husband, before and after marriage, was of dissipated habits; that the father knew it, and had but little confidence in his ability to manage money with judgment, and was desirous that the property of the wife should not be embarked in the husband's business. What so natural as that a father, having a son of this character about to marry a lady of property, should wish to have her property secured against the consequences of her husband's improvidence and dissipation? This could not be done, as he had a lot to give on the occurrence of the marriage, by agreeing to give it to the son if he improved it with his wife's means, because he might sell it and waste the money, or become involved in debt and lose it in that way. Indeed, we are assured from the father's own estimate of his son's character, he feared the happening of one or the other of these events in case he donated the lot to the son, and, to avoid placing his own

gift and the wife's inheritance in equal peril, he did what any other parent under like circumstances would have done, gave the lot to the wife, so that, if improved by her, it would be safe at all times from the effects of the husband's folly, and be a secure home for the family. It is true, the declarations of the father on the subject are, literally taken, contradictory, but we place but little reliance as evidence on his statements made to some witnesses, that the gift was to the son, because they are in conflict with statements frequently made at different times to other persons, that the gift was to the wife, and are inconsistent with his conduct and motives fairly deducible from the other evidence in the case. Besides, in one sense, it is true the gift was to the son, as it was for his benefit, and would not have been made if he had remained single; and in this sense the father doubtless meant his declarations on the subject to be received.

As, therefore, the gift was to the wife, and in fee simple, for a less estate would not secure the object the father had in view, it remains to be seen what was done with the property after the intermarriage of the parties. And here the character of the evidence, and its effect on the issue we are considering, cannot be misapprehended. It appears that shortly after the marriage the house was built with money belonging to the wife, and with the knowledge of the appellant, who lived on an adjoining lot and acted, according to one witness, as general supervisor in the matter. It further appears that on the completion of the house the newly married couple lived in it, for a season, and afterwards rented it, and that during their absence on a casual visit to Maryland in 1861, it having become temporarily vacant by the withdrawal of the tenant, the appellant, without their knowledge and consent, moved into it and still retains possession of it. It is impossible, in view of these facts, which prove that the condition of the gift had been performed, to escape the conclusion that the father at the outset was satisfied with the arrangement, and that his subsequent conduct, tending to show that he had disavowed it, was an afterthought.

It is insisted that a part of the money used in building the house was advanced by the father, who, in conjunction with the son, borrowed it from Mrs. Sears, and that, therefore, the consideration, *pro tanto*, for the gift has failed. It is clear that the husband received from the wife's guardian more money than was required to build the house, and had agreed with her to devote enough of it to this purpose, but instead of doing this, unfortunately, he employed a portion of it in his store, which rendered necessary the Sears loan. This loan, secured by the father on the property in controversy, stood on the books of the son as a confidential debt due his wife, and when he failed and assigned his property, he recognized it as such and preferred it over all other debts. There was certainly nothing wrong in this provision, which relieved the property of the wife of an incumbrance created because the husband had misappropriated her money, and, as the father accepted the trust under the assignment, with this debt thus preferred, and at the same time received sufficient property to pay it, it is hard to see wherein he has cause of

complaint in this matter, or how he can truthfully say he paid any part of the money that went into the house. In any proper sense the house was built with the wife's money, and equity will give her the benefit of it in this controversy with the father.

As before remarked, the case as stated is made out with reasonable certainty, which is all that is required. *Note to Lester v. Frazcroft, supra; Monday v. Jolliff, 5 Mylne & C., p. 177.* Any other degree of certainty in a case of this character is unattainable.

Damages will not compensate for the breach of this contract, nor answer the intention of the parties to it, and a specific performance is therefore essential to the complete ends of justice.

The decree of the court below is affirmed.

Cited—10 Blatchf., 424; 22 Am. Rep., 62 (44 Md., 617); 32 Am. Rep., 670 (30 Gratt., 255).

UNITED STATES, *Plf.*,

v.

HENRY C. DE WITT.

(See S. C., 9 Wall., 41-45.)

Power of Congress over trade in State—Act as to sale of petroleum.

Congress has no power, under the Constitution, to prohibit trade within the limits of a State.

The 28th section of the Act of March 2, 1867, in regard to the sale of petroleum oil, is not a constitutional law, except so far as it operates within the United States, but without the limits of any State.

[No. 88.]

Argued Nov. 25, 1869. Decided Feb. 21, 1870.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Michigan.

This case arose upon an indictment found in the court below against the defendant, for selling illuminating oil, inflammable at less temperature and fire test than 110 degrees Fahrenheit.

The case is fully stated in the opinion of the court.

Messrs. E. R. Hoar, Atty. Gen., and W. A. Field, Asst. Atty. Gen., for the plaintiff:

I. The validity of the Statute is to be presumed, until a violation of the Constitution is shown beyond reasonable doubt.

Ogden v. Saunders, 12 Wheat., 240; Shollenberger v. Brinton, 52 Pa., 57; Met. Bk. v. Van Dyck, 27 N. Y., 460.

II. Congress may establish police regulations, as well as the Legislatures of the States, confining its operations, however, to subjects over which it has control under the Constitution.

Cooley, Const. Lim., 586.

Instances of the exercise of this power over certain instruments or agencies of commerce, for the protection of life or property, are found in the Acts of Mar. 3, 1843, 5 Stat. at L., 626; Aug. 30, 1852, 10 Stat. at L., 61; May 5, 1864, 13 Stat. at L., 63; July 25, 1866, 14 Stat. at L., 228.

Although the main purpose of the enactment in question may be the protection of consumers against danger, one substantial reason for it may be the regulation of commerce between the States and with foreign countries; the protection of transportation companies and the protection of the United States revenue officers in the examination, gauging, etc., made necessary

See 9 WALL.

for the convenient assessment and collection of excise taxes. It may well be contended, that in the absence of any regulation by a State, the regulations of this section of the Act of Congress are fairly incidental to the exercise of the power to regulate commerce or of the taxing power, and as such constitutional.

The provisions of the internal revenue laws imposing excise taxes on mineral oil, in force at the date of the alleged offense, are found in sec. 9, ch. 184, Act 1866, 14 Stat. at L., 128, being the amendment to section 94 of the Act, June 30, 1864.

Messrs. John G. White, Henry S. Sherman and John A. Wills, for defendant:

The right to enact laws of this description must be expressly given in the Constitution, or must be necessary for the convenient exercise of the powers expressly given. This right is not directly expressed. The only provisions from which it can possibly be implied are: 1. The power of Congress to provide for the general welfare. 2. The tax power. 3. The power to regulate commerce.

The first power may be briefly dismissed. It seems unnecessary to add anything to *Judge Story's* demonstration, that the clause to provide for the general welfare contains no grant power, and is only a part of the power of taxation.

Marshall, that fountain of constitutional wisdom, considered it part of the taxing power.

Gibbons v. Ogden, 9 Wheat., 199.

The manifest object of this law was to secure the safety of the citizen, not the increase of the revenue of the State. It is, therefore, a police measure and, therefore, within the reserved powers of the several States. Congress, as to whose intentions we now dispute, has distinctly declared the purpose of this law to be safety, not revenue, by repealing all that part of the Statute which imposed a tax, while leaving still in force the penal section now in question.

15 U. S. Stat. at L., sec. 109, p. 167.

The States alone possess these police powers, because their exercise by either the States or the Federal Government must be repugnant and incompatible with the possession of such powers by the other.

License cases, 5 How., 631, Per Grier, J., and cases cited.

The police power of a State extends to all matters relating to the health, safety or morals of its citizens, and to everything referring to its domestic economy and of the relations of the people to each other and the States.

Federalist, No. 45, 216; Passenger cases, 7 How., 528, 550; 4 Bl. Com., 182; Groves v. Slaughter, 15 Pet., 512; License cases, 5 How., 589, 631; 6 Greenl., 412; 4 Blackf., 107; Holmes v. Jennison, 14 Pet., 568; Gibbons v. Ogden, 9 Wheat., 203; N. Y. v. Miln, 11 Pet., 133; Brown v. Md., 12 Wheat., 441; 4 Sandf., 492; 20 Barb., 567; 5 How., 628; 7 How., 414; 7 How., 417; 1 Black, 603 (66 U. S., XVII., 191).

This Act prohibits a state tax on these articles.

If not a police Act, it is a regulation of commerce. By art. 1, sec. 8, of the U. S. Const., Congress cannot regulate the internal commerce of a State.

Passenger cases, 7 How., 400, *per McLean*; *License cases*, 5 How., 588; *License cases*, 5 How., 620, *per Woodbury*.

Mr. Chief Justice Chase delivered the opinion of the court:

This case comes here upon a certificate of division of opinion between the Judges of the Circuit Court of the United States for the Eastern District of Michigan.

The record shows an indictment against the defendant under the 29th section of the Internal Revenue Act of March 2, 1867 (14 Stat. at L., 484), which makes it a misdemeanor, punishable by fine and imprisonment, to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale, or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at less temperature than 110 degrees Fahrenheit. The offense charged was offering for sale oil made of petroleum of the description specified in the statute, at Detroit, Michigan. To this indictment there was a demurrer; and thereupon arose the two questions on which the judges were opposed in opinion, namely:

(1) Whether the facts charged in the indictment constitute any offense under any valid and constitutional law of the United States.

(2) Whether the aforesaid section 29 of the Act of March 2, 1867, is a valid and constitutional law of the United States.

The first of these questions relates exclusively to the case made by the indictment. The fact charged was a sale of a particular description of illuminating oil within the limits of a State. There was no allegation that the sale was in violation or evasion of any tax imposed on the property sold. It was alleged only that the sale was made contrary to the Statute.

The question certified resolves itself into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that

of increasing the production and sale of other oils and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an Act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the Act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (*License cases*, 5 How., 504; *Passenger cases*, 7 How., 283; *License Tax cases*, 5 Wall., 470 [72 U. S., XVIII., 500]; and the cases cited), that we think it unnecessary to enter again upon the discussion.

The first question certified must, therefore, be answered in the negative.

The second question must also be answered in the negative, except so far as the section named operates within the United States, but without the limits of any State.

Cited—12 Wall., 571; 16 Wall., 64; 97 U. S., 504, 531; 100 U. S., 301; 6 Bank. Reg., 285; 1 Hughes, 507; 3 Hughes, 13; 97 Ill., 335; 17 Am. Rep., 763 (48 Ind., 360); 21 Am. Rep., 222 (11 Bush., 311); 43 Am. Rep., 276 (39 Ark., 368).

THE CITY OF CHICAGO, *Appt.*,

v.

WILLIAM C. SHELDON.

(See B. C., 9 Wall., 50-56.)

Duty of railroad company to keep street in repair—construction of contract—state taxation—law impairing contract.

An obligation of a railroad company to keep a street in repair does not compel the company to grade or pave the street.

Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence.

Clauses of a State Constitution, which provide that taxes shall be uniform in respect to persons and property, do not forbid the Legislature commutating, with individuals or corporate bodies, the burdens of general or specific taxes or assessments.

Where a contract is valid at the time, by the laws of the State, its Legislature cannot pass an Act impairing its obligation, nor can any decision of its courts have that effect.

NOTE.—Municipal bonds, how affected by change of ruling of highest court of state or by change in Constitution. See note to *Mitchell v. Burlington*, 71 U. S. (XVIII.), 350.

[No. 252.]

Submitted Jan. 28, 1870. Decided Feb. 21, 1870.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below by the appellee, to enjoin the collection of a special assessment on the property of the North Chicago City Railway Company for certain street improvements, the complainant being a stockholder of said Company.

Two of the defendants, the City of Chicago and A. H. Heald, appeared and demurred to the bill. The demurrer was overruled by the court, and the said defendants having elected to abide by their said demurrer, the court thereupon granted an injunction perpetually enjoining them from collecting or attempting to collect the said assessments, whereupon the City of Chicago brought the case here on appeal.

A further statement of the case appears in the opinion of the court.

Messrs. M. F. Tuley and S. A. Irvin, for the appellant:

The decision of the Supreme Court in the case of *Chicago v. Baer*, 41 Ill., 806, that this same Railway Company, occupying a portion of the street with its track and in use thereof, "Under a charter and a contract with the city authorities, have a franchise and a right of occupancy which is property of a character to be substantially benefited by the paving of such street, and which must be assessed for these improvements," will be adopted by this court.

In *Jackson v. Chew*, 12 Wheat., 162, this court says: "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been established in the state courts, the same rule will be applied by this court that would be applied by the state tribunals."

See, also, *Suydam v. Williamson*, 24 How., 427 (65 U. S., XVI., 742); *Thatcher v. Powell*, 6 Wheat., 119; *Nemith v. Sheldon*, 7 How., 812; *Bank v. Lessee of Dudley*, 2 Pet., 492; *McCrutchen v. Marshall*, 8 Pet., 220; *Polk v. Wendal*, 9 Cranch, 97; *Elmendorf v. Taylor*, 10 Wheat., 152.

As the Supreme Court of Illinois had jurisdiction of the parties, and power to decide the subject matter in controversy in said suit of *Chicago v. Baer*, 41 Ill., 806, I insist that said decision is final and conclusive, as it does not come before this court on writ of error, as required by the 25th section of the Judiciary Act.

No contract is shown which exempts the property of the Railway Company from assessments for street improvements.

The exemption claimed must be express, and it will not be assumed or inferred that it does exist.

In regard to the taxing power, *Chief Justice Marshall* says "that the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to affirm. It would seem that the relinquishment of such power is never to be assumed." *Providence Bank v. Billings*, 4 Pet., 561.

"These exemptions, as they are contrary to common rights, are not to be favored by the

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courts. * * * In short, the statute which exempts persons or property from taxation, is to be construed strictly."

Orr v. Baker, 4 Ind., 88; *Common Council v. McLean*, 8 Ind., 331; *Hamna v. Commissioners*, 8 Blackf., 355; *Prov. Bk. v. Billings*, 4 Pet., 561.

"A relinquishment of the right of taxation is not to be presumed, unless expressed in terms too plain to be mistaken." *Phila. & Wil. R. R. Co. v. Md.*, 10 How., 376; *Bk. v. Skelly*, 1 Black, 436 (66 U. S., XVII., 173); *Gilman v. Sheboygan*, 2 Black, 510 (67 U. S., XVII., 305).

"The alleged contract, so far as it may be construed to exempt the Railway Company from special assessments, is not a valid contract.

The City of Chicago could make no contract, nor could the Legislature authorize it to make one, by which the Company would be exempted from the payment of its portion for street improvements, in proportion to the benefits received.

The City is not, by the Act, authorized to exempt said Company from any future liability for taxes or assessments. It might as well be contended that the City could have exempted said Company from liability to pay state taxes.

Under what power are these special assessments made, is a question lying at the very foundation of the inquiry as to the validity of this contract, whether the contract is viewed as a legislative contract or as a contract between the City and the Company.

This question has been very elaborately considered by the Supreme Court in the *Larned* case, 34 Ill., 203.

Messrs. W. C. Goudy and B. R. Curtis, for appellee:

The Railway Company and its property is exempted from taxation and assessment for filling, grading and paving the streets, by the contract entered into by the State, through the Common Council and the Company; and such contract is valid.

It is the settled law of this court, that a Legislature can, by contract with a corporation, exempt its property from taxation for a consideration, or commute taxes so as to bind the State. *Bk. v. Skelly*, 1 Black, 446 (66 U. S., XVII., 178); *Bk. v. Knoop*, 16 How., 389; *Dodge v. Wooley*, 18 How., 331 (59 U. S., XV., 401); *N. J. v. Wilson*, 7 Cranch, 164.

It is equally well settled law in *Il. Bk. v. People*, 4 Scam, 304; *R. R. v. McLean Co.*, 17 Ill., 291; *Neustadt v. Ill. Cent. R. R.*, 31 Ill., 484; *Hunsaker v. Wright*, 30 Ill., 147.

The appellant claims that this court is bound by the decision of the Supreme Court of Illinois, in *Chicago v. Baer*, 41 Ill., 806, it being a construction of the State Constitution, and of legislation by the General Assembly.

Whenever a question arises as to whether a contract is impaired by the authorities of a State, whether it arises by legislation or judicial decision, this court must decide for itself as to the validity of the contract, and in doing so will construe for itself the State Constitution and all Acts of the state authorities.

This is so well settled by repeated decisions of this court, that I need not cite authorities. I refer to only one case where this point was fully considered. *Jeff. Br. Bk. v. Skelly*, 1 Black, 443 (66 U. S., XVII., 177).

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Northern District of Illinois.

The bill was filed by Sheldon against the City, to enjoin the authorities from collecting a special tax or assessment levied upon the North Chicago City Railway Company, for improvements of the streets upon which their rails were laid, of which Company the complainant was a stockholder.

The question arises upon the contract of the Company with the City, under which the railway was built. This Company was chartered by the Legislature of Illinois, on the 14th February, 1859, to construct and operate a single or double track of a horse railway on certain streets of the City, "in such a manner and upon such terms and conditions, and with such rights and privileges as the said Common Council may, by contract with said parties, prescribe."

On the 23d May, 1859, the Common Council passed an ordinance by which they granted to the Company permission to lay a single or double track railway upon certain defined streets, in the manner, and for the time, and upon the conditions thereafter described. Among the conditions were: that the cars used on the track would be propelled by animal power only; the tracks and railways were to be used for no other purpose than to transport passengers and their ordinary baggage, and the cars to be of the best style and class in use on such railways. The Common Council reserved the power to make regulations as to speed, and the surface of the streets, to be laid with improved modern rails, and were to be laid so that carriages and other vehicles could easily and freely cross the tracks at all points, and in any and all directions. The rates of fare for any distance within the city limits not to exceed five cents for each passenger.

Then follows the 7th section, out of which the present controversy has arisen. It relates to a new and different subject from that of providing for laying the tracks of the railways and the regulations for running the cars on the same. It is as follows:

"The said Company shall, as respects the grading, paving, macadamizing, filling or planking of the streets upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets wherever one track is constructed, and sixteen feet in width along the line of said railway on all streets where two tracks are constructed, in good repair and condition during all the time to which the privileges hereby granted to said Company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the Common Council of said City." The rights and privileges granted to the Company were to continue for twenty five years, and a bond to be given to the City in the penal sum of \$25,000, for the faithful performance of the terms and conditions of the ordinance.

Since this contract was made between the City and the Railway Company, and carried into complete execution by the latter, at a heavy expense, the Common Council passed an

ordinance for the improvement of some of the streets occupied by the Company, thereby providing for curbing them with curbstone, grading and paving them with wooden blocks, known as the Nicholson pavement; and a special tax or assessment of \$28,676.94 has been imposed for this purpose upon the property of the Railway Company, and the collection threatened, but has been enjoined by an injunction in this suit.

It is claimed on the part of the Railway Company, that by the true construction of their contract, they are exempt from the assessment made upon their property, and the 7th section of the Ordinance of the 23d May, 1859, is referred to and relied on in support of this construction. That section prescribes the obligations and duties of the Company in respect to the condition and repairs of the streets during the whole period of the running of the contract, and imposes certain burdens upon it as to repairs, from which, to their extent, the City, or adjoining owners of lots, are relieved. It is insisted that this provision was intended, and so understood by both parties, as regulating the whole subject as it respects improvements of the streets occupied by the Company, and to fix in the contract the extent of their liability.

The language of it is somewhat peculiar, and it cannot well be denied but that a fair and reasonable interpretation favors this view. It is as follows: "The said Company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition." Now, it is quite clear that the above recitals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny, but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the Company, namely: they should keep in good condition and repair eight or sixteen feet, as they used a single or double track, along the entire length of the road. They were not to grade, pave, macadamize, fill or plank even the above width or distance, except so far as such work came within the category of repairs.

What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23d May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the Company. Nor was any question raised as to its exemption till 1866, and not then by the City, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construc-

tion most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.

There is another consideration in the case entitled to weight in the interpretation of this contract. In 1864, under the authority of the charter of the Railway Company, the common council entered into another contract with it in respect to laying tracks in other streets. The grant was made "subject to all the restrictions and conditions, rights and privileges in the previous Ordinance of the 23d May, 1859, to the same Company, except as herein otherwise provided." The 5th section provided, as in the first contract, for keeping the eight and sixteen feet of the street in good condition and repair; but it provided further and in addition, that when any new improvement, paving, etc., should be ordered by the Common Council in any of the streets, the Railway Company should make the improvement the width of the eight or sixteen feet, as the case might be. This ordinance is *in pari materia* with the one of 1859, and helps to explain any ambiguity in it.

We may add, also, that the learned judge who delivered the opinion of the court, maintaining the liability of this Company to the payment of the assessment, does not place his opinion upon the ground that the contract did not exempt it, but that the Legislature were disabled by the Constitution of the State from conferring any such power on the City. The objection is founded on the clauses of the Constitution, which provides that taxes shall be levied so that each person shall pay in proportion to the value of his property; and that where corporate authorities of counties, cities, etc., are authorized to levy and collect taxes for corporate purposes, the taxes shall be uniform in respect to persons and property.

We are not concerned to deal with these provisions, as it is perfectly settled by the decisions of the Supreme Court of the State that, according to the true construction of them, they do not forbid the Legislature commuting with individuals or corporate bodies the burdens of general or specific taxes or assessments, of the character of those in question, for what they may deem an equivalent. This has been so frequently decided that we need only refer to the cases. *Illinois Central Railroad v. County of McLean*, 17 Ill., 291; *Hunsaker v. Wright*, 30 Ill., 146; *Neustadt v. Illinois Central Railroad*, 31 Ill., 434. It is supposed by the counsel for the City that this doctrine has been modified by the recent cases of *Chicago v. Larned*, decided in 1864, and *The Same v. Baer*, in 1866. But, on looking into these cases, we find no reference to the cases above cited, or to the doctrine they maintain. If it were otherwise, however, we could not agree that such decisions could have the effect to invalidate the contract in question. A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for its Legislature to pass an Act impairing its

obligation, much less could any decision of its courts have that effect.

A point is made, that the Legislature have not conferred, or intended to confer, authority upon the City to make this contract. We need only say that full power was not only conferred, but that the contract itself has been since ratified by this body.

The judgment below affirmed.

Cited—105 U. S., 295; 1 Flipp., 131; 1 Hughes, 213 60 Ind., 123; 66 Ind., 408; 60 Ill., 270; 80 N. Y., 449; 80 Am. Rep., 109 (43 Md., 97).

FRANCIS O. J. SMITH, *Piff. in Err.*,

v.

SAMUEL F. B. MORSE AND AMANDA O. VAIL, Executrix, AND THEODORE LITTLE AND GEORGE I. COBB, Exrs. of ALFRED VAIL, Deceased.

(See S. C., 9 Wall., 76-83.)

Arbitration—umpire—ratification of agent's acts—contract by agent, how executed—party.

An agreement, in a submission to arbitration, that the claims should be referred to the final decision and arbitration of parties designated, and of an umpire if needful, authorized the arbitrators, in case of their disagreement, to appoint an umpire.

The agreement carried with it the further agreement to abide the award which the arbitrators might render, or, in case of their disagreement, which the umpire might render.

A principal adopts and ratifies the acts of his agent by accepting a settlement made by him on his behalf, and by bringing an action upon a covenant in the submission signed by him.

An agent may sign his own name first to a contract, and add to it, agent for his principal; or he may sign the name of his principal first, and add, by himself as agent, where the contract purports to be the contract of the principal.

An agent need not be made a party to an action on the submission.

[No. 68.]

Submitted Feb. 4, 1870. Decided Feb. 21, 1870.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The defendants in error brought an action in the court below, for an alleged breach of a covenant of submission to arbitrators of certain matters in controversy. Judgment having been given for the plaintiff, the defendant sued out this writ of error. The covenant declared upon was as follows:

"And it is agreed between the said parties that, in respect to the first of said claims, the same shall be referred to the final decision and arbitration of Thomas R. Walker and H. O. Alden, Esquires, and an umpire if needful, *as provided in articles of submission this day executed*"—the limitation in the words in italic being omitted in the declaration.

The plaintiff offered in evidence an unsealed memorandum, indorsed on said sealed instrument and dated December 18th, 1859, more than two months after the sealed instrument was dated, as follows: "We, the within named parties, hereby agree and bind to abide and perform the award of the within named arbitrators, without exception to or appeal from their decision."

Both the said sealed instrument and the said indorsement were signed by Francis O. J.

Smith, and by "Amos Kendall, for himself, and as agent for Samuel F. B. Morse and the executors of Alfred Vail, deceased."

The arbitrators failing to agree, selected A. Mann, Jr., as umpire.

The case is further stated by the court.

Messrs. Richard H. Huntley and B. B. French, for plaintiffs in error:

The variance shown in the omission of the words "as provided in articles of submission this day executed," is a fatal variance, and justifies the defendant's plea that he made no such deed. 1 Greenl. Ev., sec. 69.

But if there were no variance, how then would the case stand? Still the covenant is not absolutely to submit to arbitration, but to submit according to another agreement yet to be made. The defendant insists that the indorsement being not under seal, cannot be introduced to aid or support a covenant.

2 Greenl. Ev., sec. 238; *Philips v. Rose*, 8 Johns., 391.

But if the indorsement of Dec. 13 is to be admitted into the case, then the plaintiff cannot recover by reason of it. Not on the covenant; if so, why introduce the indorsement? Not on the indorsement; for in that the parties agree only to abide the award of the particular arbitrators therein named. No umpire is contemplated.

The question then arises: where is there authority for the proceedings before the umpire? Not in the covenant to submit; for that was conditional upon a further agreement. Not in the last named indorsement; for that explicitly excludes the idea of an umpire.

The authorities sustain the proposition that without the indorsement of Dec. 13, there was no submission.

Baxter v. Ryeres, 13 Barb., 267; 2 Pars. Cont., 5th ed., 512; Bac. Abr., tit. Leases, K.

The plaintiffs, as far as appears in the case, are not bound by Mr. Kendall's signature. The covenant and indorsement then are void for lack of mutuality.

The mode of signing here claims attention. This does not bind Morse even, much less "the executors of Alfred Vail, deceased," who are not even named.

Bac. Abr., tit. Leases, I, 19; *Clarke v. Courtney*, 5 Pet., 319; *Spencer v. Field*, 10 Wend., 87; 1 Pars. Cont., 54; *Stackpole v. Arnold*, 11 Mass., 27.

The objection that Amos Kendall should have been made a party to the action, was well taken. Bac. Abr., Covenant, tit. D; Yelv., 177.

Though this action was in covenant, the proofs were in *assumpsit*.

1 Chit. Pl., 101; *Brady v. Mayor of Brooklyn*, 1 Barb., 584; *Hays v. Hays*, 23 Wend., 363.

And when the action took this form, it opened the door for the defendant to show that the award was erroneous.

Moore v. Cockcroft, 4 Duer, 138, *per* Oakley, Ch. J.; *Watson*, Arb., 121, and cases there cited.

Mr. Charles Tracy, for defendant in error:

"The action is not brought on the award, but on the submission."

Vin. Abr., tit. Arbitration, c, a, 4; *Dod v. Herbert*, Styles, 459.

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This is a covenant under seal, and binds the parties to the observance of the award. *Wats. Arb.*, 355.

There being, in fact, no separate "articles of submission" in existence at the making of the covenant, the reference to such a paper was a mere nullity, and ought not to be stated in the pleadings.

1 Chit. Pl., 334.

The parties, in fact, went before the arbitrators upon the sealed instrument, and proceeded with the hearing without any production of other "articles of submission," and thereby waived all requirement of such separate articles, if they had been entitled thereto.

It is said that the parties agreed to abide by the award of the arbitrators, and they do not add that of the umpire. But the umpire is an arbitrator, and included in the phrase "within named arbitrators," because the nomination of him is provided for within, and the phrase used includes that idea.

There was no defect of party. Mr. Kendall had no cause of action, and could not be joined as plaintiff.

The defendant below admitted Kendall's authority by appearing and going to trial and argument before the arbitrators and the umpire, where Kendall represented the plaintiffs; and the defendant below comes now too late to make the objection. *Ackerman v. Finch*, 15 Wend., 652.

No higher ratification could be given; and every ratification relates back and is equivalent to a prior authorization. *Omnis ratihabito retrotrahitur et mandato priori equiparatur*.

Broom, Max., 380; *Story*, Agen., sec., 248.

The criticism about the mode of signing also, is not authorized. Where the body of the writing shows that the plaintiffs were the contracting parties, the agent may sign in either form—"A. B. by C. D., agent;" or "C. D., agent for A. B."

The umpire was duly appointed, and his sole award is valid.

The award in such cases is properly made by the umpire alone.

Lyon v. Blossom, 4 Duer, 318; *Billings*, Law of Award, 106; *Beck v. Sargent*, 4 Taunt., 232; *Wats. Arb.*, 86, *et seq.*

Mr. Justice Field delivered the opinion of the court:

This is an action to recover damages for an alleged breach of a covenant to perform an award of arbitrators. The submission recites that all causes of actions between Morse and the executors of Vail of the one part, and Smith of the other part, and between Kendall and Smith had been amicably settled, and reciprocal releases given, with two exceptions. One of these exceptions consisted of a claim on the part of Smith against Morse and the executors of Vail for stock and dividends in the Washington and New Orleans Telegraph Company, and a like claim on the part of Morse and the executors of Vail against Smith. These claims, the parties agreed to refer to the final decision of two arbitrators, and in case it should become necessary, to an umpire.

The claims, thus excepted from the settlement, were accordingly brought to a hearing before the arbitrators, who disagreed respecting

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them and appointed an umpire. Before this umpire the claims were again heard, and in May, 1862, he made his award in favor of Morse and the executors of Vail against Smith, for an amount exceeding \$7,000, payable partly in stocks of the Washington and New Orleans Telegraph Company, and partly in cash. Smith refused to perform the award, and the present action was brought for breach of the covenant of submission.

Several objections were taken to a recovery by the plaintiffs, the principal of which, and the only objections requiring notice, were substantially these: that there is a variance between the covenant to submit, stated in the declaration, and the covenant in the submission produced; that the submission contains no authority to the arbitrators to appoint an umpire, and no agreement to abide any award rendered by him; that Kendall was not authorized to sign the submission for the plaintiffs, and, if authorized, the manner in which his authority was exercised was defective; and that there is a defect of parties plaintiffs, Kendall having signed the submission and not having joined in the action.

1. The supposed variance between the covenant stated in the declaration and the covenant contained in the submission, arises from the fact that the submission, after referring the claims mentioned to the decision of the arbitrators, and an umpire, if necessary, adds the words, "as provided in articles of submission this day executed," and the declaration makes no mention of any such articles. In truth, no such articles ever had any existence, and the insertion of the words relating to such supposed articles probably arose from the carelessness or unskillfulness of the draftsman who prepared the formal submission. Previous to its preparation, the parties had informally agreed upon the terms of the submission, which were incorporated into the instrument signed, and the draftsman no doubt had this informal arrangement in his mind in the reference made. Be this as it may, the articles named having no existence—and this fact was established by the proofs in the case—formed no part of the contract of submission, and ought not, therefore, to have been stated in the pleadings.

On the hearing before the arbitrators, and subsequently before the umpire, no allusion was made to any such articles, nor was any objection taken on account of their absence. The parties treated the instrument under which the submission was made, as embracing the whole of the terms stipulated between them.

2. The agreement in the submission that the claims designated should "be referred to the final decision and arbitration" of parties designated, "and an umpire, if needful," authorized the arbitrators, in case of their disagreement, to appoint an umpire. It will be presumed that the parties intended that the usual mode should be followed in the appointment, in the absence of any different designation; and the usual mode is by the act of the arbitrators themselves. So the agreement to submit the matter to arbitrators, and to an umpire, if needful, carried with it the further agreement to abide the award which they might render, or, in case of their disagreement, which he might render. The law implies an agree-

ment to abide the result of an arbitration from the fact of submission.

3. The objection from Smith that Kendall was not authorized to sign the submission for the plaintiffs comes too late. That instrument recites that Kendall was the agent of Morse and the executors of Vail, and as such agent he makes the settlement mentioned therein between them and Smith, and agrees to submit the disputed claims between them to arbitration. The instrument Smith signs, and thus becomes a party to the settlement and submission and must have been satisfied of the sufficiency of the authority upon which Kendall acted. And this is not all: throughout all the proceedings before the arbitrators and the umpire, Kendall represented the plaintiffs, and Smith, who appeared in person on the other side, took no exception to his authority. But if the authority had been originally insufficient, the plaintiffs have adopted and ratified his acts by accepting the settlement made by him on their behalf, and by bringing the present action upon the covenant contained in the submission.

The manner in which Kendall executed his authority is not open to the criticism of counsel. Where an instrument shows on its face the names of the contracting parties, the agent may sign his own name first, and add to it, as in the present case, "agent" for his principal, or he may sign the name of his principal first, and add, by himself as agent. Either form may be followed; all that is required in such case is that the contract shall purport on its face to be the contract of the principal.

4. There is no defect of parties plaintiffs. Kendall had no cause of action against Smith, or against any other party to the submission. He signed that instrument only for the purpose of settling various causes of action in which he was personally interested. The agreement of submission was exclusively between the parties to the present action. The award followed the submission, and neither adjudged anything to Kendall or against him.

In coming to the conclusion we have upon the objections of the defendants, we have not regarded the memorandum between the parties, made on the 18th of December, 1859, nor the previous correspondence with Cooper, as affecting in any respect the terms or character of the submission. Those documents were admissible to show that no articles of submission were ever executed, as mentioned in the sealed instrument, and the defendant recognized the authority of Kendall, and that both Smith and Kendall treated the sealed instrument as containing the whole of the stipulations between the parties, and went to hearing before the arbitrators and umpire with that understanding.

Judgment affirmed.

THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, *Plff. in Err.*

v.

LEWIS SMITH.

(See S. C., 9 Wall., 95-102.)

Grants of land in aid of railroads—Swamp Land Act—parol testimony.

The grants of lands by Congress, to the States, in aid of railroads, left it to be determined by the location of the roads what precise lands were granted.

This uncertainty in the grant was made certain by the location of the road.

Under the Act of June 10, 1852, granting lands to the State of Missouri for railroad purposes, swamp and overflowed land, as described in the Act of Sep. 20, 1850, known as the Swamp Land Grant, was reserved.

Verbal testimony of witnesses as to the character of the tracts claimed to be swamp and overflowed, is competent to show that they are swamp and overflowed, and so excluded from the grant for railroads.

[No. 26.]

Argued Apr. 2, 1869. Decided Feb. 21, 1870.

IN ERROR to the Supreme Court of Missouri. The plaintiff in error brought this action in the court below, to recover certain lands. Judgment having been given in favor of the defendant, the plaintiff sued out this writ of error.

The case is stated in the opinion of the court.

Messrs. James Carr, Sidney Bartlett and W.P. Hall, for plaintiff in error:

The Swamp Land Act of 1850 does not vest any title to the swamp lands in any State, until the Secretary of the Interior shall have made out an accurate list and plat of the lands, and issued a patent to the State therefor.

2d section, Act 1850; *Lester, Land L.*, p. 169, No. 182; *Foley v. Harrison*, 15 How., 447; *Rice v. R. R.*, 1 Black, 875 (66 U. S., XVII., 152), *et seq.*; *Parsons v. Commissioners*, 9 Wis., 286; *Murphy v. Ewing*, 23 Ind., 801; *Funston v. Metcalf*, 40 Miss., 507; *R. R. Co. v. Smith*, 41 Mo., 810; *Dart v. Hercules*, 84 Ill., 403; 31 Ill., 68; 10 La. Ann., 185.

This is the settled construction of the Act of 1850, by both the Legislative and Executive Departments of the Government of the United States.

26 Cong. Globe, 610; 80 Cong. Globe, 966; Rep. of Com. Gen. Land Office, Nov. 26, 1851; 8 Sen. Doc., 1851, 1853, part I., p. 18, No. 1; Op. Sec. of Interior; *Lester, Land L.*, 549, No. 578.

Mr. C. D. Drake, for defendant in error:

I. The Act of Congress of Sep. 18, 1850, was a present grant of swamp lands to the States in which they lay.

The 2d section, authorizing selections of the lands and patents therefor, was only for the purpose of settling the fact that the lands were swamp lands.

9 U. S. Stat. at L., 519; R. S. of Mo. of 1855, p. 1005; *Allison v. Halfacre*, 11 Ia., 450; *Whiteside Co. v. State's Atty.*, 81 Ill., 68; *Fletcher v. Pool*, 20 Ark., 100; *Hempstead v. Underhill*, 20 Ark., 337; *Fors v. Williams*, 35 Miss., 533; *Aubuchon v. Ames*, 27 Mo., 89; *Dunklin Co. v. County Court*, 23 Mo., 453; *Lessieur v. Price*, 12 How., 60.

II. The swamp lands and railroads having both been granted to the State, and the State having, before granting the railroad lands to the Hannibal & St. Joseph Railroad, granted the swamp lands to the several counties, the railroad received the lands granted, subject to the previous grant of the swamp lands to the counties.

R. S. of Mo. 1855, p. 1005.

Mr. Justice Miller delivered the opinion of the court:

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The grants of lands by Congress to the States in aid of railroads have generally been made with reference to the lands through which the roads were to pass, and, as the line of the road had to be located after the grant was made, it has been usual in the Acts making the grant, to describe them as alternate sections of odd numbers within a certain limit on each side of the road, when it should be located.

This, of course, left it to be determined by the location of the road, what precise lands were granted. So far as this uncertainty in the grant was concerned, it was one which might remain for a considerable time, but which was capable of being made certain, and was made certain, by the location of the road. But as Congress could not know on what lands these grants might ultimately fall, and as the roads passed through regions where some of the lands had been sold, some had been granted for other purposes, and some had been reserved for special uses, though the title remained in the United States, these statutes all contained large exceptions from the grant, as measured by the limits on each side of the road and as determined by the odd numbers of the sections granted.

We have had before us two cases growing out of the construction to be given to the language of these exceptions in the grant of May 15, 1856, to the State of Iowa. The first of these was the case of *Wolcott v. The Des Moines Company*, 5 Wall., 681 [72 U. S., XVIII., 318]. The other is the case of *The Burlington and Mo. R. R. Co. v. Fremont County* [ante, 563], decided at this term.

The case before us arises under a similar grant to the State of Missouri, with like reservations in the Act, but it raises a question somewhat different from that presented by the other two cases.

In the last of those cases it was determined that a proviso which excluded from the grant "all lands heretofore reserved by any Act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever," excluded the lands granted to the States by the Act of September 28th, 1850, known as the Swamp Land Grant. In that case the County of Fremont, claiming under the Swamp Land Grant, was plaintiff, and the Railroad Company, claiming under the grant to the State for railroads, was defendant, and the main point in it related to the evidence which might be necessary to establish the fact that the land claimed by plaintiff were swamp and overflowed within the meaning of the Act of 1850.

In the present case the position of the parties is reversed, the plaintiff claiming under the Act of June 10th, 1852, granting lands to the State of Missouri for railroad purposes, and the defendant claiming under the Swamp Land Grant.

In the former case it was necessary for the plaintiff, who must succeed on the strength of her own title, to show satisfactory evidence that the title of the United States had, under the Swamp Land Grant, become vested in Fremont County. The opinion of the court shows how this was successfully done in that case.

In the present action it was incumbent on the Railroad Company to show that the title of

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the United States had become vested in the Company under the grant for railroad purposes.

It is admitted that this has been done, unless the land is of that class reserved from the grant as swamp land; for the Act under which plaintiff claims has an exception in precisely the same terms with the Act for the benefit of the Iowa railroads.

In the former case the plaintiff, claiming under the Swamp Land Grant, was bound to establish his title by such evidence as Congress may have determined to be necessary to make the title complete in the State, or the grantees of the State, to which the lands were supposed to be granted, otherwise the plaintiff established no legal title. In the present case it is not necessary to defeat the title under the railroad grant to show that all the steps prescribed by Congress to vest a complete title in defendant, under the Swamp Land Grant, have been taken. It is sufficient to show that this land which is now claimed under the railroad grant, was reserved out of that grant, and this is done whenever it is proved by appropriate testimony to have been swamp and overflowed land, as described in the Act of 1850.

In order to determine the character of the testimony which will prove this, it may be useful to look at the statute which granted these swamp lands.

The 1st section of the Act, after declaring the inducements to its passage, says that the whole of these swamp and overflowed lands, made thereby unfit for cultivation and unsold, are hereby granted to the States.

The 8d section, for further description, says that all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included as swamp lands; but when the greater part is not of that character the whole of it shall be excluded.

Congress has here given a criterion, apparently not difficult of application, by which to determine what was granted, to wit: such legal subdivisions of the public lands, the greater part of which were so far swamp and overflowed as to be too wet for cultivation. Now, here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges and sections to identify them as coming within it. In this respect it is precisely like the railroad grants, which only became certain by the location of the road. In fact, in this regard the swamp land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a float, to be determined by the choice of the line of the road in future. No Act of Congress has ever attempted to take back this grant of the swamp lands, or to forfeit it, or to give it to any other grantee, or modified the description by which they were given to the States. It was protected by positive reservation in the grant under which the plaintiff claims. Now, when a party claiming under that grant sues to recover a particular piece of land which is excepted out of the grant by appropriate language, is it not competent to show by parol proof that it was of the class covered by the first grant and excepted from the second, See 9 WALL.

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namely, so swampy, overflowed, and wet, as that the major part of the tract was unfit for cultivation?

By the 2d section of the Act of 1850 it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the Act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the Land Department, with the State officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity?

The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.

Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from the plaintiff's grant.

The decision of the case of *Burlington & Mo. R. R. Company v. Fremont Co.* [ante, 563], disposes of all the errors alleged in this case but the admission of the verbal testimony, and as we are of the opinion that the state court did not err in that, the judgment is affirmed.

Mr. Justice Clifford, dissenting:

Unable to concur in the judgment of the court in this case, I think it proper to state the reasons of my dissent.

Congress made provision, by the 1st section of the Act of the 28th of September, 1850, that swamp and overflowed lands "made unfit thereby for cultivation," and which remained unsold at the passage of the Act, should be granted to the States in which the same were situated, to enable the States to construct the necessary levees and drains to reclaim the lands so granted, and render them fit for cultivation. 9 Stat. at L., 519.

Such lands were a part of the public domain, and of course it was necessary, before the title could vest in the States, that the land should be surveyed and designated, as lands not made unfit thereby for cultivation were no more in-

cluded in the 1st section of the Act than lands sold prior to its passage.

Taken literally, the first section, it is conceded, purports to grant the whole of those swamp and overflowed lands, made unfit thereby for cultivation; but the 2d section makes it the duty of the Secretary of the Interior to make out an accurate list and plats of the lands described as aforesaid; and the 3d section provides that, in making out said list and plats, whenever the greater part of the subdivision is wet and unfit for cultivation, the whole of it shall be included in the lists and plats, which is a matter to be ascertained and determined by the Secretary of the Interior, and which, under the Act of Congress, cannot be ascertained and determined by any other tribunal. Lands fit for cultivation, under those circumstances, are to be included in the list and plats; but the corresponding provision in the same section is, that if the greater part of a subdivision is not of that character, that is, not swamp and overflowed lands, made unfit thereby for cultivation, then the whole of the subdivision shall be excluded from the list and plats.

Special power is conferred upon the Secretary of the Interior to make out an accurate list and plats of the lands, and it is quite clear that a jury is no more competent to ascertain and determine whether a particular subdivision should be included, or excluded, from the list and plats required to be made under that section, than they would be to make the list and plats during the trial of a case involving the question of title.

Courts and juries are not empowered to make the required list and plats, nor can they determine what particular lands shall be included in the list and plats before they are prepared by the officer designated by law to perform that duty.

Support to that conclusion is derived from the subsequent language of the same section, which makes it the duty of the secretary, when the list and plats are prepared, to transmit the same to the Governor of the State, and to cause a patent to be issued to the State for the lands. Unless the requirements were such as is supposed, it is difficult to see how the affairs of the Land Department can be administered, as the records and files of the office would not furnish any means of determining whether a given parcel of land belongs to the State in which it is situated or to the United States.

Evidently the title to the lands remains in the United States until these proceedings are completed, as the same section which makes it the duty of the Secretary, when the list and plats are prepared, to transmit them to the governor and to cause a patent to be issued therefor, also provides that when the patent is issued "the fee simple to said lands shall vest in the said State, * * * subject to the disposal of the Legislature thereof."

Prior to the issuing of the patent therefor the fee simple to the lands does not vest in the State, and the lands, prior to the date of the patent, are not subject to the disposal of the Legislature.

Strong confirmation that the construction of that Act herein adopted is correct is also derived from the subsequent legislation of Congress upon the same subject. Selections of swamp and overflowed lands were made by the

State, in certain cases under that Act, before the required list and plats were made by the secretary, and Congress, on the 3d of March, 1857, passed an amendatory Act to remedy the difficulty, in which it is provided to the effect that such selections, if reported to the General Land Office, should be confirmed, provided the lands selected were vacant and unappropriated, and the selections did not interfere with actual settlements under any existing laws of the United States. 11 Stat. at L., 251.

Such a law was certainly unnecessary if the construction of the original Act adopted in the opinion just read is correct, as in that view the original Act, vested a fee simple title in the States without the necessity of waiting for any action on the part of the Land Department; and if so, then it follows that the States may select for themselves, and if their title is questioned by the United States or by individuals, they may claim of right that the matter shall be determined by jury.

Anticipating that the decision will occasion embarrassment to the Land Department, I have deemed it proper to state thus briefly the reasons of my dissent.

Cited—22 U. S., 741; 93 U. S., 173; 97 U. S., 347; 99 U. S., 475; 107 U. S., 411; 6 Sawyer, 198; 2 McCrary, 410; 53 Mo., 570; 58 Mo., 280; 95 Ill., 90; 35 Mich., 384.

HENRY PELHAM, *Plff.*,

v.

DAVID G. ROSE ET AL.

(See S. C., 9 Wall., 103-107.)

Act for seizure of property of insurgents—seizure, what is—return of Marshal—question in division.

Under the Act of July 17, 1862, as to the seizure of property of persons engaged in armed rebellion against the United States, the seizure of the property is essential to give jurisdiction to the court to decree of forfeiture.

By the seizure of a thing is, meant the physical taking into custody, as applied to subjects capable of manual delivery.

To effect the seizure of a promissory note, it was necessary for the Marshal to take the note into his actual custody and control.

The return of the Marshal to the writ, that he has "arrested the property within mentioned," signifies that he has actually taken the property into his custody and under his control.

This court will decline to answer a question certified on division of opinion which rests upon an hypothesis.

[No. 51.]

Submitted Feb. 1, 1870. Decided Feb. 21, 1870.

ON a certificate of division of opinion between the Judges of the Circuit Court of the United States for the Southern District of Indiana.

This action was brought in the court below upon the official bond of the defendant, Rose, as Marshal of the United States for the State of Indiana.

The case is fully stated by the court.

Messrs. John Coburn, James Morrison, Dye & Harris, for plaintiff:

NOTE.—Cases certified on division of circuit court, jurisdiction of U. S. Supreme Court in; on what division should be. See note to Webster v. Cooper, 51 U. S. (10 How.), 64.

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The whole proceeding being against the note and nothing else, and the writ having commanded the Marshal to attach the note and nothing else, he could obey the mandate only by seizing the note.

Act, Cong., approved July 17, 1862; Conkl. Tr., 4th ed., p. 457; *The Ann*, 9 Cranch, 289.

When a court has jurisdiction to proceed *in rem*, and does so proceed, its judgments are conclusive and binding on the whole world.

Ashbrook v. The Golden Gate, Newb. Adm., 306.

See, also, Conkl. Tr., 4th ed., 232; *Trump v. The Thomas*, Bee, Adm., 86; *Sheaff v. The Betsey*, Bee, Adm., 163; 2 Phil. Ev., 5; 4 Miller, La., 81; *Thoms v. Southard*, 2 Dana, 475; *The Mary*, 9 Cranch, 126.

By reason of the false return of the Marshal, the court had jurisdiction over the *rem*.

The plaintiff would unquestionably be estopped by the record from maintaining an action on the promissory note, against the maker.

Mr. John B. Niles, for defendants.

Mr Justice Field delivered the opinion of the court:

This case comes before us on a certificate of division of opinion between the Judges of the Circuit Court for the District of Indiana, upon questions arising on the demurrer to the declaration. The action is brought upon the official bond of the defendant Rose, as Marshal of that District, for an alleged false return made by him to a writ of monition issued upon a libel of information exhibited on behalf of the United States in the District Court of the District, against a promissory note held by the plaintiff for the sum of \$7,000. The declaration sets forth the exhibition of the libel against the note; and avers that in pursuance of its prayer, a writ of monition, a copy of which is given, was issued to the Marshal of the District, commanding him to attach the note and detain the same in his custody until the further order of the court, and to cite all persons claiming the same or having anything to say why it should not be condemned and sold, to appear on a day designated and interpose their claims; that the Marshal received the writ and returned the same with his indorsement that he had "arrested the property within mentioned," and cited all persons as commanded; that the court subsequently proceeded to try and determine the matters involved in the libel, and decreed, that for failing to appear, the default of all persons interested in the note should be entered; that the charges of the libel should be taken as confessed; that the note should be condemned as forfeited to the United States; and that the clerk should issue a writ of *renditioni exponas* to the Marshal to sell the note at public auction.

The declaration further avers that this latter writ was accordingly issued and delivered to the Marshal, and was returned by him with a certificate that he had sold the note at auction to Lewis Pelham, who was its maker, for the sum of \$3,000.

The declaration then sets forth that the Marshal did not, in obedience to the writ of monition, attach the note therein described, nor seize the same by himself or deputy; that the note was not even within sight of the Marshal, or of any of his deputies, at any time between

See 9 WALL.

the delivery of the writ to him for execution and its return; nor was it, pending the proceedings by libel, within the State of Indiana, but that during this time, and for a period long after the entry of the decree of confiscation, it was in the custody and possession of the plaintiff, in the State of Kentucky; wherefore, the declaration continues, the return of the Marshal was wholly false, and a decree of condemnation was founded upon a false return, and hence an action hath accrued to the plaintiff on the bond of the Marshal.

To this declaration the defendants demurred, and upon the argument of the demurrer the following questions arose upon which the judges of the court were opposed in opinion:

1. Whether, upon the facts stated in the declaration, it was material and necessary to the due and legal service of the writ of monition therein set forth by the Marshal, that he should have seized and taken into his custody and under his control the promissory note mentioned.

2. Whether the return to the writ of monition, as set forth in the declaration, must be construed to mean that the Marshal had actually taken into his custody and under his exclusive control the promissory note.

3. Whether, on the hypothesis that all the matters as set forth in the declaration are true, the judgment and proceedings in the district court, as therein stated, would estop the plaintiff to maintain an action on the promissory note against the maker.

The Act of July 17th, 1862 (12 Stat. at L., 590, secs. 5, 6, 7), contemplates the seizure of the property, the forfeiture of which is sought by the proceedings taken under its provisions. It says so in express terms. In one section it makes it the duty of the President "to cause the seizure" of the estate and property, money, stocks, and credits of the persons designated therein. In another section it declares that the like property of persons engaged in armed rebellion against the United States, or in aiding or abetting the Rebellion, "shall be liable to seizure," and imposes a similar duty upon the President to seize and use it. And in a third section it provides, that to secure the condemnation and sale of the property, "after the same shall have been seized," proceedings shall be instituted, in the name of the United States, in any district court thereof, or in any territorial court, or in the District Court for the District of Columbia, within which the property, or any part thereof, may be found, or if movable, may first be brought; and that such proceedings shall conform, as nearly as possible, to proceedings in admiralty or revenue cases.

The seizure of the property, as thus seen, is made the foundation of the subsequent proceedings. It is essential to give jurisdiction to the court to decree a forfeiture. Now, by the seizure of a thing is meant the taking of a thing into possession, the manner of which, and whether actual or constructive, depending upon the nature of the thing seized. As applied to subjects capable of manual delivery, the term means caption; the physical taking into custody.

In the case at bar, a visible thing, capable of physical possession, is the subject of the libel.

It is the promissory note of Pelham which constitutes the *res*, against which the proceeding is instituted, and not "a credit," or debt, which the note is supposed by the defendants' counsel to represent. Whether by any proceedings under the Act of July, 1862, the indebtedness of a maker on a negotiable promissory note before its maturity, could be reached without the possession of the note itself, is not a question presented for our consideration. It is sufficient that the object of the present libel is to reach the note itself. This appears at every stage of the proceedings; in the information; in the motion to the Marshal; in his return; in the decree of the court; and in the sale made.

To effect its seizure, as required by the Act it was, therefore, necessary for the Marshal to take the note into his actual custody and control. And such was the purport of the command of the writ of monition. The writ describes the note, and the command to the Marshal is, "to attach the note, and to detain the same in your custody until the further order of the court respecting the same,"—language which is inconsistent with any service than that made by physically taking the note into his possession and control. This form of command is usually adopted in warrants to the Marshal in cases of municipal seizure. "On receiving it" (the warrant), says Conkling in his Treatise, "it is the duty of the Marshal to arrest the property seized by taking it into his custody." Fourth edition, p. 524. The term arrest is the technical term used in admiralty process to indicate an actual seizure of property. And the return of the Marshal to the writ, that he has arrested the property within mentioned, "signifies in apt and technical language that he has actually taken the property into his custody and under his control.

The first and second questions certified to us must, therefore, be answered in the affirmative.

The third question rests upon an hypothesis, and we must decline to answer it until it has lost its hypothetical character and become involved in actual controversy.

Cited—15 Wall., 197, 201, 202, 596; 17 Wall., 95; 99 U. S., 376; 1 Dill., 390; 6 Bias., 249.

BENJAMIN H. CHEEVER, *Appt.*,

v.

JESSE B. WILSON AND ANNIE J. WORCESTER.

(See S. C., 9 Wall., 108-124.)

Marriage settlement—rights of wife—state laws and judgments—wife's separate domicile—divorce suit, where instituted.

NOTE.—*Domicil of wife in divorce actions.*

The common law rule is that the domicil of the wife follows that of the husband. *Hackettston Bk. v. Mitchell*, 4 Dutcher, 516; *Greene v. Greene*, 11 Pick., 410; *Williams v. Saunders*, 5 Cold., 80; *Hairston v. Hairston*, 27 Miss., 704; *McAfee v. Ky. University*, 7 Bush, 135; *Smith v. Morehead*, 6 Jones, Eq., 390; *Brewer v. Linnaeus*, 36 Me., 428; *Waterborough v. Newfield*, 8 Greenl., 203; *Hood v. Hood*, 11 Allen, 199.

Where husband and wife are living under a judicial separation or divorce from bed and board, the domicil of the wife does not follow the husband's. *Barber v. Barber*, 62 U. S. XVI., 228; *Williams v. Dorman*, 16 Jur., 383; 9 Eng. L. & E., 598; 2 *Robertson*, 506; *Bennett v. Bennett*, *Deady*, 299.

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Under a marriage settlement which vested the title in a trustee, in trust to permit the wife to receive rents and profits of lands for her sole use; the real estate therein described became the separate property of the wife, and she had the same power to anticipate and incumber the rents as if she had been a *feme sole*.

The courts of the United States take a judicial notice of the laws and judicial decisions of the several States.

The Constitution and laws of the United States give an Indiana decree the same effect elsewhere which it has in Indiana.

The finding of the residence of the plaintiff by the decree is sufficient, until overcome by adverse testimony.

The wife may acquire a separate domicile from her husband whenever it is necessary or proper that she should do so.

Proceeding for a divorce may be instituted where the wife has her domicile; the place of marriage, of the offense, and the domicile of the husband are of no consequence.

[No. 58.]

Argued Feb. 3, 1870. Decided Feb. 21, 1870.

A PPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below by the appellant, to compel the payment of certain moneys claimed to be due from the defendants upon certain leases, etc. A decree having been entered dismissing the bill, the complainant took an appeal to this court.

The case is fully stated by this court.

Messrs. W. W. Boyce, C. Cushing and Thos. Wilson, for appellant:

Res judicata. A judgment or decree of a court of competent jurisdiction is conclusive, wherever the same matter is brought in controversy between the same parties or privies.

Miles v. Caldwell, 2 Wall., 35 (69 U. S., XVII., 755); *Hopkins v. Lee*, 6 Wheat., 109; *Parish v. Ferris*, 2 Black, 606 (67 U. S., XVII., 317); *Walden v. Bodley*, 14 Pet., 156; *Thomas v. Lawson*, 21 How., 332 (62 U. S., XVI., 83); *Ableman v. Booth*, 21 How., 506 (62 U. S., XVI., 169); *Thompson v. Roberts*, 24 How., 233 (65 U. S., XVI., 648); *Aspden v. Nixon*, 4 How., 467; *Steam Packet Co. v. Sickles*, 24 How., 333 (35 U. S., XVI., 650); *Warburton v. Aken*, 1 McLean, 460; *Bissell v. Briggs*, 9 Mass., 463.

"If the judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere" in the courts of the United States.

Christmas v. Russell, 5 Wall., 302 (73 U. S., XVIII., 478); *Story*, Const., sec. 313, 3d ed.

The courts of every country are the exclusive judges of their own jurisdiction; so far as it depends on their municipal law.

Rose v. Himely, 4 Cranch, 241; *Grignon v. Astor*, 2 How., 839.

In Indiana the decree is conclusive.

Whenever the wife is plaintiff in a divorce suit, it is the burden of the allegation that she

Where the wife commits an offense entitling husband to a divorce, his domicil must, for the purposes of the litigation, be regarded as hers also, even though the wife may, in fact, be living in another country. *Tovey v. Lindsay*, 1 Dow., 117; *Whitcomb v. Whitcomb*, 2 Curt. Ec., 351; 7 Eng. Ec., 199; *Chichester v. Donegal*, 1 Add. Ec., 5; *Warrender v. Warrender*, 2 Cl. & F., 483; but see *Irby v. Wilson*, 1 Dev. & Bat. Ec., 568, 569; *Borden v. Fitch*, 15 Johns., 121; and see *Hull v. Hull*, 2 Strob. Ec., 174; *Hare v. Hare*, 10 Tex., 355; *Green v. Green*, 11 Pick., 410; *Hood v. Hood*, 11 Allen, 199.

Where wife is plaintiff she may sustain herself on her husband's domicil, though she is, in fact, living abroad. *Masten v. Masten*, 15 N. H., 159; *Davis v. Davis*, 30 Ill., 180; *Harrison v. Harrison*, 30 Ala.,

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is entitled, through the misconduct of her husband, to a separate domicile. If she fails to prove this, she fails in her cause; if she does prove it, she establishes her cause.

2 Bish. Mar. & Div., 126, sec. 125.

A wife may establish separate domicile from her husband.

Ditson v. Ditson, 4 R. I., 87; *Hanberry v. Hanberry*, 29 Ala., 719.

A wife may have separate domicile from her husband for purpose of divorce.

Story, Conf. L., 285, n.; *Jenness v. Jenness*, 24 Ind., 355.

Judge Story says: "The doctrine, now firmly established in America, is: that the law of the place of the actual *bona fide* domicile of the parties, gives jurisdiction to decree a divorce.

Story, Conf. L., 287, sec. 280; see, also, Bish. Mar., n. to sec. 142; *Harding v. Allen*, 9 Me., 140.

"The protection of innocent parties and the purity of public morals require that divorces lawfully pronounced in one jurisdiction * * * should be recognized as operative and binding everywhere."

Harrison v. Harrison, 19 Ala., 499; *Tolen v. Tolen*, 2 Blackf., 407; *Maguire v. Maguire*, 7 Dana, 181; *Wall v. Williamson*, 8 Ala., 48; *Wall v. Williams*, 11 Ala., 826; *Fellows v. Fellows*, 8 N. H., 160; *Pawling v. Bird*, 18 Johns., 192; *Manafeld v. McIntyre*, 10 Ohio, 27; *Cooper v. Cooper*, 7 Ohio, 2d Vt., 288; *Gleason v. Gleason*, 4 Wis., 64; *Hubbell v. Hubbell*, 3 Wis., 662; *Ditson v. Ditson*, 4 R. I., 87.

Apart from the question of divorce, it is submitted that the money part of the decree in the Indiana court is conclusive in this case.

Messrs. W. S. Cox, J. M. Carlisle and W. A. Meloy, for appellees:

The decree of divorce was void for want of jurisdiction.

The courts of Indiana had no jurisdiction to decree the divorce of any but *bona fide* domiciled citizens of that State.

Bish. Mar. and Div., sec. 721, *et seq.*; Story, Conf. L., sec. 228-230; *Chase v. Chase*, 6 Gray, 157; *Jackson v. Jackson*, 1 Johns., 424; *Dorsey v. Dorsey*, 7 Watts, 349; *Bradshaw v. Heath*, 13 Wend., 407; *Hinds v. Hinds*, 1 Ia., 36.

The question of *bona fide* domicile is one of fact. It is clear, from the proof, that Mrs. Cheever went to Indiana for the sole purpose of procuring this divorce.

Besides, during her coverture she could not have acquired a domicile in Indiana.

Pa. v. Ravenel, 21 How., 110 (62 U. S., XVI., 85).

If there was jurisdiction of the person, there was none to affect the wife's property, even through the performance under the laws of Indiana, which provide that where a divorce is decreed for the act of the husband, the wife shall be restored to her property as if he had died.

See R. S. of Ind. of 18—, art. 48, ch. 4, sec. 18.

Even if there was jurisdiction, the decree was unjust, and the courts of this district are not bound to carry it into execution. It does not establish a prior indebtedness or title. It merely undertakes, in the exercise of judicial discretion, to create rights of property anew. Our courts are called on in this suit to enforce that decree. They are not bound to do so.

3 Dan. Ch. Pr., 1869.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the decree of the Supreme Court of the District of Columbia.

The material facts of the case, as disclosed in the record, are as follows:

On the 6th of September, 1842, Cheever, and the defendant, Annie, then Annie J. Hughes, executed a deed of marriage settlement, whereby the title of the real estate therein described, situate in the City of Washington, was vested in Sarah T. Hughes, the mother of Annie, "in trust, to permit her daughter, the said Annie J. Hughes, to receive take and enjoy the rents and profits of the said lands and premises to her sole and exclusive use and benefit," etc. The property embraced in the settlement is designated in the proceedings as "the Avenue property," and "the Sixth Street property." On the 8th of September, 1842, the parties were married. On the 10th of September, 1855, Mrs. Cheever and Mrs. Hughes executed to the defendant, Wilson, a lease of the Avenue property for five years, from the 1st of October, 1855, at an annual rent of \$1,800. to be paid quarterly. On the 26th of November, 1856, they executed a deed of trust to Carlisle and Maury, to secure certain advances therein mentioned, made, and to be made, by the defendant Wilson, to Mrs. Cheever.

This deed refers to the lease, and authorizes Wilson, after the 1st of October, 1857, to retain and apply the rents to the indebtedness until it

629; *Kashaw v. Kashaw*, 3 Cal., 312; *Thompson v. State*, 28 Ala., 12; *Hanberry v. Hanberry*, 29 Ala., 719; 5 Yerg., 303; 6 Humph., 148; 8 Watts & S., 251.

This has been denied by some courts and in others is not settled. *Schonwald v. Schonwald*, 2 Jones, Eq., 367; *Ashbaugh v. Ashbaugh*, 17 Ill., 476; *Kruse v. Kruse*, 25 Mo., 68.

A husband deserted his wife in Massachusetts, where she resided and remained. He removed to New Hampshire, and she was refused a divorce in the latter State on the ground of non-residence. *Hopkins v. Hopkins*, 35 N. H., 474.

For the purpose of an action of divorce, the wife may require a separate domicile. *Burien v. Shannon*, 115 Mass., 448; *Colvin v. Reed*, 6 Smith (Pa.), 875; *Harteau v. Harteau*, 14 Pick., 181; 8 C., 26 Am. Dec., 372; *The Republic v. Skidmore*, 2 Tex., 161; *Kinnier v. Kinnier*, 45 N. Y., 535; *Frary v. Frary*, 10 N. H., 61; *Yates v. Yates*, 2 Beasley, 280; *Hardy v. Alden*, 9 Greenl., 140; 8 C., 23 Am. Dec., 549; *Hanberry v. Hanberry*, 29 Ala., 719; *Sawtell v. Sawtell*, 17 Conn., 284; *Hinds v. Hinds*, 1 Iowa, 36;

See 9 WALL.

Fickle v. Fickle, 5 Yerg., 208; *Hare v. Hare*, 10 Tex., 355; *Richardson v. Richardson*, 2 Mass., 153; *Tolen v. Tolen*, 2 Blackf., 407; *Brett v. Brett*, 5 Met., 283; *Fishil v. Fishil*, 2 Litt., 337; see, also, *Dasent v. Dasent*, 1 Robertson, 800; *Harrison v. Harrison*, 19 Ala., 499; *Wharton v. Mair*, Ferg., 250; 3 Eng. Ec., 414; *Vischer v. Vischer*, 12 Barb., 640; *Chase v. Chase*, 6 Gray, 157; *Shanks v. Dupont*, 28 U. S. (3 Pet.), 242; *Vence v. Vence*, 15 How. Pr., 497.

Some cases hold that after the offense, wife cannot acquire a new domicile in which to prosecute her action for divorce. *Neal v. Her Husband*, 1 La. Ann., 315; *Dorsey v. Dorsey*, 7 Watts, 349; *Jackson v. Jackson*, 1 Johns., 424; *Maguire v. Maguire*, 7 Dana, 181; see *Pawling v. Bird*, 18 Johns., 192; *Collett v. Collett*, 3 Curt. Ec., 726; 7 Eng. Ec., 563; *Dasent v. Dasent*, 1 Robertson, 800; *Glover v. Glover*, 18 Ala., 440.

The residence of the wife is in subordination to that of her husband. *Burnham v. Rangeley*, 1 Wood & M., 7.

should be extinguished. On the 11th of February, 1857, Mrs. Cheever executed to Wilson a paper purporting to assign to him all the rents then due and thereafter accruing until he should have received the sums therein mentioned. A further lease was given by Mrs. Hughes and Mrs. Cheever to Wilson, on the 16th of July, 1857, of the Avenue property, for the term of five years, to commence on the 1st of October, 1860, at the same rent, to be paid in the same manner as was provided in the former lease. Mr. and Mrs. Cheever lived together in Washington until December, 1854, when they separated. On the 16th of June, 1857, Mrs. Cheever filed her petition for a divorce in the Circuit Court of Marion County, Indiana. She described herself therein as a *bona fide* resident of that county. The cause was removed by an order for a change of venue to the Circuit Court of Madison County, in that State. On the 19th of August, 1857, Cheever appeared and filed his answer and a cross-petition. On the 26th of that month the court decreed a divorce *a vinculo matrimonii*, and thereafter, by the agreement of the parties, it was further decreed that Cheever should have the custody of the three elder children, and that Mrs. Cheever should have the custody of the younger one until the further order of the court, and that for the support and education of the children Cheever should receive one third of the rents and profits, to which Mrs. Cheever was entitled, accruing from the property described in the deed of settlement. The decree declared "that the same is hereby decreed to the said Benjamin, as the same shall hereafter become due and payable, for the uses and purposes of the said infant children during the lifetime of the said Annie. * * * And the said Annie shall execute to the said Benjamin a good and sufficient power to receive said rents and profits for the uses and purposes herein declared, which shall be sufficient for the purpose." On the 27th of August she executed such instrument, pursuant to the decree; but before doing so she added this sentence to the draft which had been prepared: "This assignment of rents is subject to an incumbrance upon said rents to my agent, Jesse B. Wilson, of about \$5,000." Her interest in the rents at the date of the decree was two thirds in possession, and the remaining third expectant upon the death of her mother, who received that portion for her dower. Notice of the decree was given to Wilson within a very short time after it was rendered. He did not recognize the complainant's claim, and has never paid him anything.

Soon after the divorce was granted Mrs. Cheever married Louis Worcester. On the 11th of December, 1858, Worcester and wife gave to Wilson an instrument whereby they assigned to him all her rents until he should have received the sum of \$3,000. On the 30th of December, 1858, Worcester and wife and Mrs. Hughes gave to Wilson an extension of his lease of the Avenue property for the term of ten years, from the 1st of October, 1860, being an addition of five years to the term of the last preceding lease. At the same time Mr. and Mrs. Worcester executed to him a further assignment of the rents. The Avenue buildings were destroyed by fire in April, 1862. Wilson erected the present store on the property at a cost to himself of upwards

of \$4,000. He has continued to occupy it, and has paid no rent since the fire to any one.

Mrs. Hughes died on the 12th of April, 1863. Worcester died before that time. On the 23d of October, 1863, Wilson and Mrs. Worcester came to a settlement of their accounts. He had collected the rents of the Sixth Street property up to that time, but did so no longer. The accounts embraced the rents received from that property, as well as that from the Avenue property, and extended to the period of the fire. The result was that she was found to be indebted to him in the sum of \$3,290.

The complainant's bill was filed the 21st of June, 1868, and seeks a specific performance of the Indiana decree, against Wilson, as to the portion of the rents allotted to the complainant for the benefit of the children. On the 17th of June, 1863, it was ordered by the court that the auditor should report upon the state of the accounts between Mrs. Worcester and Wilson. There was no finding as to the rights of the parties, and no specific directions were given in the order.

The auditor made a very elaborate report. Assuming the Indiana decree to be valid, his conclusions were that the balance due to Wilson for his advances on the faith of the pledges of the rents, prior to the divorce or his having notice, and at the time of notice—which the auditor found to be the 11th of September, 1857—was \$4,627.78, including interest; and that this balance was extinguished on the 1st of January, 1863, leaving an overplus of \$23.30; that there was due to the complainant the sum of \$622.97, including interest, for rents, from the time of the payment of Wilson's advances to the 1st of January, 1865, the last quarter day before the adjustment by the auditor, and the further sum of \$2,437.41 and interest for rents, from the date of the decree to the time the advances were paid; that the amount of the rents, accruing from the time of the payment of the advances to the 1st of March, 1865, from the Avenue property, as well as the Sixth Street houses, while the defendant collected the rents of the latter, excluding the third which fell in by the death of Mrs. Hughes, was \$1,831.84; that the amount due to the complainant was, therefore, \$3,060.38, and that the sum in the hands of the defendant, Wilson, applicable thereto in payment, \$1,831.84, was not sufficient to pay complainant's arrears by the sum of \$1,295.53.

According to the report the claimant is entitled to a decree against Wilson for the sum of \$1,831.84, with interest from the 1st of March, 1865, and for the further sum of \$1,295.53 against Mrs. Worcester, with interest from the same time. The sum proposed to be decreed against Wilson is made up of two elements: (1), the complainant's share of the rents received by Wilson after his advances were paid, with interest down to March 1st, 1865, being \$622.97; and (2), the share belonging to Mrs. Worcester of the rents accruing after the same period (excluding her mother's share, which lapsed by her mother's death), with interest computed also to her the 1st of March, 1865, being \$1,208.87, these sums making together the aggregate of \$1,831.84. The auditor held that Wilson was liable for the latter sum, because the complainant was entitled to it, on the principle of subroga-

tion. All the parties excepted to the report. The court sustained the defendant's exceptions, and dismissed the bill upon the ground that the Indiana decree was void.

Upon the execution of the deed of settlement, the real estate therein described became the separate property of Mrs. Worcester, and she had the same power to anticipate and incur the rents as if she had been a *feme sole*. 10 B. Monroe, 247; *Colwin v. Currier*, 22 Barb., 387; *Heatley v. Thomas*, 15 Vesey, 596; *Bulpin v. Clarke*, 17 Vesey, 886; *Jaques v. Methodist Church*, 17 Johns., 548; *North American Coal Company v. Dyett*, 7 Paige, 9; *Insurance Company v. Bay*, 4 N. Y., 9; *Gardner v. Gardner*, 22 Wend., 526; *Browning v. Coppage*, 3 Bibb, 87; 1 Story, Eq., sec. 64; 2 Bibb., 198; 3 Bibb, 87.

The proportion of the rents to which the complainant was entitled was one third of the two thirds to which Mrs. Worcester was entitled at the time of the rendition of the decree in Indiana. The decree had reference to her rights as they existed at that time. It was not affected by the falling in of the other third, which her mother held as her dower to the time of her death.

The complainant was not bound by the lease of December, 1858. It was executed after the decree and notice to Wilson. He was bound by the preceding lease of July, 1857, which was executed before the decree. That lease contained a covenant on the part of Wilson to repair and pay rent. It did not expire until October 1st, 1865.

The buildings on the Avenue property destroyed by fire in April, 1862, were insured in the name of Mrs. Hughes for \$4,000, and she received that amount from the insurance company. The lease of 1857 fixed the amount of the rent, and the complainant is entitled to claim accordingly.

Under the lease of 1858, important questions may arise between Wilson, Mrs. Worcester, and the estate of Mrs. Hughes, but they do not affect the rights of the complainant in this litigation, and we need not, therefore, consider them.

It was proper, under the circumstances, to include in the accounts the rents received by Wilson from the Sixth Street property. That property was embraced in the deed of settlement and in the Indiana decree. The record of that case was filed with the bill as an exhibit, and became a part of it. The prayer of the bill is for general relief. The securities given by Mrs. Worcester embraced alike the rents accruing from that and the Avenue property. Wilson had applied and credited both. It would not be proper to withdraw and separate the former.

It appears by the complainant's exceptions, that he objected strenuously in the court below to the findings of the auditor, as to the state of the accounts between Wilson and Mrs. Worcester touching the advances. After a careful consideration of the evidence, we are satisfied with his conclusions, and see no reason to disturb them. We do not think anything would be gained to the interests of justice by modifying the report, or by setting it aside, and ordering a further examination of the subject.

We think the auditor was right in his conclusion upon the point of subrogation. A much larger amount of the complainant's share of the

rents than this principle will give him of hers was applied in payment of Wilson's advances. It is proper that an equal amount of her share, according to her rights, as they were when the decree was rendered, should replace what had been so applied for her benefit. This will leave, unaffected by this ruling, for her enjoyment, the full third which had belonged to her mother, and to which she became entitled at her mother's death. We are satisfied with the auditor's findings as to the amount for which the defendants respectively should be held liable. Their exceptions should have been overruled.

The decree rendered in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the *situs rei*, by the proper proceedings conducted there for that purpose. *Sutphen v. Fowler*, 9 Paige, 280; *Mossie v. Watts*, 6 Cranch, 148, 158; 3 Ves., 44; *Swann v. Ponnerreau*, 3 Ves., Jr., 44; *Portarlington v. Souby*, 3 Mylne & K., 104; *Monroe v. Douglas*, 3 Sandf. Ch., 185; *Shattuck v. Cassidy*, 3 Ed. Ch., 152; 1 Story, Eq., secs. 743, 744. But no question arises upon that subject. The assignment executed by Mrs. Worcester to the complainant, of the 27th of August, 1857, in pursuance of the decree, was ample to vest in him the interest and authority which the court ordered her to convey. The reservation in behalf of Wilson was only what the law without it would have prescribed, and did not impair its efficacy, or limit what would otherwise have been the scope of its effect and operation.

The main pressure of the arguments here has been upon the question of the validity of the Indiana decree. Those at the bar were confined to that subject, and the printed briefs go but little beyond it.

The courts of the United States take judicial notice of the laws and judicial decisions of the several States. *Pennington v. Gibson*, 16 How., 80.

Upon looking into the laws of Indiana we find that the proceedings in the case there were governed by "An Act Regulating the Granting of Divorces, Nullification of Marriages, and Decrees and Orders of Court incidental thereto," approved May 13th, 1852. The petition makes a case within the statute. It alleges that the petitioner was a *bona fide* resident of the county where it was filed, and sets forth as causes for a divorce abandonment from December, 1854, and cruel treatment, by the husband. His answer denied the allegations of the petition. His cross petition prayed for a divorce, for the custody of the children, and for provision for their support out of the separate property of the wife described in the deed of settlement. The decree sets forth as follows: "The court find the marriage, abandonment, and residence of the said Annie J. Cheever, and the births and names and ages of the children, as alleged in the original petition, to be true, and the residue of said petition, to be untrue." A divorce was thereupon adjudged in the usual form.

It would be a sufficient answer to the questions raised as to the validity of this decree that no such issue is made in the pleadings. The answer of Mrs. Worcester is silent upon the subject. Wilson, in his answer, says he "does not admit the validity or regularity of said de-

cree," or that "it is operative to affect his rights," but, on the contrary, * * * "reserves to himself the right to impeach it if occasion should offer and require him to do so." This language is too vague and indefinite to have any effect. If he desired to assail the decree he should have stated clearly the grounds of objection upon which he proposed to rely. The averments should have been such that issue could be taken upon them. *White v. Hall*, 12 Ves., 824. He and his co-defendant are precluded by the settled rules of equity jurisprudence from entering upon such an inquiry. Their silence is an admission, and they are bound by the implication. As, however, the question has been fully argued upon both sides, and may arise hereafter in further litigation between the parties, we deem it proper to express our views upon the subject.

The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. It contained all the requisite averments. The court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject-matter. The decree was valid and effectual, according to the law and adjudications in Indiana. Stat. of 1852, sec. 38; *McQuigg v. McQuigg*, 18 Ind., 294; *Noel v. Ewing*, 9 Ind., 52; *Lewis v. Lewis*, 9 Ind., 105; *Rourke v. Rourke*, 8 Ind., 430; *Tolen v. Tolen*, 2 Blackf., 407; *Wilcox v. Wilcox*, 10 Ind., 436.

The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. Const., Art. 4, sec. 1; Stat. at L., 122; *D'Arcy v. Kelchum*, 11 How., 175. "If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere," in the courts of the United States. 2 Story, Const., sec. 1313; *Christmas v. Russell*, 5 Wall., 302 [72 U. S., XVIII., 478].

It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicile. *Case v. Clarke*, 5 Mason, 70; *Cooper's Lessee v. Galbraith*, 3 Wash. C. C., 550; *McDonald v. Smalley*, 1 Pet., 620. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony. *Noyes v. Butler*, 6 Barb., Sup. C., 618; *Hall v. Williams*, 6 Pick., 239; *Mills v. Duryee* (2 Amer. L. C., 791, note), 7 Cr. 481-487. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the *animus manendi* may have been wanting.

It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. 2 Bishop

on Marriage and Div., 475. The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence. *Ditson v. Ditson*, 4 R. I., 87.

The Statute of Indiana enacted that "The court, in decreeing a divorce, shall make provision for the guardianship, custody, and support and education of the minor children of such marriage." Act 1852, sec. 21. That part of the decree which relates to this subject has been already sufficiently considered. *Barber v. Barber*, 21 How., 582 [69 U. S., XVI., 226], has an important bearing upon the case under consideration. There a wife had obtained a divorce *a mensa et thoro*, and an allowance of alimony, in the State of New York. The husband afterwards removed to Wisconsin. To enforce the payment of the alimony she sued him in equity in the District Court of the United States for that district. The court was clothed with equity powers. The ground of federal jurisdiction relied upon was the domicile of the husband and wife in different States. The court decreed for the complainant. This court, on appeal, recognized the validity of the original decree, sustained the jurisdiction, and affirmed the decree of the court below. This is conclusive upon several of the most important points involved in the case before us.

The decree of the Supreme Court of the District of Columbia is reversed, and the cause will be remanded with directions to enter a decree in conformity to this opinion.

Cited—25 N. J. Eq. 63; 46 N. Y., 33; 23 Am. Rep., 304 (122 Mass., 156); 25 Mich., 261, 269; 28 Am. Rep., 126, 148 (72 N. Y., 228); 81 Am. Rep., 667 (3 Lea., 686); 32 Am. Rep., 278 (76 N. Y., 83); 41 Am. Rep., 508 (37 Ohio St., 317) 44 Am. Rep., 88 (104 Ill., 36).

WILLIAM H. NORRIS, JR., *Plff. in Err.*,

v.

THOMAS JACKSON.

(See S. C., 9 Wall., 123-129.)

Trial by the court—effect of findings—what rulings reviewed—general and special findings—exceptions.

The Act of Mar. 3, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, provides for two kinds of findings in regard to the facts, to wit: general and special.

The special finding is a statement of the ultimate facts on which the law of the case must determine the rights of the parties, and not the evidence on which those ultimate facts are supposed to rest.

Whether the finding be general or special, it has the same effect as the verdict of a jury, and is conclusive as to the facts so found.

If the verdict be general, only such rulings of the court in the progress of the trial can be reviewed, as are presented by the bill of exceptions, or as may arise on the pleadings.

In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

If the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them.

Objections to the admission or exclusion of evidence, or to such rulings on the propositions of law as the party may ask, must appear by bill of exceptions.

[No. 301.]

Submitted Feb. 11, 1870. Decided Feb. 21, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment brought in the court below by the plaintiff in error, to recover a certain tract of land.

By agreement of the parties, the case was tried by the court without a jury.

The judgment of the court below having been for the defendant, the plaintiff sued out this writ of error.

A further statement appears in the opinion of the court.

Messrs. Anson S. Miller, J. F. Farnsworth and Cyrus F. Miller, for plaintiff in error.

Mr. Samuel W. Fuller, for the defendant in error:

Mr. Justice Miller delivered the opinion of the court:

This is an action of ejectment tried in the Circuit Court for the Northern District of Illinois by the court, to whom it was submitted without a jury.

At the close of a long bill of exceptions embracing all the evidence, which consisted of judgments, executions, deeds, depositions, admissions and agreements of the parties, it is said that "The foregoing was all the cause, and the court thereupon found the issues and rendered judgment for the defendant, to which decision and ruling of the court the plaintiff then and there excepted."

By section 4 of the Act of March 3, 1865, 13 Stat. at L., 50, it is provided that parties may submit the issues of fact in civil cases to be tried and determined by the court, without the intervention of a jury; and it declares what the effect of such finding shall be, and how and under what circumstances there may be a review of such judgments.

We give the language of the section on this subject *verbatim*.

"The finding of the court upon the facts, which finding shall be general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

The first thing to be observed in this enactment is: that it provides for two kinds of findings in regard to the facts, to wit: general and special. This is a perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict.

This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which

those ultimate facts are supposed to rest. *Burr v. Des Moines Co.*, 1 Wall., 99 [68 U. S., XVII., 561]; *Graham v. Bayne*, 18 How., 62 [59 U. S., XV., 266].

The next thing to be observed is, that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law.

In the case of a special verdict, the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record. If there were such special verdict here, we could examine its sufficiency to sustain the judgment.

But there is none. The bill of exceptions, while professing to detail all the evidence, is no special finding of the facts.

The judgment of the court, then, must be affirmed, unless the bill of exceptions presents some erroneous ruling of the court in the progress of the trial.

The only ruling in the progress of the trial to which exception was taken by plaintiff, was to the refusal of the court to permit him to prove that Gitchell, the landlord of defendant, had promised to pay the judgment under which the land was sold to plaintiff.

We do not see that this was a matter of which plaintiff, a volunteer purchaser, had any right to complain. It could not extend the lien of the judgment beyond the time fixed by law, which seems to be the purpose for which it was offered.

We have taken some pains to comment on the mode in which cases tried by the court, which are properly triable by a jury, may be reviewed here. Attention was called to the Statute of 1865, in the case of *Insurance Co. v. Treed*, 7 Wall., 44 [*ante*, 65], and we here condense the results of an examination of that statute:

1. If the verdict be a general verdict, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

2. In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them.

4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.

As the only ruling of the court in this case that we can examine seems to have been correct, the judgment is affirmed.

Cited—9 Wall., 251; 12 Wall., 301; 17 Wall., 411; 18 Wall., 248, 250, 252; 21 Wall., 160, 307; 92 U. S., 473; 93 U. S., 81; 94 U. S., 798; 95 U. S., 134; 98 U. S., 443; 103 U. S., 688; 107 U. S., 601; 109 U. S., 188; 9 Blatchf., 204; 2 Dill., 173; 3 Dill., 108; 7 Bank. Reg., 564; 6 Sawy., 220.

THE STEAMBOAT JOSEPH JOHNSON,
HER TACKLE, etc., FREDERICK A. POTTS,
Claimant, *Appt.*,

v.

IRWIN McCORD AND THE WASHINGTON INSURANCE COMPANY;

AND

IRWIN McCORD AND THE WASHINGTON INSURANCE COMPANY, *Appts.*,

v.

THE PROPELLER WILLIAM F. BURDEN, SILAS BETTS ET AL., Claimant.

(See S. C., "*The Johnson*," 9 Wall., 146-156.)

Rules of navigation—steam vessels meeting.

Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and so long as the means and opportunity to avoid the danger remain.

Steam vessels, approaching each other from opposite directions so as to involve risk of collision, are required to port their helms so that each may pass on the port side of the other.

Where two vessels are in close proximity, one of them has no right to insist upon any departure from the ordinary rules of navigation.

[Nos. 61, 62.]

Argued Feb. 8, 1870. Decided Feb. 21, 1870.

APPEALS from the Circuit Court of the United States for the Southern District of New York.

A libel was filed in the District Court of the United States for the Southern District of New York, by the appellants, Irwin McCord and the Washington Insurance Company, against the steamboat Joseph Johnson and the steam propeller William F. Burden, her tackle, etc., to recover for damages resulting from a collision.

The said court entered a judgment against the said Joseph Johnson and the said William F. Burden, and thereupon the claimants of the said steamboat and propeller took their appeals to the circuit court. In that court a decree was entered against the steamboat Joseph Johnson for the whole amount of said damages, and dismissing the libel against the said propeller. Thereupon the libelants took an appeal to this court from that part of the decree which related to the said propeller, and the claimants of the said steamboat took an appeal from the whole of said decree and particularly from so much thereof as condemned the said steamboat to pay any damages or costs.

The case is fully stated by the court.

Mr. C. Van Santvoord, for libelants.

Mr. F. J. Fithian, for steamer, Joseph Johnson.

Mr. E. C. Benedict, for the propeller, William F. Burden.

Mr. Justice Clifford delivered the opinion of the court:

Damages were claimed in this case on account of a collision which occurred in East River, on the 9th of December, 1863, between the canal-boat, Kate McCord and the steamboat Joseph Johnson, whereby the canal boat and her cargo, consisting of seven thousand bushels of wheat, were greatly injured.

Prior to the commencement of her trip, the canal-boat was lying in the Atlantic basin at 610

Brooklyn, and the proofs show that she was heavily laden, and that she was taken in tow there by the steam propeller, William F. Burden, to be towed up the river to pier forty-four, on the New York side of the river, for the purpose of discharging her cargo and delivering the same on board of the ship, Whampos, then lying at that pier. She was lashed to the port side of the propeller, and when the collision occurred, the propeller with the canal-boat in tow was proceeding up the river to the place where her cargo was to be transhipped.

Loss was sustained by the owner of the canal boat and by the owners of her cargo, and they joined in the same libel, claiming damages, as well of the propeller to which the canal-boat was lashed as of the steamboat Joseph Johnson, which collided with the canal-boat, and which was the immediate cause of the injury both to the canal boat and her cargo.

Lashed to the propeller as the canal boat was, she was as entirely under the control of the propeller as if she had been a part of that vessel. When they were proceeding on their course up the river, The Johnson, with two unladen canal barges in tow, one on each side, started from Corlear's Hook, on the New York side, on a trip down the river, inclining, however, towards the Fulton Ferry dock, on the Brooklyn side, to a point just below the lower slip of that dock, where she intended to take another boat in tow. When the boats started on their respective trips it was about eleven o'clock in the forenoon, and the tide at that time was half ebb, with a strong current in the channel of three miles an hour.

Vessels of that description proceeding up the river on that side, in that state of the tide, usually keep close to the shore, as they by that means avoid the downward current in the stream, and get the aid of the eddy or reflex tide near the shore, which facilitates their progress, and the evidence shows that the propeller, with the canal-boat in tow, was proceeding up the river along that shore in the track usually pursued by steam tugs in performing towage service under those circumstances.

Boats descending the river at ebb tide usually select the middle of the channel, as their speed is much aided by the current, and the witnesses generally concur that The Johnson, until just prior to the collision, was proceeding down the river in a course much nearer the center of the stream than the ascending boat with her tow lashed to her port side.

Aided by the current, the speed of the descending boat was seven miles an hour; but the propeller with the canal-boat in tow was not able, in ascending the river, to make more than three or four miles an hour.

Whatever may have been the cause, it is admitted by the master of The Johnson that he did not see the propeller until she was opposite the slip next above the ferry slip, and he also states that the propeller, at that time, was about the same distance below the ferry that The Johnson was above that point, and of course they were not far distant from each other.

They were approaching at a combined speed of ten or eleven miles an hour, but not exactly from opposite directions, nor on lines precisely parallel, as The Johnson was nearer to the center of the stream than the propeller, and her

course was inclining towards the Brooklyn shore. Strong doubts, however, are entertained whether the vessels would have collided if both had kept their course, but it is not necessary to decide that point, as it is conceded that the helms of both were changed before the collision occurred.

Appearance was regularly entered by the owners of the steamers, and the claimants of each steamer filed separate answers, denying that their vessel was liable for the injury, but the district court held that both vessels were in fault, and entered a joint decree for the libelants in conformity with the allegations of the libel. Dissatisfied with the decree, the claimants of the respective steamers appealed to the circuit court, where all the parties were again heard, and the circuit court affirmed the decree of the district court as against The Johnson, but reversed it as against the propeller, holding that The Johnson was wholly in fault for the collision. Whereupon the claimants of The Johnson appealed to this court, and the libelants also appealed from so much of the decree as held that the propeller was not in fault.

All persons engaged in navigating vessels upon navigable waters, whether upon the seas or in rivers or harbors, are bound to observe the rules of navigation recognized and approved by the courts in the management of their vessels on approaching a point where there is danger of a collision. Such rules are ordained and administered to prevent collisions and to afford security to life and property exposed to such dangers, and experience shows that if they are seasonably observed and strictly followed, such disasters would seldom occur. *Steamship v. The Rumball*, 21 How., 383 [62 U. S., XVI., 148].

Rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and they continue to be obligatory as the vessels advance, so long as the means and opportunity to avoid the danger remain. They are not strictly applied to a vessel which is otherwise without fault in cases where the proximity of the vessels is so close that the collision is inevitable, and they are wholly inapplicable when the vessels are so distant from each other that measures of precaution have not become necessary to prevent a collision. But precautions, in order to be effectual, must be seasonable; and if they are not so, and a collision ensues because they were not adopted earlier, it is no defense to show that they were adopted as soon as the necessity for the precaution was perceived, nor to prove that at the moment of the collision it was too late to render such a precaution of any service. Unless precautions are seasonable they are of little or no use, as it will seldom or never happen that a collision could be avoided at the time when it occurred. *The Governor*, 1 Cliff., 97.

Steam vessels, independently of the sailing rules enacted by Congress, are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. *St. John v. Paine*, 10 How., 583.

Prior to the passage of the Act of Congress prescribing sailing rules, as well as since that

time, steam vessels approaching each other from opposite directions, so as to involve risk of collision, were required to put their helms to port so that each may pass on the port side of the other, and the court is of the opinion that that rule is applicable in this case, although the collision occurred before that Act of Congress went into operation. *The Sussex*, 1 W. Rob., 275; *The Niagara*, 3 Blatchf., 37.

Suppose it to be true that these vessels were approaching each other on intersecting lines, so that they would have collided if they had not changed their course, then it is clear in view of the circumstances that each was bound to port their helm and pass to the right, as there was nothing to prevent them from complying with that well-known rule of navigation. They were navigating in the daytime and in good weather, and they had an unobstructed view of what was before them; but The Johnson, instead of complying with that rule of navigation, put her helm to starboard for the purpose of crossing to the Brooklyn side and taking another boat in tow, which was lying in the dock just below the lower slip of the Fulton Ferry. Descending the river, as the Johnson was, at the rate of seven miles an hour, she obeyed her helm readily, and aided by the reflex tide as she left the stream she came round quickly so as to head towards the shore, and as she advanced on her new course she struck the canal-boat on her port side and caused the injury described in the libel.

Complaint is made by the appellant that the propeller was in fault, but the court is of opinion that what the propeller did was correct, and that she left nothing undone which, under the circumstances, was required of her by the rules of navigation. When the master of the propeller saw that The Johnson was heading directly towards the canal-boat, he ported her helm, which was all he could do at that time, as the collision was inevitable. Some benefit, no doubt, resulted from the movement, as it doubtless diminished the force of the blow and lessened somewhat the injury to the canal-boat and her cargo.

Unexplained, the appellant concedes that the attempt of the steamboat to cross the track of the propeller before she passed up, would not be warranted by the rules of navigation, but he alleges in argument that The Johnson, before she starboarded her helm, gave notice to the propeller, by blowing her steam-whistle twice, that she intended to make that change in her course and go to the left, but the weight of the evidence is the other way, and the theory of the defense is expressly contradicted by the answer, which must be regarded as alleging the true state of the case.

Whether tested by the pleadings or the evidence, the case shows that the helm of the steamboat was put to starboard, when, if changed at all, it should have been put to port, and that the steamboat was put upon a course heading towards the Brooklyn shore, across the track of the propeller, before the steamboat blew her whistle, as alleged by the appellant.

Even supposing it were otherwise, and that the theory of the fact assumed by the appellant could be sustained, still the court is of the opinion that it would constitute no valid defense in this case, for several reasons, which will be

briefly explained: (1) Because the respective vessels, as they approached each other, were in such close proximity that the steamboat had no right to insist upon any departure from the ordinary rules of navigation. (2) Because any such departure from the rules of navigation as that contemplated by the steamboat necessarily involved danger of collision, as the propeller was nearer to the shore than the steamboat. (3) Because the steamboat, even if she did blow her whistle before she starboarded her helm, still she had no right to change her course until it was certain that the signal was heard and understood by the approaching vessel. (4) Because the signal, even if given before the order to starboard, was, nevertheless, too late to justify the steamboat in attempting to cross the bows of the propeller; but the court is satisfied that the signal, if given as alleged by the appellant, was not understood by those in charge of the propeller, and that it was culpable rashness, in view of the circumstances, for the steamboat to attempt to cross the bows of the propeller before receiving any signal that the propeller was willing to co-operate in the proposed change of course.

Those on board the steamboat received no answer to their signal, and it is reasonable to suppose that if they were attentive to their duties they must have known that those in charge of the propeller did not understand their signal, and consequently if they made the proposed change in the course of their steamer, a collision would follow, and if they did not so understand the matter, it was their own fault.

Viewed in any light, the propeller was not at fault, and the responsibility must rest on the steamboat. Our conclusion is, that The Johnson is liable for the whole damage, and that the decree of the circuit court should be in all things affirmed.

Appeal was taken by the libelants from so much of the decree as exonerated the propeller, but their claim, in the view of this court, is against the colliding steamboat, and not against the propeller.

Decree in each case affirmed.

Cited—7 Blatchf., 225; 1 Brown, 249; 2 Hughes, 19; 3 Cliff., 468; 59 N. Y., 300.

UNITED STATES, *Appt.*,

v.

ANTONIO ROCHA ET AL.

(See S. C., 9 Wall., 639-650.)

District court may open California land case for new proof—claim sustained.

The district court possessed power to open a California land case, for the purpose of hearing newly discovered evidence.

Where the claimants and their ancestors have been in the uninterrupted possession and occupation nearly half a century, under a *pueblo* grant confirmed by a provisional grant from the Mexican Governor, the claim is sustained.

[No. 48.]

Argued Feb. 3, 1870. Decided Feb. 21, 1870.

APPEAL from the District Court of the United States for the District of California.

The petition in this case was presented by

the appellees to the United States Land Commissioners, for ascertaining and settling private land claims in California. A decree was entered by the said Commissioners, dismissing the claim of the said petitioners, who thereupon took an appeal to the court below. That court having reversed the said decree and adjudged the claim of the petitioners to be valid, the defendants took an appeal to this court.

The case is fully stated by the court.

Messrs. E. R. Hoar, Atty. Gen., R. J. Brent and John A. Wills, for appellant:

A bill of review can only be entertained where the decree attacked has become final and been enrolled, and it is in the nature of a writ of error.

The decree of August, 1860, affirming the decree of the Land Commissioners, became a final and enrolled decree within four months after rendition, as the term expired on the first Monday of December then next.

9 Stat. at L., 521, sec. 5; *Whiting v. Bk. of U. S.*, 13 Pet., 6; Story, Eq. Pl., sec. 403.

A bill of review can be filed within the five years allowed for taking out a writ of error; but when leave to file it is asked on the ground of newly discovered evidence, the bar of limitations runs from the date of the discovery, and not from the date of the decree.

Messie v. Graham, 3 McLean, 44.

If the District Courts of California, in the exercise of the special jurisdiction to hear and determine appeals in land cases conferred on them by the Act of Mar. 8, 1851, can entertain bills of review, the consequences that will result are of the most important character.

No decision of this court, which has fallen under our notice, has intimated that such a jurisdiction can be exercised.

Admitting the genuineness of all the documentary, and the truth of the oral testimony offered by the claimants, we contend they have no case.

The title presented by the claimants to the Board of Land Commissioners was a bare permission or license, by the *pueblo*, authorities of Los Angeles, "To build corrals, to pasture their cattle, and cultivate lands on the same conditions as the other citizens have done, who have received such a favor."

This was a mere provisional right of occupancy, under the city's claim of title; and besides, there is no evidence to show the extent of the place formerly occupied by Neposimo Alvarado.

The petition to file the bill of review was based upon the alleged discovery of a certain *espediente*.

This states that the Governor had determined that "All the places ceded for *ranchos* of this jurisdiction will remain of the character of provisional, until the *ejidos* of the city shall be regulated." In other words, it shows a refusal by the Governor to grant the land as prayed.

The claim of De Haro was much stronger, because he had a provisional grant, formally extended by the Governor. It was held by this court to be invalid.

De Haro v. U. S., 5 Wall., 622 (72 U. S., XVIII., 687); see, also, *U. S. v. Serrano*, 5 Wall., 459 (72 U. S., XVIII., 496); *U. S. v. Chaboya*, 2 Black, 593 (67 U. S., XVII., 357).

But no proof was offered, of the genuineness

of the signature attached to the *espediente* offered in evidence.

The evidence in the cause shows no equity arising from possession or occupancy, binding the conscience of the Government.

All the occupancy shown is legitimately accounted for by the provisional right to occupy. There is no ground for contending that the occupancy was adverse, for it shows that it was under and in subordination to the rights of the *pueblo* and of the Mexican Nation, under the last of which the United States claims.

But no title can be gained by adverse occupancy, against the United States. This is common learning.

Mr. Cornelius Cole, for appellees:

The proof in this case is, that the ancestor of the claimants entered into possession of the land claimed as early as April, 1828.

The possession, by the claimants and their father and mother, has been continuous and uninterrupted from that time to the present, under claim of title from the Government. Titles of this nature have always been respected and confirmed by the courts.

U. S. v. Castro, 1 Hoff. Land Cas., 126; *U. S. v. Alviso*, 23 How., 318 (64 U. S., XVI., 456); *U. S. v. Wilson*, 1 Black, 267 (66 U. S., XVII., 142); *U. S. v. De Haro*, 22 How., 293 (63 U. S., XVI., 343).

In the case of *Strother v. Lucas*, 12 Pet., 436, the court uses the following language: "The court has uniformly held that the term 'grant' in a treaty comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession."

Vide the cases last cited, 8 Pet., 466; 9 Pet., 152; 10 Pet., 331; 10 Pet., 718.

Uninterrupted possession for thirty years would authorize the presumption of a grant.

Barclay v. Howell's Lessee, 6 Pet., 498; Dom. Civ. L., Cushman, Ed., 2190.

The allowance of a bill of review is never a matter of right, but rests entirely in the discretion of the court.

Hollingsworth v. McDonald, 2 Harr. & J., 230; *Dexter v. Arnold*, 3 Mas., 284; *Mattie v. Graham*, 3 McLean, 52.

The courts of the United States clearly possess the power to allow such a bill to be filed.

Dexter v. Arnold, 5 Mas., 311.

The title of the Act of Mar. 3, 1851, is "An Act to Ascertain and Settle the Private Land Claims in the State of California." There was no necessity whatever for presenting perfect titles to the Board of Commissioners.

Minturn v. Brower, 24 Cal., 644.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the District Court of United States for the Southern District of California.

The case involves the right of the appellees to a league of land called La Brea, some seven miles west of the Town of Los Angeles, in the State of California. The petition was presented to the Board of Commissioners in 1853, setting forth that their ancestor and one Nemesio Dominguez in 1828 applied to the authorities of the *pueblo* of Los Angeles for a grant of the

land, supposing at the time it was situate within its limits; that the grant was made according to the prayer of the petitioners, and that the grantees or their legal representatives took possession and occupied the premises from that time down to the application before the Board. The petition to the authorities of the *pueblo* and the grant by Carrillo, the President, were annexed. The facts stated in the petition were proved before the Board; Carrillo, still living in Los Angeles, proving his signature to the grant, and also to the genuineness of the paper. Dominguez conveyed in 1853 his moiety of the La Brea to one of the sons of his co-grantee, who in the meantime had died, leaving a widow, two sons and a daughter. The Board of Commissioners rejected the claim, solely on the ground of the want of a sufficient description of the tract. The description was simply for "A place called *ranchito de La Brea*, which Nepomezano Alvarado formerly occupied in a provisional manner."

The Board expressed no doubt as to the genuineness of the papers or the effect of them in a conveyance of a right to the tract. This decision was made in March, 1855. The parties appealed to the district court, where an issue was made up in January, 1858, and in August, 1860, the appeal was dismissed for want of prosecution.

In February, 1861, a notice was given to the United States Attorney of a motion to the court for a bill of review on newly discovered evidence, which was heard and granted in October, 1862. The newly discovered evidence was found among the Spanish or Mexican archives of the Executive Department, Vol. 12, in the Surveyor-General's office of California, where they are kept according to law, upon a diligent search in September, 1860. Search had previously been made, but failed, as there were no indices to the volumes of these records. These documents were duly certified from these records by the Surveyor-General. They embraced a petition of the widow of Antonio Rocha to the prefect, dated Los Angeles, April 13, 1840, stating that the tract La Brea had been ceded provisionally to her deceased husband, lying two leagues distant from the city, and which had been covered with cattle and horses, and designed to secure subsistence for her numerous family, solicits, etc., the place, giving a general description of it.

The prefect referred the petition to a justice of the peace at Los Angeles, to inform him in respect to the petition and the petitioner on the 14th April; and on the 28th of the month, the justice reported that he went with two witnesses to examine the land which is shown in the annexed *diseño* of La Brea, to see if it was in conformity with the petition, and that she had the stock required by the Ordinance, and reported that there was no objection to the land being conceded to her. On the 2d May following, the prefect communicated with the Governor informing him of the petition of the widow, and advising that there was no objection to the granting of the petition, and on the 10th May the grant was made in the following words: "In conformity with the disposition of His Excellency, the Señor Governor, communicated to this prefecture in a note of the 27th of April last, with respect to the

resolution of the excellent Departmental Junta, all of the places ceded for *ranchos* of this jurisdiction, will remain of the character of provisional, until the *ejidos* of the city shall be regulated. I have made known the superior disposition to the interested party to this petition, and she remains informed." On the 4th October, 1862, leave to file the bill of review was granted. It was subsequently filed and an answer put in to the same, and leave granted for further testimony. Four witnesses were examined on the part of the appellant, in addition to those examined before the commissioners, and on the 8th December, 1864, the decree of dismissal was set aside, and the decision of the Commissioners reversed, and the claim of the appellants confirmed.

The case is now before us on appeal.

Several objections are taken to the decree of the court below. The first is, that this court had no power to grant the relief prayed for by a bill or petition of review. As we have seen, the cause was dismissed the 8th of August, 1860, for want of prosecution; and, on the 22d of February, 1861, some five months afterwards notice was given for leave to file this petition, which was granted on the 4th of October, 1862, at a special term of the court, sitting at Los Angeles. There was no great delay, therefore, in making the application for relief, founded on the newly discovered evidence. The 9th section of the Act of March 3d, 1851, 9 Stat. at L., 681, for the settlement of California land claims, provides that the claimant, if he fails before the commissioners, may present a petition to the United States District Court praying the court to review the decision; and the 10th section, that the court shall proceed to render judgment upon the pleadings and evidence in the case, before the commissioners, and upon such further evidence as may be taken by order of the court; the 11th section, that the district courts, and the Supreme Court on appeal, shall, "in deciding on the validity of any claim brought before them under the provisions of the Act, be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, as far as they are applicable."

This provision, doubtless, refers to the rules to be observed by the courts in passing upon the merits of the claimant's right or title to the land; but no one can avoid seeing that the liberal and equitable principles thus enjoined as a duty in the decision of the cases, cannot be fully or fairly carried out, without giving to them a reasonable application and effect in conducting the proceedings before the courts as well as in passing upon the merits. And, regarding these principles in this light, we cannot agree that the court possessed no power to open the case for the purpose of hearing the newly discovered evidence. It is not important what the proceedings are called, petition of review, or motion to set aside the decree dismissing the case for want of prosecution, for the purpose of letting in the new evidence. There has been no decree on the merits. The confusion and disorder that existed, in respect to the Spanish and Mexican archives at the

close of the war, when the Mexican authorities hastily left the country, has been shown in several cases before this court; and some indulgence is due to an honest claimant as to the order and time in which to produce his evidence.

The next question, and the only remaining one, that it is material to notice, is whether the case presented to the court below justified the confirmation of the claim.

Antonio José Rocha and his legal representatives had been in the possession and occupation of the land in question, claiming title to the same, for a period of twenty-four years, when, in 1852, the petition was presented to the commissioners for confirmation. The representatives have since been in the possession and occupation, and in continued litigation to defend their rights for the period of eighteen years, making an uninterrupted possession of forty-two years. The present appellees are the children and grandchildren of the original occupant of the tract as early as 1828. He was then a blacksmith by trade, and one of the most respectable and substantial settlers in the *pueblo* of Los Angeles. The first claim of title under which he took possession was a grant of the president of the *ayuntamiento* of this *pueblo* dated April 8th, 1828. The document is in the usual form by which grants were made of *pueblo* lands. Carillo, the President, still living in Los Angeles, was examined before the commissioners, and verified the document as original and signed by him. The *ranchito* La Brea was then, and long afterwards, supposed to belong to the *pueblo*, and, if so, the council of the city had the right to dispose of it. This right is recognized in the Act of 1851 for settling these titles. Section 14 enacts "that the provisions of this Act shall not extend to any town lot, farm lot, or pasture lot held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish to Mexican governments." The section then provides that the claim for land embraced within the limits of the town may be presented to the commissioners by the corporate authorities.

It appears from the evidence that it was the general understanding and belief of the authorities of the City of Los Angeles, at the time, that the *Rancho La Brea* was situated within the limits of the city, and which was founded on an idea, which was prevalent, that a *pueblo*, according to Mexican laws, was entitled from the Government to sixteen square leagues; whereas, it was ultimately determined that it was entitled only to four, which left this ranch outside of the city limits. But this was not settled till after the cession to this government. The City of Los Angeles presented their petition before the commissioners for the confirmation of sixteen square leagues. Four only were confirmed.

Then, as to the second claim, founded on this newly discovered evidence. This is obtained from Governor Alvarado, in the year 1840. It is true that the formal papers were before Tiburcio Tapia, the prefect of the district, but authority had been conferred upon him by the Governor. The authority was issued March 7th, 1839. It states, 1st, that persons presenting petitions for land shall direct the same to the prefects of the district, who will

make report on them: 2d, these *expedientes* shall be directed to the Secretary of the State by the prefects.

The reason assigned was for the convenience of the people, most of whom resided at great distances from Monterey, the residence of the governor. The City of Los Angeles was over four hundred miles distant. The papers in the case conform strictly to this regulation. Objection is made that there was no proof of the signatures of the officials to the *expediente*; but the answer is, that no objection was made to it upon this ground in the court below; nor, indeed, does it appear that any objection was made to it as it respected the genuineness of the papers. The objection seems to have been founded on the legal effect of the instrument as a concession of any title to the premises. The prefect had expressed his opinion to the Governor that there was no objection to the grant of the land to the petitioner; but the Governor, it would seem, being uncertain whether or not the tract might not lie within the limits of the town lands, or *ejidos* of the City of Los Angeles, issued his decree that this as well as other neighboring tracts theretofore ceded for *ranchos* within the jurisdiction of the prefect of this district, should remain as provisional grants until the *ejidos* of the city should be ascertained. The prefect was directed to make this communication to the petitioner, which he did.

We think it clear, that the fair import and effect of this instrument, reading it in connection with the petition of the widow, that she and her children should take the titles provisionally, that is, if the tract fell within the limits of the town land, when they were ascertained it should be inoperative; but if outside these limits, the title should become absolute.

The petitioner had stated in her petition that she was the widow of Antonio Rocha; that the tract had been ceded to her husband, in 1828, provisionally; that it was about two leagues from the City of Los Angeles; that it was covered with cattle and horses, and that she desired it for the subsistence of her numerous family.

The *ejidos* were not ascertained during the existence of the Mexican Government, as the disturbances broke out soon after this grant, which resulted in the war with this country and the cession of the lands. Since the peace, the limits belonging to the city have been defined under the direction of the Surveyor-General of the United States, and the premises in question are not included within them. If this had taken place under the former government, it cannot, we think, be doubted but that under the Mexican laws and usages this title would have become perfect, and hence, under the Treaty and Act of Congress, it is the duty of this court so to hold. As we have seen, that Treaty and Act of Congress make it our duty to decide these cases "according to the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of this court as far as applicable." Here the claimants and their ancestors have been in the uninterrupted possession and occupation approaching the period of half a century, having entered first under a *pueblo* grant, which

See 9 WALL.

at the time was supposed to be in pursuance of authority; and, second, was confirmed by a provisional grant from the Mexican Governor, who possessed full authority, which, we think, fairly enough brings the case within the principles governing these cases.

The decree below affirmed.

Mr. Justice Clifford, dissenting:

I dissent from the opinion and decree of the court in this case, for the following reasons:

1. Because the *ayuntamiento* of Los Angeles never possessed any authority to make such a grant, and it follows of course that the document purporting to be signed by the *alcalde* is null and void. Argument upon that topic is unnecessary, as the claimants admit that the proposition is correct.

2. Because the additional documents exhibited by the claimants in the district court show conclusively, not only that those under whom the appellees claim never had any grant from the Governor under the colonization laws, but that the Governor, when the application was made to him for that purpose, peremptorily refused to make the grant; and that they never had any grant or concession of any kind from the Governor of the department.

3. Because possession before the Treaty, of the public lands held by the former government, without any title, is not sufficient evidence to warrant a confirmation of such a claim. Authorities to support that proposition are not necessary, as they are very numerous in the decisions of this court published within the last ten years.

Concurring, in dissent, *Mr. Justice Davis.*

UNITED STATES, *Appt.*,

v.

NELSON ANDERSON.

(See S. C., 9 Wall., 56-72).

Acts of Congress—claimant not a witness in Court of Claims—jurisdiction of such court.

The Acts of Mar. 12, 1863, and of July 17, 1862, cannot be construed *in part materia*; the one is penal, the other remedial.

The claimant in the Court of Claims cannot testify in the Court of Claims, nor can the person who, after a claim has accrued to him against the United States, has sold or transferred it to the claimant; nor can any one who is interested in the event of the suit.

Aug. 20, 1866, is the time when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.

The Court of Claims was authorized to render judgment for a specific sum, in a claim made under said Act.

[No. 387.]

Argued Feb. 10, 1870. Decided Feb. 23, 1870.

APPEAL from the Court of Claims.

The claim in this case was preferred June 5, 1863, to the Court of Claims to recover the proceeds of certain property under the Act of March 12th, 1863.

Judgment for \$6,723.36 was rendered in favor of the claimant in the court below. Whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty. Gen., and Robert S. Hale, special counsel for appellant:

The action was not brought within two years after the suppression of the rebellion, and the court had no jurisdiction under the Act.

The existence of the rebellion, its commencement and suppression, and the respective dates of these are historical facts which the court is bound to notice and know. They are facts whose existence does not depend on any declaration or other legislative or executive Act.

The true test of the existence of civil war is summarily stated by this court in the *Price* cases, 2 Black, 667 (87 U. S., XVII., 476); when the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, civil war exists, etc.

The test of its termination is logically the same;—when the armed organization against the Government has ceased to exist, when the courts of justice are no longer prevented by violence; when there is no longer civil war, and the rebellion is suppressed.

Hanger v. Abbott, 6 Wall., 532, 541 (73 U. S., XVIII., 939).

In April, 1865, the armies of the rebel Generals, Lee and Johnson, surrendered, followed by the surrender of Taylor's Army, May 4, and by that of Kirby Smith, May 26, 1865.

If the rebellion was not suppressed within the meaning of this Act until Aug. 20, 1866, as held by the Court of Claims, and the condition of war still continued, it follows that until the last named date the rebel States were still a hostile and belligerent power to the United States; its inhabitants, in law, enemies of the United States; all intercourse, commercial or otherwise, between them unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence (and down to August, 1866), utterly void.

The Executive and Administrative Departments of the Government recognized the restoration of peaceful relations by the re-opening of postoffices; (Postmaster-General's Report, 1866, p. 268); the letting of contracts for mail service throughout the rebellious States; (Postmaster-General's Report, 1865, pp. 9, 10); and the extending of the revenue system throughout the same States. (Report of the Secretary of the Treasury, 1865, pp. 29, 30).

The United States Courts were re-opened in the insurrectionary districts.

The various Proclamations of the President issued in May, June, and July, 1865 (13 Stat. at L., pp. 757-777), do not create the condition of peace, but are simply the Executive recognitions of the fact that peace was restored, precisely as the action of the courts constituted judicial recognitions of the same fact.

But if it shall be held that official, executive or legislative action is requisite to establish the fact of the termination of the rebellion, then it is submitted that the Proclamation of the President of June 17, 1865 (13 Stat. at L., 764), is a complete recognition and declaration of the suppression of the rebellion within the State of Georgia; and that the cause of action having arisen in that State, the statute begins to run whenever the rebellion is there suppressed.

The Proclamation of 13th June, 1865 (13 Stat. at L., 763), removed all restrictions on "internal, domestic and coastwise intercourse and trade," with all the insurrectionary States east of the Mississippi, and thus recognized the termination of the war as to those States. Freedom of mutual intercourse and trade is, in itself, inconsistent with a condition of war, and the restoration of such freedom is the recognition of peace. And see, on this head, the opinion of Judge Shipman in the Circuit Court for the District of Connecticut in *Semmes v. Ins. Co.*, 8 Am. Law Reg. (N. S.), 673.

The cause of action arose in South Carolina, and reference is made to the Proclamation of 30th June, 1865 (13 Stat. at L., 769).

The suit was also brought subsequently to Apr. 2, 1868, the termination of two years from the Proclamation of Apr. 2, 1866 (14 Stat. at L., 811), to which reference is also had.

The cotton having been bought after Sep. 23, 1862, of persons proven to have given aid and comfort to the rebellion after that date, and presumed as such from their residence under the Act of 25th June, 1863 (15 Stat. at L., 75), the title of the claimants falls under the Act of July 17, 1862. 13 Stat. at L., 590.

The court below erred in admitting the depositions of the vendors of the cotton in question to the claimant, they being incompetent under the 14th section of the Act of June 25, 1868. 15 Stat. at L., p. 75.

The court below erred in assuming to determine the amount of the net proceeds of the cotton in question, and to render judgment for a specific sum.

Messrs. T. J. D. Fuller, A. G. Riddle, Geo. Taylor, J. A. Wills and W. Penn Clarke, for appellee.

When did the Statute commence to run? When was the rebellion suppressed?

It is not for the court to determine, but for the law making power to determine.

2 W. Va., 416; *Williams v. Ins. Co.*, 13 Pet., 420; *Forster v. Neilson*, 2 Pet., 314; *U. S. v. Percheman*, 7 Pet., 86; *Garnett v. Jenkins*, 8 Pet., 70; *Luther v. Borden*, 7 Pet., 44.

The law making power and the executive power concurrently have settled the question and fixed the point of time at Aug. 20, 1866.

The President, by his Proclamation of June 15, 1865, declares the insurrection (not rebellion), at an end in the State of Tennessee; and by his Proclamation of April 2, 1866, declares the insurrection (not the rebellion) at an end in the States therein enumerated, excepting the State of Texas. By his final Proclamation of August 20, 1866, he adds the additional clause, not found in any previous Proclamation, to wit:

"And I do further proclaim that the said insurrection is at an end, and that peace, order, tranquillity and civil authority now exist in and throughout the whole of the United States."

In the 2d section of the Act of March 2, 1867 (Vol. 13, p. 422), occurs this language: "From and after the close of the rebellion, as announced by the President of the United States by his Proclamation bearing date August 20, 1866."

This enactment is a legislative sanction and approval of the Proclamation of the President. The next question is: what effect shall be given to the Statute of July 17, 1862 (Vol. 12, p. 591), as it respects this claimant? He purchased his

cotton in the usual course of trade, long anterior to the surrender of Charleston, in good faith and with no design or intent to give aid or comfort to the rebellion, or to persons engaged in it, and the record so finds.

Mr. Justice Davis delivered the opinion of the court:

The claim in this case was preferred on the 5th of June, 1868, to the Court of Claims, under the provisions of the Act to Provide for the Collection of Abandoned Property, passed Mar. 12, 1863 (12 Stat. at L. 820), and the question for decision is, whether the court was right in rendering a judgment for the claimant on the facts which it found to be true. These facts are substantially as follows: the claimant, Nelson Anderson, a free man of color, possessed of real and personal property, by occupation a drayman and cotton sampler, and a resident of Charleston, South Carolina, in the early part of the war purchased some cotton of Daniel F. Fleming, and in the fall of 1864, before the evacuation of Charleston, other cotton of Philip M. Doucen. On the 5th of March, 1865, Anderson reported his cotton to the United States military authorities, and on the 5th of April following, it was removed, under their direction, from its place of deposit to the Charleston custom-house, from whence it was shipped to New York, and there sold for the United States, and the gross proceeds paid into the Treasury. The net proceeds amounted to the sum of \$6,723.36, for which the court rendered judgment against the United States. Fleming and Doucen, from whom the cotton was purchased, resided within the insurrectionary territory, and their loyalty was not proven; but the claimant proved his own loyalty, and that he never gave any aid or comfort to the rebellion, or to the persons who were engaged in it.

The counsel for the Government urges four principal grounds of objection to the recovery in this case.

1. That the action is barred by the limitation in the Statute.

2. If, however, in this they are mistaken, the suit must, nevertheless, fail, because the persons who sold the property to Anderson, being residents of an insurrectionary district, were unable under the state of the law on this subject, to convey title to him.

3. That the vendors of the cotton in question were incompetent witnesses, and their testimony should have been excluded by the court.

4. That the court had no authority to render judgment for a specific sum, the power of the court being limited to deciding whether the claimant was entitled to recover at all, leaving the amount to be determined by computation by the proper officers of the Treasury Department.

Whether these positions are well taken or not, depends on the construction to be given to the Act concerning abandoned and captured property, and the 4th section of the Act of June 25th, 1868.

The Act of March 12, 1863, in one particular, inaugurated a policy different from that which induced the passage of other measures rendered necessary by the obstinacy and magnitude of the resistance to the supremacy of the national authority. To overcome this resistance, and to carry on the war successfully,

the entire people of the States in rebellion were considered as public enemies; but it is familiar history that there were many persons whom necessity required should be treated as enemies who were friends, and adhered with fidelity to the national cause. This class of people, compelled to live among those who were combined to overthrow the federal authority, and liable at all times to be stripped of their property by the usurped government, were objects of sympathy to the loyal people of this country, and their unfortunate condition was appreciated by Congress.

During the progress of the war it was expected that our forces in the field would capture property and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the *status* of the loyal Southern people, and distinguished between property owned by them and the property of the disloyal. It was not required to do this, for all the property obtained in this manner could, by proper proceedings, have been appropriated to the necessities of the war. But Congress did not think proper to do this. In a spirit of liberality it constituted the Government a trustee for so much of this property as belonged to the faithful Southern people, and while directing that all of it should be sold and its proceeds paid into the Treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in the Court of Claims, and establish their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership.

It is true the liberality of Congress in this regard was not confined to Southern owners, for the law is general in its terms, and protects all loyal owners; but the number of Northern citizens who could, in any state of the case, be *bona fide* owners of this kind of property was necessarily few, and their condition, although recognized in the law, did not induce Congress to incorporate in it the provision we are considering.

The measure, in itself of great beneficence, was practically important only in its application to the loyal Southern people, and sympathy for their situation doubtless prompted Congress to pass it. It is in view of this state of things, as it is the duty of a court in construing a law to consider the circumstances under which it was passed and the object to be accomplished by it, that we are called upon to apply this particular provision to the facts of this case. The loyalty of the claimant is not questioned, but his ownership, in the sense of the law, of the property in dispute is denied.

It is not denied that he purchased the property in good faith for value, and with no purpose to defraud the Government or anyone else; but it is said that the persons from whom he bought resided in South Carolina, were presumed to be rebels and were, therefore, prohibited from selling.

This is an attempt to import from the confiscation law of July 17, 1862, into this law, a dis-

ability which it does not contain. If this could be done, but very little benefit would accrue to the loyal people of the South from the privilege conferred upon them by the law in question. It is well known that nearly all the Southern people were engaged in the rebellion, and that those who were not thus employed furnished the exception rather than the rule. Few as they were, the necessities of life required that they should buy and sell, and, equally so, that their trading should be free and unrestricted.

This condition of things Congress was aware of, and if it had been its purpose to limit the privilege in controversy to the loyal citizen, who happened to acquire his property from another person equally loyal, they would have said so. But Congress had no such narrow policy in view. Its policy in the matter was broad and comprehensive, and embraced within its range all persons who had adhered to the Union. It treated all alike, and did not discriminate in favor of the person who could trace his title through a loyal source, and against him who was not so fortunate. It did not consider the loyal planter, who raised his own cotton and rice, as entitled to any more protection than the dweller in the cities and towns who lived by traffic, and bought where he could buy the cheapest.

The confiscation law, however, was not intended to apply to a person occupying the *status* of this claimant. The purpose which Congress had in view in passing that law was very different from that which induced it, in the Captured and Abandoned Property Act, to extend a privilege to the loyal owner. The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, in so far as it claims the right to seize and condemn their property, as a punishment for their crimes, recognizes that certain legal proceedings are necessary to do so. But by the Act in question the Government yielded its right to seize and condemn the property which it took in the enemy's country if it belonged to a faithful citizen, and substantially said to him, "We are obliged to take the property of friend and foe alike, which we will sell and deposit the proceeds of in the Treasury; and if, at any time within two years after the suppression of the rebellion, you prove satisfactorily that of the property thus taken you owned a part, we will pay you the net amount received from its sale."

The two Acts cannot be construed *in pari materia*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege.

It is said the vendors of the cotton were incompetent witnesses by reason of the 4th section of the Act of June 25th 1868 (15 Stat. at L., p. 75), which declares that no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim, or right against the United States, or any person interested in any such title, claim or right, shall be a competent witness in the Court of Claims in supporting any such title, claim or right.

There are three classes of persons who are, by this section prohibited from testifying. The claimant cannot testify, nor can the person who, after a claim has accrued to him against the

United States, has sold or transferred it to the claimant, nor can any one who is interested in the event of the suit. Doucen and Fleming, the immediate vendors of Anderson, are not excluded by this rule. They were not interested in the suit, and in no sense did Anderson derive his claim against the United States through them. They never had any claim against the United States, because when the property was taken it belonged to Anderson, and it is only after the property was sold that Anderson's claim, even to the proceeds, attached. If the property *in transitu* from Charleston to New York had been lost, no claim could arise under the law in favor of Anderson against the United States, his claim being contingent upon the proceeds of the property finally reaching the treasury.

But the point most pressed in the argument against the right to recover in this case relates to the limitation in the law. It is contended that the claim was barred by this limitation, as it was not preferred until the 5th of June, 1868. It is, therefore, necessary to determine when the time for preferring claims commenced, and when it ended. The words of the statute on this subject are, that any person claiming to be the owner of abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims. There is certainly nothing in the words of this provision which disables a person from preferring his claim immediately after the proceeds of his property have reached the Treasury, and there is no good reason why a different interpretation should be given them. On the contrary, there is sufficient reason in the nature of the legislation on this subject, apart from the letter of the law, to bring the mind to the conclusion that Congress intended to give the claimant an immediate right of action. The same motive that prompted Congress to grant the privilege to prefer a claim at all, operated to allow it to be done so soon as the property had been converted into money. If in the condition of the country, it was known that the Union men of the South, as a general thing, would be unable to prosecute their claims while the war lasted, still it was recognized that some persons might be fortunate enough to do so, and to meet the requirements of their cases the right to sue at once was conferred. In the progress of the war, as our armies advanced and were able to afford protection to the Union people, it was expected that many of them, availing themselves of the opportunity, would escape into the national lines, and be thus in a condition to secure the rights conceded to them by this statute; and the history of the times informs us that this expectation was realized. To impute to Congress a design to compel these people, impoverished as they were known to be, to wait until the war was over before they could institute proceedings in the Court of Claims, would be inconsistent with the general spirit of the statute, and cannot be entertained. If, then, the right to prefer a claim attached as soon as the money reached the Treasury, when did it expire? The law says, two years after the rebellion was suppressed; but the question recurs, when is the rebellion to be considered suppressed, as regards the rights intended to be

secured by this statute? It is very clear that the limitation applied to the entire suppression of the rebellion, and that no one was intended to be affected by its suppression in any particular locality. It might be suppressed in one State and not in another, but the citizen of the State that has ceased hostilities was in no better or worse position in this regard than the citizen of the State where hostilities were active. The limitation was not partial in its character, but operated on all persons alike who are affected by it; was dependent on the solution of a great problem, and an interpretation of it which would prescribe one rule for the people of one State, and a different rule for those living in another State, cannot be allowed to prevail.

The point, therefore, for determination is: when, in the sense of this law, was the rebellion entirely suppressed? And in this connection it is proper to say, that the purposes of this suit do not require us to discuss the question—which may have an important bearing on other cases—whether the rebellion can be considered as suppressed for one purpose and not for another, nor any of the kindred questions arising out of it, and we, therefore, express no opinion on the subject.

The inquiry with which we have to deal concerns its suppression only in its relation to those persons who are within the protection of this law. It is argued, as the rebellion was in point of fact suppressed when the last Confederate general surrendered to the national authority, that the limitation began to run from that date. If this were so, there is an end to the controversy; but did Congress mean, when it passed the statute in question, that the Union men of the South, whose interests are especially cared for by it, should, without any action by Congress or the Executive on the subject, take notice of the day that armed hostilities ceased between the contending parties, and if they did not present their claims within two years of that time, be forever barred of their recovery? The inherent difficulty of determining such a matter, renders it certain that Congress did not intend to impose on this class of persons the necessity of deciding it for themselves. In a foreign war, a treaty of peace would be the evidence of the time when it closed; but in a domestic war, like the late one, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated, and we are of the opinion that Congress did not intend that the limitation in this Act should begin to run until this was done. There are various Acts of Congress and Proclamations of the President bearing on the subject, but in the view we take of this case, it is only necessary to notice the Proclamation of the President, of August 20, 1866, and the Act of Congress of the 2d of March, 1867.

On the 20th day of August, 1866, the President of the United States, after reciting certain Proclamations and Acts of Congress concerning the Rebellion, and his Proclamation of the 2d of April, 1866, that armed resistance had ceased everywhere except in the State of Texas, did proclaim that it had ceased there also, and that the whole insurrection was at an end, and that peace, order, and tranquillity existed throughout the whole of the United States of America.

See: WALL.

This is the first official declaration that we have, on the part of the Executive, that the rebellion was wholly suppressed, and we have shown, in a previous part of this opinion, that the limitation, in its effect on the persons whose rights we are considering, did not begin to run until the rebellion was suppressed throughout the whole country. But we are not without the action of the Legislative Department of the Government on this subject. On the 20th day of June, 1864 (13 Stat. at L., 144), Congress fixed the pay of non-commissioned officers and privates, and declared that it should continue during the rebellion; and on the 2d day of March 1867 (14 Stat. at L., 421), it continued this Act in force for three years from and after the close of the rebellion, as announced by the Proclamation of the President.

Congress, then, having adopted the 20th day of August, 1866, in conformity with the announcement of the President, as the day the rebellion closed, for the purpose of regulating the pay of non-commissioned officers and privates, can it be supposed that it intended to lay down a harsher rule for the guidance of the claimants under the Captured and Abandoned Property Act, than it thought proper to apply to another class of persons whose interests it equally desired to protect? In order to reach this conclusion, it is necessary to ascribe to Congress a policy regarding the statute under which this claim is preferred foreign to the views we have expressed concerning it. Besides, it would require us to construe two Acts differently, although relating to the same general subject, in the absence of any evidence that such was the intention of the Legislature. If we are right as to the motive which prompted Congress to pass the law in question, and the object to be accomplished by it, it is clear the point of time should be construed most favorably to the person who adhered to the National Union, and who has proved the Government took his property, and has the money arising from its sale in the Treasury.

As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it. That day will, therefore, be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.

The point taken that the court below was not authorized to render judgment for a specific sum, but only to determine whether the claimant was entitled to receive the proceeds of his property, leaving it for an officer of the Treasury to fix the amount, cannot be sustained. To sustain this position would require us to hold that for this class of cases Congress intended to constitute the Court of Claims a mere commission. This court will not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect.

It is proper to say, in conclusion, that the case of *McKee v. U. S.* [ante, 329], decided at the last term, cited as an authority against the claimant's right to recover, has no application whatever to this case.

The judgment of the Court of Claims is affirmed.

Cited—9 Wall., 538; 10 Wall., 25; 11 Wall., 253; 13 Wall., 149; 14 Wall., 374; 19 Wall., 525; 22 Wall., 96; 22 U. S., 194; 102 U. S., 438; 1 Dill., 575; 1 Sawy., 406; 9 Am. Rep., 665 (35 Ind., 145).

THE UNITED STATES, *Appt.*,

v.

WILLIAM POLLARD.

THE UNITED STATES, *Appt.*,

v.

MORRIS KOHN.

THE UNITED STATES, *Appt.*,

v.

HULDAH L. STANTON ET AL.

[Nos. 891, 859, 890.]

A PPEALS from the Court of Claims.

There are no material points of difference between these cases and the cases of *The U. S. v. Nelson Anderson*, decided at this term, and the views presented in that case dispose of these.

The judgment of the Court of Claims in each of the above named cases is affirmed.

Ex parte IN THE MATTER OF JOHN F. PAR-
GOUD, *Petitioner*.

Mandamus to Court of Claims to compel it to allow an appeal.

The case of *Ex parte Zellner*, *post*, 665, followed, and a *mandamus* granted to compel the Court of Claims to allow an appeal from the decree in that court.

[No. 9, Original.]

Argued Feb. 18, 1870. Decided Feb. 28, 1870.

PETITION for *mandamus* to the Judges of the Court of Claims.

The relator filed a petition in the court below, for the proceeds of certain bales of cotton. The said petition having been dismissed by a decree of that court, on the ground that it had not jurisdiction of the same, upon the allegations of the petition, the petitioner made application for the allowance of an appeal to this court, which application was denied. Whereupon the said petitioner prays this court for a writ of *mandamus*, to compel the allowance of said appeal.

Messrs. Riddle and Thomas J. Durant, for the relator.

Mr. Robert S. Hale, special counsel, for the United States.

Mr. Justice Nelson delivered the opinion of the court:

This is a petition on behalf of Pargoud, the relator, for a *mandamus* to the Court of Claims, to compel them to allow an appeal from a decree against him in that court.

The case falls within the case of *Zellner* [*post*, 665], and the motion must be granted.

Motion for a peremptory mandamus granted.

THE STEAMBOAT M. BURNS, her Tackle,
etc., *Piff. in Err.*,

v.

JAMES F. REYNOLDS AND JAMES
AIKEN;

AND

SAME

v.

THOMAS MORRISON AND THOMAS F.
McENNIS.

(See S. C., 9 Wall., 237-240.)

Appeal in the name of a steamboat, improper.

Appeal or writ of error should be brought by some person who asserted an interest in the vessel. It cannot be done in the name of the steamboat.

[Nos. 58, 59.]

Argued Feb. 4, 25, 1870. Decided Feb. 28, 1870.

IN ERROR to the Supreme Court of the State of Missouri.

A petition was filed in the Circuit Court of St. Louis County, State of Missouri, by Thomas Morrison und Thomas McEnnis, to obtain judgment with a lien upon the steamboat, M. Burns, and a judgment was duly entered in their favor in said court. In the course of the proceedings thus instituted, a claim was presented in said court by James F. Reynolds and James Aiken against said steamboat, and a judgment entered in their favor. In each case the judgment was entered in form against the steamboat, M. Burns, as defendant. Upon an appeal to the Supreme Court of the State, the said judgments were affirmed. Whereupon these writs of error were sued out in the name of the said steamboat, M. Burns, as plaintiff in error.

The case is sufficiently stated by the court.

Messrs. John H. Rankin and John A. Wills, for plaintiff in error:

The proceeding is one under a special statute of Missouri, the like of which in all its terms is found in no other State.

That Statute, as construed by the Supreme Court, makes the boat itself a party to the record, and the active, moving party; the plaintiff in error or the appellant above, and the plaintiff or defendant (as the case may be), in the court below. Suppose that this court is of opinion that the practice of the courts of Missouri under the statute has hitherto been erroneous, would it not, nevertheless, acquiesce in the state practice? This court has said in *Bk. v. Knoop*, 16 How., 869, "The established construction of a statute of the State is received as a part of the statute"; see, also, *Pease v. Peck*, 18 How., 598 (59 U. S., XV., 520).

The record of the present case is made up in the courts of this State. It cannot now be altered. The boat is the defendant, and the only defendant throughout. Adolphe Heinecke, the owner, appears only as an agent of the boat. The judgment runs thus: "In the matter of the steamboat, M. Burns. Now at this day comes the defendant by its attorney, etc." The entry of the appeal allowed in the St. Louis Circuit Court to the Supreme Court, is as follows: "*Thomas Morrison v. Steamboat M. Burns*. Now comes the defendant by attorney, etc. An appeal is allowed it, etc. It thereupon files an appeal bond which is approved."

How should a writ of error be taken? The words of the Judiciary Act are "the adverse party." "No one can bring up as plaintiff in a writ of error, the judgment of an inferior court to a superior one, unless he was a party to the judgment in the court below."

Payne v. Niles, 20 How., 219 (61 U. S., XV., 895).

Mr. George P. Strong, for defendants in error.

(The arguments of counsel are given only upon the point considered by the court.)

Mr. Justice Miller delivered the opinion of the court:

These cases are brought before us by what purport to be writs of error to the Supreme Court of Missouri. The writ in the first place refers to a judgment in that court in a suit between the steamboat, *M. Burns*, her tackle, etc., appellants, and *James F. Reynolds* and *James Aiken*, respondents and appellees, in which "A manifest error hath appeared to the great damage of the said steamboat, her tackle, etc., as by her complaint appears." The citation makes the same recital. The writ and citation in the second case only vary from this in the names of the defendants in error.

It is believed to be the first time that anything but a human being, or an aggregation of human beings, called a corporation or association, has attempted to bring a writ of error or appeal in this court.

It is said in support of the writ that the proceeding below was *in rem* against the steamboat by name, and that as it was so conducted through all the state courts it should be so here.

There is nothing in the essential nature of proceedings *in rem* which justifies or requires this. Whenever the *res* is seized in admiralty proceedings proper, or in revenue or other proceedings partaking of that character, the property is condemned and sold, and with the distribution of the proceeds the case ends, unless some one appears in court as claimant either of the *res* or its proceeds. When a claimant appears he becomes a party to the proceedings, and may defend, take an appeal or writ of error, or adopt any other proceeding that a party properly before the court may be entitled to.

It is true, that in placing such cases on the dockets of our courts, and in the reports of our decisions, the name of the vessel or thing seized is often retained; but in all cases where any defensive action is taken, some person must appear and claim an interest or a right to be heard on account of his relation to the property.

It is said that the Statute of Missouri allows the steamboat to be sued by name, and allows a defense to be made by the owner in the name of the vessel. But the States cannot in this manner confer on an inanimate object, without sense or reason, or legal capacity, the right to prosecute legal proceedings in the Federal Courts. Nor does the statute under which these proceedings were had in the state court present any difficulty to a party interested in the boat, in asserting his rights. Section 12 of the Steamboat Law (1 Rev. Stat., Mo., 806), provides that the owner, captain, agent, consignee, or any creditor of the boat, may appear to the action, on behalf of the boat or vessel,
See 9 WALL.

and plead thereto and defend the same; and though it has been the practice to do this in the name of the vessel, it has never been held, nor do we suppose it will ever be by the state courts, that an owner cannot appear in his own name and assert his rights in the vessel.

Section 38, however, relieves the matter of all embarrassment, and shows that the framers of the statute seemed to think as we do, that when an appeal or writ of error was to take the case to a higher court, it should be by some person who asserted an interest in the vessel. With the liberal provision which that section makes for review of the judgment, there can be no necessity that we shall so far violate reason and law as to permit a steamboat to bring a suit here by writ of error.

If any person or corporation whom this court can recognize as a legal entity, capable of sustaining a suit in this court, has an interest in such a controversy, that party must connect himself with the case in such a manner as to enable himself to assert his rights here. It cannot be done in the name of a steamboat.

An examination of the records in these cases shows that *Adolph Heinecke* did in the inferior court claim to be the owner, and defended the suit in the name of the steamboat. He likewise made affidavit that he was the owner, and gave bonds to enable him to appeal to the Supreme Court of the State. But instead of taking the appeal in his own name he took it in the name of the steamboat. We are of opinion that by a liberal construction of the record he may be so far regarded as claimant and party to the record as to enable him to bring a writ of error to this court in his own name if he shall be so advised.

The present writs are dismissed.

JOHN H. INGLE, Administrator *de bonis non*, etc., of *ANN R. DERMOTT*, Deceased, and *HORACE STRINGFELLOW ET AL.*, Appts.,

v.

ZEPHANIAH JONES.

(See S. C., 9 Wall., 486-500.)

Judgment against administrator not evidence against the heir—Administrator as trustee—Statute of Limitations—discretionary order—decree of sale.

A judgment against the administrator is not evidence against the heir.

Duties of an administrator are confined to the personal estate.

A power given to an executor, by a will, never passes by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power, in place of the executor appointed by the will.

Defense of the Statute of Limitations interposed by the administrator cannot avail those who represent the real estate, in an action to subject the real estate to the payment of a debt.

The decision of the court below, as to enlarging the time to take testimony, will not be reviewed except in flagrant cases.

It is not necessary that the amount of the liabilities to be paid out of the proceeds of the sale of real estate should have been ascertained before the decree of sale was made.

[No. 18].

Argued Dec. 9, 1869. Decided Feb. 28, 1870.

A PPEAL from the Supreme Court of the District of Columbia.

An action was brought by the appellee, to recover from Ann R. Dermott for the erection of a certain building. After a judgment in the case had been twice rendered in that court and reversed by this case, a judgment was rendered, and a reference ordered by the court below to the auditor, to ascertain and report the personal assets of Ann R. Dermott in the hands of her administrator. That judgment was not reviewed. The report of an auditor taken in the proceedings showed that there were no personal assets applicable to the debt.

Thereupon the complainant filed his bill in this case against the said administrator and the heirs at law of said Ann R. Dermott, to obtain satisfaction of his debts by a sale of the real estate, on which the said building had been erected by him. A receiver of said real estate was appointed. A decree having been entered in favor of the complainant, the respondents took an appeal to this court.

The case is further stated by the court.

Messrs. R. J. and J. L. Brent, S. L. Phillips and R. T. Merrick, for appellants.

The supposed judgment at law is inoperative, and of no effect in this equity suit.

It was on its face but interlocutory, and not a final judgment.

The proceeding in this suit at law is regulated by the Acts of Maryland, in force in this District at the date of its cession to the United States, Congress having adopted all those Acts in 1801.

The case falls precisely under the provisions of the Maryland Act of 1786, ch. 80, sec. 1. By this Act it is substantially declared, that "The representative so appearing shall not be burdened with the debt, damages or costs, further than property or assets have come to his hands."

But it may be said that the statement in the record that the court in General Term affirmed this judgment, on appeal, and adjudged that "The plaintiff recover against the defendant the damages aforesaid, in manner and form aforesaid adjudged to be levied as aforesaid, when ascertained by the auditor as directed in said judgment."

This has the form of a judgment as against the administrator, for the whole debt to be levied when ascertained, etc. But it is, in fact, and so manifestly intended to be, merely the affirmance of the order referring it to the auditor, and directing that judgment shall be entered when the auditor reports.

Such an interlocutory judgment is not a lien upon the real property, because no execution could be issued on it against the lands.

Davidson v. Myers, 24 Md., 555; *U. S. v. Morrison*, 4 Pet., 136; 1 Tidd, Pr., 568.

But so far as this bill in equity to sell the real estate relies on the verdict and interlocutory judgment at law, it is clearly inadmissible to affect the heirs at law, who are defendants, because Mrs. Dermott dying, her administrator appeared to that action at law, and the judgment establishing the debt only binds the personal estate, as the administrator only defended the suit in his character of administrator.

2. John H. Ingle, as administrator with the

will annexed, represented the rents and profits of the real estate under the will.

He has succeeded to the powers and title of executor under the will of Mrs. Dermott.

The testatrix had contemplated this very event, and provided, as she supposed, for the continuance of the trust.

She contemplated the occurrence of two events, viz.: the nomination by the vestries and its ratification by the Orphans' Court. But she has failed to say what her intention was in case the Orphans' Court appointed a person as administrator against the nomination of the vestries, upon their failure to nominate.

Did she mean to let the great trusts of her will fail in this last case, or are we to construe her will as containing two intents? First, a particular intent that her administrator should be named by the vestries; second, a general intent that her administrator, however appointed, should be the trustee. If so, and both intents cannot be gratified, the rule is to construe the will upon the *cy pres* doctrine, and sacrifice the particular intent, which in such case is construed as merely directory and not imperative.

Tiff. & B., Tr., 758; Jackson v. Veeder, 11 Johns., 169.

That this question depends on the intention of the testatrix. See *Edgerton v. Conklin*, 35 Wend., 232.

Her intention was manifestly to substitute her administrator *de bonis non* in the place of her executors, if they had not completed their administration; but to allow the vestries to nominate, if they chose so to do.

Where a testator directs his real estate to be sold for certain purposes, without declaring by whom the same shall be made if the fund is distributable by the executor, he will have the power by implication.

3. We hold that, upon the evidence, Jones failed to perform his contract as averred in the answer of the administrator *de bonis non* and, therefore upon the merits, the final decree of this case should be reversed.

4. The defense of limitations in the answer of the administrator with the will annexed, bars the debt of complainant.

See Act of Md., 1798, ch. 101, sub. ch. 9, sec. 9.

5. The court below erred in superseding Ingle and appointing a receiver. No receiver of rents can be obtained by a creditor, unless a strong probability of insufficiency of both real and personal estate be shown. *Warfield v. Owens*, 4 Gill., 379.

But the same case decides that the bill (not a petition) must charge insufficiency of real and personal estate, so as to require a receiver of rents or an injunction. 4 Gill., 380.

Creditors at large cannot go into equity. 5 Gill. & J., 452; *Griffith v. Bk.*, 6 Gill. & J., 424.

A receiver will not be appointed except where there is imminent danger, even where defendant is in wrongful possession of land.

Edw., Receiver, p. 2, 24; 3 Md., 99; 1 Md., ch. 70.

Nor will it be granted at the instance of a party whose right is not acknowledged.

1 Barb. Ch. Pr., 658; 1 Bland, 213.

The answers do not acknowledge Jones' claim, nor is the judgment against the administrator any evidence against heir or devisee.

Gaither v. Welch, 3 Gill. & J., 259; *Birely v. Staley*, 5 Gill. & J., 482.

The recommendations of those most likely to be injured, should have been regarded, and not Jones' wishes. 1 Bl., 427; *Edw. Receiver*, p. 5.

If Ingle be trustee or administrator, there must be abuse or insolvency to justify a receiver. *Edw. Receiver*, 48.

6. The decree was erroneous on its face.

This is directly in contravention of the opinion of this court in a similar proceeding to sell the real estate on a creditors' bill filed in this District. See, *Bk. U. S. v. Ritchie*, 8 Pet., 128.

7. We are entitled to restitution of our property, even as against the purchaser, Jesse B. Wilson, who was receiver and a quasi party in the cause, and privy to the appeal pending when he purchased.

If a decree was erroneous on its face, and a party or quasi party purchased, his title will be properly set aside on a reversal of the decree. *Bk. v. Ritchie*, (*supra*); 8 N. Y., 183.

Even where there has been a sale under a decree when in force, the appellate court on reversal will decree restitution of the property condemned and sold. *The Rachel v. U. S.*, 6 Cranch, 329.

If the sale is to a party to the suit, it will not be protected upon writ of error, as when made to a stranger. *Bac. Abr. Error*, M. sec. 8; *Rose, Abr.*, 778.

Messrs. J. H. Bradley and W. D. Davidge, for appellee.

With respect to the unknown heirs at law, whether on the part of the father or the mother, the bill avers that the complainant is a citizen of the District, and that the debt sought to be recovered was contracted here; and the proof establishes these facts.

In such case, the Act of Assembly of 1794, ch. 60, sec. 3, provides that the Chancellor may, on such notice being given as he shall direct, and on the proof of the debt to his satisfaction, decree the sale of any real estate devised or descended to unknown devisees or heirs at law.

See, also, *Alex. Ch. Pr.*, 44.

Publication having been made as required, the bill was taken *pro confesso*, Mar. 7, 1866, against such unknown heirs at law.

The heirs at law are either bound by the decree *pro confesso* or, so far as they have answered, either admit that Ann R. Dermott died indebted to the complainant, or declare their willingness that what is justly due should be paid.

The answers of the heirs at law do not deny complainant's claim, and it is established by proof.

John H. Ingle, the administrator *de bonis non, cum testamento annexo*, had no sort of interest in the real estate in controversy; he was called into court merely to settle his account of the personal estate not administered by him as administrator, and no decree was asked against him.

He did not succeed to the powers and control over the real estate possessed by the executor. So far from the will making any such appointment, by the strongest implication it is guarded against.

Gaither v. Welch, 3 Gill & J., 259; *Birely v. See 9 WALL.*

Staley, 5 Gill & J., 482; *David v. Grahams*, 2 Har. & G., 94; *Dominick v. Michael*, 4 Sandf., 374; *Conklin v. Edgerton*, 21 Wend., 430; *Beekman v. Benson*, 28 N. Y., 298; *Wills v. Cooper*, 2 Ohio, 124; *Greenough v. Welles*, 10 Cush., 571; Act 1798, ch. 101, sub. ch. 14, sec. 2; *Collinson v. Owens*, 6 Gill & J., 9.

But, second. If he succeeds to the powers and control of the executors over the real estate, the verdict and judgment recovered against him worked an estoppel. The case was tried and determined against him.

And, third. At October rules, the bill was taken *pro confesso* against him as administrator, as well as against him and Osborn Ingle as executors, for default of appearance.

He pleads the Statute of Limitations.

But, in equity, the defense of limitations avails only in favor of the party who sets it up.

Dixon v. Dixon, 1 Md., ch. 271; *McCormick v. Gibson*, 8 Gill & J., 12; *Collinson v. Owens*, 6 Gill & J., 9.

He has no interest in the real estate to take by the decree; and if he had such interest, the verdict and judgment were conclusive. Where one of several heirs at law or devisees pleads the Statute, the others cannot take advantage of it. *Alex. Ch. Pr.*, 148.

Here, too, the plea was pleaded after the party was in contempt for default of appearance, and an order *pro confesso* had passed against him.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the decree of the Supreme Court of the District of Columbia. The record is voluminous, and contains numerous exhibits and much of detail, which we have not found it necessary to consider. The material facts lie within a narrow compass, and the questions presented for our determination are neither numerous nor difficult of solution. On the 22d of April, 1861, the testatrix and the appellee entered into a contract for the erection by the latter of a large building in the City of Washington. She was to pay for the structure the sum of \$24,000; \$5,000 on the 1st of July, 1851; \$5,000 on the 1st of October following, provided certain parts of the building were then ready for occupation; and the remaining \$14,000 on the 1st of January, 1860, with interest, as stipulated. The first installment was duly paid. Nothing has been paid since. Possession of those parts of the building to be first completed was delivered in December, 1851, and the residue in April, 1852. In May, 1852, Jones sued for the installment due on the 1st of October, 1851, and recovered. The judgment was reversed by this court. 28 How, 220 [64 U. S., XVI., 442]. The declaration was then amended by withdrawing the special counts and enlarging the *ad quod damnum* to \$40,000, and a verdict and judgment were recovered for \$23,149, and interest. This judgment was also reversed, 3 Wall., 1 [69 U. S., XVII., 762]. The case was again tried, and a verdict and judgment were recovered for \$20,136.23, with interest from the 5th of April, 1852. The auditor of the court was directed to ascertain the amount of assets in the hands of Ingle, the administrator, which could be applied in payment of the debt.

He reported that there were no assets available for that purpose. Jones thereupon filed this bill to subject the real estate therein described to the payment of his demand.

It is insisted by the counsel for the appellants that the judgment is erroneous in form and is, in fact, only interlocutory. This objection is well taken. According to the Statutes of Maryland, which are in force in the County of Washington, the judgment, under the circumstances, should have been entered only for assets as they should thereafter come into the hands of the administrator. But this fact is immaterial. The case is governed by the local law. That law makes the proceeding against the administrator and the heir, when the latter proceeding is necessary, entirely independent of each other. The duties of the administrator are confined to the personal estate, and never extend beyond it. If that be insufficient to discharge the debts, and it be necessary to resort to the realty of the deceased for that purpose, a proceeding against the heir must be instituted. In that event, whatever has been done by the administrator is without effect, as to the property sought to be charged. A judgment against the administrator is not evidence against the heir. The demand must be proved in all respects as if there had been no prior proceeding to effect its collection, and the Statute of Limitations may be pleaded with the same effect as if there had been no prior recovery against the personal representative. Stat. of Md. of 1786 and 1798; *Collinson v. Owens*, 6 Gill & J., 4; 8 Pet. 528.

We have examined with care the proofs in the record of the complainant's demand as set forth in the bill, and are satisfied with the amount found by the decree. It could be productive of no good to vindicate this view of the subject, by entering into an analytical examination of the testimony. We are not unmindful of the length of time through which the complainant has been pursuing his remedy, nor of the verdicts which have been rendered in the trials at law. They were the results of vigorously contested litigation, after the most elaborate preparation of the case. Nor are we unmindful that the court below, in the case before us, came substantially to the same conclusion. Our judgment, however, has been formed upon grounds wholly apart from these considerations. If the question were *res integra* in this case, and now for the first time to be passed upon, we should have no difficulty in sustaining the decree. We think the full amount found by the court is justly due.

Ann R. Dermott, by her will, appointed eight executors, and clothed them with important powers and duties. They were to have the entire management and control of the estate during the uncertain time specified. They were to rent out the real estate. Out of the rents and the personal estate, not otherwise disposed of, they were to pay her debts, without regard to limitation of time; to pay her funeral expenses; several legacies, amounting in the aggregate to between \$3,000 and \$4,000; to pay an annuity of \$400, while their duties were executory, after which it was to be a charge upon the estate; they were to pay, in their discretion, certain debts of her brother; they were to build a vault to receive her remains, and

they were authorized to sell two cemetery lots. The power was given to mortgage, if found necessary to pay debts. After the debts and legacies were all satisfied, the entire estate was to be delivered over to twenty trustees, named in the will, to whom and their heirs it was devised, to enable them to found and support a female orphan asylum. The beneficiaries were to be such destitute white orphans as the trustees, or any corporation which might succeed them, should select. The provision for this charity is admitted, on both sides, to be void. The Statute of the 43d Elizabeth never was in force in Maryland. The trust resulted for the benefit of the heirs at law. *Dashiell v. Atty-Gen.*, 5 Har. & J., 400; *Same v. Same*, 6 Id., 9; *Wilderman v. Mayor of Balt.*, 8 Md., 554. All the persons named as executors declined to act, except one of them, John P. Ingle, who qualified and took out letters testamentary. He died, whereupon the defendant, John H. Ingle, was appointed administrator, with the will annexed. The will provides, that if the surviving executor should die while the trusts are executory, their execution should devolve upon such person or persons as the vestries of St. John and Trinity Churches should elect to go on and complete their execution, so far as they were committed to the executors, and she desired that letters of administration, with the will annexed, or other competent authority, should be granted to the person or persons so elected. The vestries made no election. Letters were granted by the judge of probate to John H. Ingle, as if the will contained no such provision.

The question whether the administrator thus appointed could exercise any authority as to the real estate, is deemed an important one by the counsel on both sides, and has been fully argued. The Maryland Statutes which bear upon the subject, provide for the appointment of an administrator *de bonis non*, with the will annexed, but are silent as to his powers. By the common law his duties are confined to the personal estate, unadministered by his predecessor. Whatever authority he may possess as to the real estate must be derived from the will. If not found there in express terms, or by necessary implication, it has no existence. Hence the test, in all such cases, is the intention of the testator. Many of the duties enjoined upon the executors were foreign to those which come within the scope of their ordinary functions. Such a power never passes by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power, in place of the executor appointed by the will. If no provision be made by the will for such substitution, the power does not become extinguished, but the case falls within the category of those where a court of equity will not permit a trust to fail for the want of a trustee, but will appoint one, and clothe him with authority adequate to the duties to be discharged. *Egerton, Adm., v. Conklin*, 25 Wend., 233; *De Peyster v. Clendinning*, 8 Paige, 296; *Dominick v. Michael*, 4 Sandf., 402; *Cole v. Wade*, 16 Vesey, 42; 1 Chance, Powers, 658, 661. In the case under consideration it is clear the testatrix did not intend that anyone, not clothed with the sanctions she prescribed, should be intrusted with any duty

touching her estate. The administrator occupies the same relation to the realty as if he were administrator *de bonis non* without the will annexed, and the testatrix had died intestate. This disposes of the questions raised as to the Statute of Limitations. The administrator alone has interposed that defense. It cannot avail those who represent the real estate, and who are the only parties in interest in this proceeding.

It was proper for the court to appoint a receiver. Until this was done there was no one authorized to take charge of the property and receive the rents.

Upon looking carefully into the record we find no foundation for the imputation that the answers of the heirs at law were obtained by fraud or contrivance. It was within the discretion of the court to allow them to be taken off the files and the parties to answer *de novo*, or to overrule the application made for that purpose. We think this discretion was not abused.

It was strenuously insisted that the court erred in refusing further time to the defendants to take testimony. The earnestness with which the point was pressed has induced us to examine it with more care than we should otherwise have deemed necessary. The cause was put at issue on the 6th of March, 1866. The 69th Rule in equity allowed the parties three months thereafter to take their testimony. The complainant commenced taking his on the 14th of that month. Between that time and the 28d, inclusive, he examined nine witnesses. Notice was given to the defendant's counsel. He appeared and cross-examined the witnesses so far as he chose to do so. An adjournment was ordered by the examiner, from the 28d of March until the 2d of June. A single deposition relating to a formal matter was then taken. The examiner thereupon closed the testimony and returned it to the court. It does not appear that the defendants made any objection to the adjournment, or manifested any desire to take testimony during the period of more than two months between the time of the adjournment and the time to which it extended. The application for further time was heard and overruled by the court on the 8th of June. The Rule referred to provides that "three months; and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time." The three months are allowed for the taking of testimony by both parties. The limitation applies as much to defendants as to complainants. It is for the court or judge to decide whether further time shall be given or refused, and ordinarily the determination of the question would not be deemed a fit subject for review by this tribunal. Cases may occur, however, of so flagrant a character that it would be our duty to correct the error. In the case before us the complainant's testimony was substantially closed on the 28d of March. The defendants had from that time until the 6th of June to take testimony on their part in the regular way. No reason is given why they neglected to do so. Indeed they were bound to proceed as soon as the cause was at issue. They had no right to wait until the complain-

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ant was through. They knew from the previous trials at law what his testimony would be. If there was any surprise, and an extension of time was necessary, doubtless it would have been given. The complainant was pursuing the residue of his compensation for the house he had built. He had delivered possession years before. The house was large and valuable. The proof is that it rented for from seven to eight thousand dollars per year. His expenditures had been large. He had received less than a quarter of the contract price, and nothing for his extra work. He had recovered two verdicts for the amount claimed. He had been engaged for more than fourteen years in a bitter and expensive litigation, in which every possible impediment had been thrown in his way. In the light of these facts we are not prepared to say that the court below erred in the ruling complained of.

There is no error apparent on the face of the decree. It finds the amount due to the complainant, and that it was necessary to sell the real estate described in the bill to pay it. It orders the premises to be sold in the manner prescribed, and the proceeds to be held subject to the further order of the court. The auditor had found and reported the deficiency of assets requisite to give the court jurisdiction and to entitle the complainant to the relief sought by his bill. The necessity of making the sale, if the complainant's demand was to be paid, was clear upon the proofs, and was not denied by the answers. The amount of the liabilities to be paid out of the proceeds might have been ascertained before the decree of sale was made, but that was not indispensable. It may as well be done when the sale is confirmed. The rights of all parties in respect to the fund can then be ascertained, and payment and distribution be ordered accordingly. It is not alleged that the premises were susceptible of division, or if they were, that it was not necessary to sell the whole. No such issue is made in the pleadings, and no such proof is found in the testimony.

It is now nearly eighteen years since the complainant commenced a suit to recover what has been adjudged to him in this case. The conflict has been flagrant ever since. The demand seems to us to be simple and just.

We find no error in the record, and the decree of the court below is affirmed.

Cited—3 McARTH., 241.

UNITED STATES, *Appt.*,
v.
ASHER AYRES.

(See S. C., 9 WALL., 608, 609.)

Motion for new trial in Court of Claims—effect of, on appeal.

Motion for a new trial may be made in the Court of Claims while an appeal from the judgment there is pending in this court.

[No. 364.]

Argued Feb. 18, 1870. Decided Feb. 23, 1870.

APPPEAL from the Court of Claims.
The case is fully stated by the court. See,

also, the next succeeding case between these parties, renewing this motion, *post*, 637.

Mr. James Hughes, for appellee:

This case was decided in the Court of Claims, and appealed to this court by the United States.

Pending the appeal, the United States made and filed a motion for a new trial in the Court of Claims. It is still pending in that court.

The object of the present motion in this court, to dismiss the appeal, is to obtain a judicial construction of the statute.

The appellee maintains that it was not intended by the statute that the appeal to the Supreme Court and the motion for a new trial in the Court of Claims should be concurrent remedies to be prosecuted simultaneously, but that the United States is bound to elect, and that the election having been made, the Government is concluded by it and this court ousted of its jurisdiction, and that the cause is remitted to and retained in the Court of Claims.

In that court, should the Government succeed on a motion for a new trial, the whole cause is re-opened on its merits, and from a second judgment either party may appeal. But should it fail, the United States cannot resort to its appeal from the first judgment. The motion for a new trial is not compulsory. It is elective, and the election is made at the peril of the party making the motion; and should the application for a new trial be refused, the Government is concluded by it.

If the United States does not choose to abide by its appeal, and try the case on the record as it stands, it is competent for it to dismiss it; and a new resort to the Court of Claims under the statute is equivalent to an abandonment of the pending appeal by an emphatic act, and should be so construed and enforced. The object of the statute was simply to restore the case to the jurisdiction of the Court of Claims, notwithstanding the appeal, in case of newly discovered testimony; not to provide for concurrent jurisdiction in the two courts, the one appellate, the other original; a jurisdiction anomalous and incompatible with the nature of judicial proceedings.

Messrs. E. R. Hoar, Atty-Gen., and Robert S. Hale, special counsel, for appellant:

The provision for the granting of a new trial by the court below, pending an appeal in this court, is new and perhaps anomalous. But it is submitted that it is within the power of the Legislature to establish such practice, and that its establishment is not inconsistent with the pendency of the appeal here. The appellate jurisdiction of this court under the Constitution, is under such regulations as Congress may make.

Although an appeal, irrespective of the statute, when perfected, transfers the cause to this court, and takes it out of the jurisdiction of the court below, it is certainly in the power of the Legislature to provide that, pending the appeal, a qualified jurisdiction of the cause for the purpose of granting a new trial and thereby preventing injustice, may remain in the court below. And this qualified jurisdiction is not inconsistent with the jurisdiction of this court on appeal, for the determination of the cause on its merits.

A qualified jurisdiction is, for certain purposes,

retained in the district courts pending appeals to this court, by the 13th section of the Prize Act of June 30, 1864, 13 Stat. at L., p. 310.

The two remedies given by the Act of June 25, 1868, are concurrent, both established for the promotion of justice; and the adoption of one remedy by the party aggrieved is not an abandonment of the other. If, however, the two are deemed inconsistent, it is evident that it is the remedy sought in the court below which must give way to the other. This court is not to be ousted of its jurisdiction regularly acquired, by an application for a remedy in the court below, which has already (if the remedies are inconsistent) been deprived of its jurisdiction by the appeal. If, therefore, the respondent is aggrieved by the double relief sought by the appellant, his remedy is to be sought by objection to the jurisdiction of the court below, and not to that of this court.

The practice under this Act is yet unsettled; but it is submitted that the following would be the proper practice, where a motion is made in the court below for a new trial under the statute, after the taking of an appeal to this court.

"The motion is to be first heard in the court below." If the motion is denied there, that is an end of the matter, and this court proceeds on the appeal in the ordinary course. If the motion for a new trial should be granted there, the appellants should then move in this court to remand the record to the court below, to await the result of the new trial.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion, on the part of the appellee, to dismiss the appeal from a decree in his favor in the Court of Claims.

The motion is founded on the 2d section of an Act passed 25th June, 1868, (15 Stat. at L., 75), as follows:

"That said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim may, on motion on behalf of the United States, grant a new trial of any such suit or claim, and stay the payment of any judgment therein upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of the judgment, the same shall be payable and paid as now provided by law."

After the decree in favor of the claimant and an appeal taken by the Government from it to this court, and while pending here, the counsel for the Government has made a motion in the court below under the above section for a new trial on newly discovered evidence, it is insisted on the part of the claimant, that the two proceedings—one the appeal and the other a motion for a new trial—are inconsistent, and not in accordance with a reasonable interpretation of the Act; that the counsel must elect as to which of the two remedies he will adopt; and having in this instance elected to adopt the motion for a new trial, the appeal should be dismissed.

We shall not now undertake to give a construction of the several provisions of this section, which are new and anomalous, but shall leave that until cases of actual inconsistency or conflict may arise between the two modes of proceeding. So far as the present question is concerned, there is no great difficulty. The Act expressly provides that the motion for a new trial may be made in the court below, while the appeal from the judgment there is pending in this court. So far the section is clear and, although it may be regarded as giving to the Government a considerable advantage in the litigation, the power to give it by Congress cannot, we suppose, be doubted.

Motion to dismiss the appeal must be denied.

Cited—12 Wall., 176; 94 U. S., 259.

UNITED STATES, *Appt.*,

v.

ASHER AYRES.

(See S. C., 9 Wall., 609, 610.)

After a case is brought to this court from the Court of Claims, if the latter court grant a new trial in the case, thus vacating the judgment from which the appeal is taken, the appeal will be dismissed.

[No. 364.]

Argued Apr. 8, 1870. Decided Apr. 18, 1870.

A PPEAL from the Court of Claims.

On motions to remand and dismiss.

After the denial, by this court, of the first motion to dismiss the appeal in this case, (as above reported,) the court below granted the motion for a new trial, then pending in that court. Under these circumstances, the appellee renews his motion to dismiss, and the appellant moves to remand the transcript of the record for further proceedings below.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty-Gen., and Robert S. Hale, special counsel, for appellant.

Mr. James Hughes, for appellee.

Mr. Justice Nelson delivered the opinion of the court:

This suit was originally brought by Ayres against the Government, in the Court of Claims, to recover the proceeds of a quantity of cotton, which was seized at the City of Savannah, Georgia, by the military forces under Gen. Sherman, in December, 1864, shipped to the City of New York, and sold, the net proceeds of which were \$3,511.68. A judgment was rendered in favor of the petitioner for that amount, and an appeal taken by the Government to this court, which is now pending.

The 2d section of the Act of Congress of June 25, 1868 (15 Stat. at L., p. 75), authorizes the Court of Claims, even pending an appeal by the Government from their judgment, to entertain a motion of a new trial, and upon satisfactory evidence, grant the same, and at the same time stay the payment of the judgment.

See 9 WALL.

In the present case the Government made application to the court below under this section of the Act, upon newly discovered evidence, and has obtained a new trial, and also an order of the court staying the payment of the judgment until the final hearing of the cause, or the further order of the court.

The case stands thus: the petitioner has obtained a judgment in the court below against the Government, from which an appeal has been taken, and is pending in this court. A new trial has since been granted by the court below, and the payment of the judgment stayed. The Act of Congress furnishes no solution to this anomaly.

We are of opinion the granting of the motion to dismiss the appeal, on the ground that the court has granted a new trial in the cause under the Act of Congress, will furnish the best solution of the embarrassments in which the parties find themselves involved. It is quite apparent that the counsel for the Government is desirous to retain the appeal notwithstanding the order for a new trial, under an impression that for some unknown or unanticipated occurrence in the proceedings in the court below, the new trial might fall through, and never take place; and, for the like reason, the counsel for the petitioner desires to have the appeal terminated, so as not to be available to his adversary. But, it is quite clear, that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause. This is the legal effect of the new trial by a court competent to grant it. There is no reason, therefore, for continuing any longer the case on our docket.

The motion, to dismiss the appeal, granted.

UNITED STATES, *Appt.*,

v.

HENRY GROSSMAYER.

(See S. C., 9 Wall., 72-76.)

Trade with enemy, unlawful—how regulated—agent in hostile country—ratification of unlawful acts.

Business intercourse between the citizens of the respective parties engaged in war is unlawful, without any express declaration of the sovereign on the subject.

During the late civil war, all trade with the enemy had to be conducted according to regulations prescribed by the Secretary of the Treasury.

An individual has no power to appoint an agent in the hostile territory for any purpose, after hostilities have actually commenced.

A transaction originally unlawful cannot be made any better by being ratified.

[No. 370.]

Argued Feb. 10, 1870. Decided Mar. 7, 1870.

A PPEAL from the Court of Claims.

This was a claim preferred in the Court of Claims, by the appellee, to recover the proceeds of forty-eight bales of cotton, seized and sold by an agent of the United States, under the Captured and Abandoned Property Act.

The court below found for the petitioner and entered judgment for \$8,040.96. Whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty. Gen., and Robert S. Hale, special counsel, for the appellant: The cotton in question was purchased by Einstein, in the spring of 1863, of persons then residing in the State of Georgia, where the rebel force or organization held sway, and whose loyalty is not proven.

Such residence (which is, in the absence of evidence to the contrary, to be presumed voluntary) is by the Act of June 25, 1863 (15 Stat. at L., 75, sec. 3), made *prima facie* evidence "That such person did give aid and comfort to said rebellion, and to the persons therein engaged."

By the Act of July 17, 1862, 12 Stat. at L., 591, sec. 6, and the Proclamation of the President, issued in pursuance of it, July 25, 1862, *Id.*, 1266, "All sales, transfers or conveyances," of the estate and property of such persons, after Sep. 23, 1862, were made null and void.

Einstein's vendors, therefore, could convey no title to him or to his principal, and the claimant's title failed.

This transaction involves two direct violations of the laws of war:

(1) The creation of the agency of Einstein, of itself depending on intercourse which is prohibited; and,

(2) The purchase of the property in question, by claimant, through his agent, from belligerents.

Mr. George Taylor, J. A. Wills and A. G. Riddle, for appellee:

The cotton, the proceeds of which are in question, was purchased during the rebellion from January to April 1, 1863, by an agent of the claimants residing within the Confederacy and, therefore, was not a violation of the Intercommerce Act.

A citizen of a country at war with another, may have an agent in the enemy's country, and may enforce the contracts or accept the beneficial acts of his agent after peace; and in this respect he may do by an agent what he could not do himself.

Conn. v. Penn., 1 Pet. (C. C.), 496; *Dennison v. Imbrie*, 3 Wash. (C. C.), 396; *Paul v. Christie*, 4 Har. & McH., 161; *Buchanan v. Currie*, 19 Johns., 137; *Ward v. Smith*, (*ante*, 207).

Sending a request to an agent in the Confederacy during the war, to protect his interests or change his securities, may fairly be considered within the partial intercourse permitted by the President's Proclamation, February 28, 1862, and the commercial regulation of Aug. 28, 1862.

But if the message were illegal, the agent had a right, voluntarily, on his own motion, to purchase and appropriate this property to his creditor and by the appropriation of it and the shipment of it to Savannah for storage for him, the title passed, subject only to the ratification of Grossmayer.

Ogle v. Atkinson, 5 Taunt., 759; *Mitchell v. Ede*, 11 Ad. & E., 888; *Fowler v. Down*, 1 Bos. & P., 47; *Mason v. Lickbarrow*, 1 H. Bl., 365; *Cott v. Houston*, 3 Johns. Cas., 243, and remarks

upon it in *Hawley v. Foote*, 19 Wend., 517; *Wilkes v. Ferris*, 5 Johns., 335; *De Wolf v. Gardner*, 12 Cush., 19.

The purchase, etc., of Einstein was fully and distinctly ratified by Grossmayer; and the ratification reverts back and is equivalent to a previous commission or command. *Omnis ratihabitio retrotrahitur et mandato priori equipatur.*

Co. Litt., 207; Wingate, 485; Story, Ag., sec. 244.

Claiming the cotton and instituting a suit for it is, in itself, a sufficient ratification.

Billon v. Hyde, 1 Atk., 128; *Wilson v. Poulton*, 2 Sh., 859; *Smith v. Hodson*, 4 T. R., 211; Co. Litt., 258 a; Paley, Ag., 315; Story, Ag., secs. 252-259.

Mr. Justice Davis delivered the opinion of the court:

This was a claim preferred under the Captured and Abandoned Property Act, and presents one question for consideration, which the case of the *U. S. v. Anderson* [*ante*, 615], decided at this term, did not contain. It appears that Elias Einstein, a resident of Macon, Georgia, was indebted, when the war broke out, to Grossmayer, a resident of New York, for goods sold and money loaned; and that, while the war was in progress, a correspondence on the subject was maintained through the medium of a person whose name is not disclosed, who passed back and forth several times between Macon and New York. The communication between the parties resulted in Grossmayer requesting Einstein to remit the amount due him in money or sterling exchange, or, if that were not possible, to invest the sum in cotton and hold it for him until the close of the war.

In pursuance of this direction—as it is supposed money or sterling exchange could not be transmitted—Einstein purchased cotton for Grossmayer and informed him of it, who expressed himself satisfied with the arrangement. The cotton was afterwards shipped as Grossmayer's to Abraham Einstein, at Savannah, who stored it there in his own name, in order to prevent its seizure by the rebel authorities. It remained in store in this manner until the capture of Savannah in December, 1864, when it was reported to our military forces as Grossmayer's cotton, and taken by them and sent to New York and sold.

On this state of the case Grossmayer insists that he is within the protection of the Captured and Abandoned Property Act, but it is hard to see on what ground he can base this claim for protection. It was natural that Grossmayer should desire to be paid, and creditable to Einstein to wish to discharge his obligation to him, but the same thing can be said of very many persons who were similarly situated during the war, and if all persons in this condition had been allowed to do what was done in this case, it is easy to see that it would have produced great embarrassment and obstructed very materially the operations of the army. It has been found necessary, as soon as war is commenced, that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without

any express declaration of the sovereign on the subject.

But Congress did not wish to leave any one in ignorance of the effect of war in this regard for as early as the 13th of June, 1861, it passed a Non-Intercourse Act, which prohibited all commercial intercourse between the States in insurrection and the rest of the United States. It is true the President could allow a restricted trade, if he thought proper; but in so far as he did allow it, it had to be conducted according to regulations prescribed by the Secretary of the Treasury.

There is no pretense, however, that this particular transaction was authorized by anyone connected with the Treasury Department, and it was, therefore, not only inconsistent with the duties growing out of a state of war, but in open violation of a statute on the subject. A prohibition of intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted. In this case, if Einstein is to be considered as the agent of Grossmayer to buy the cotton, the act appointing him was illegal, because it was done by means of a direct communication through a messenger who was in some manner not stated in the record able to pass, during the war, between Macon and New York. It was not necessary to make the act unlawful that Grossmayer should have communicated personally with Einstein. The business intercourse through a middle man, which resulted in establishing the agency, is equally within the condemnation of the law.

Besides, if, as is conceded, Grossmayer was prohibited from trading directly with the enemy, how can the purchase in question be treated as lawful when it was made for him by an agent appointed after his own disability to deal at all with the insurgents was created?

It is claimed that the purchase by Einstein was ratified by Grossmayer, and that it relieves the case of difficulty; but this is a mistaken view of the principle of ratification, for a transaction originally unlawful cannot be made any better by being ratified.

In any aspect of this case, whether the relation of debtor and creditor continued, or was changed to that of principal and agent, the claimant cannot recover.

As he was prohibited during the war from having any dealings with Einstein, it follows that nothing which both or either of them did in this case could have the effect to vest in him the title to the cotton in question.

Not being the owner of the property he has no claim against the United States.

and the cause is remanded to that court, with directions to enter an order dismissing the petition.

Cited—21 Wall., 352; 98 U. S., 612; 96 U. S., 290; 97 U. S., 623; 7 Blatchf., 409; 9 Blatchf., 255; 2 Sawy., 568; 1 Flipp., 312; 35 Ind., 406; 56 Mo., 444; 3 Am. Rep., 686, 688 (43 N. Y., 164); 7 Am. Rep., 742 (45 Miss., 531); 10 Am. Rep., 540 (50 N. Y., 632); 13 Am. Rep., 567 (54 N. Y., 439).

THE SHIP B. L. HARRIMAN, C. J. JANSEN, Claimant, Appt.,

v.

JOSEPH EMERICK.

(See S. C., "The Harriman," 9 Wall., 161-175.)

Contract of affreightment—when must be fulfilled.

The contract of affreightment is governed by the same principles as other special contracts.

Where there has been no complete fulfillment on one side, and no fault or waiver on the other, no freight money can be recovered.

If what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant.

[No. 65.]

Argued Feb. 15, 1870. Decided Mar. 7, 1870.

APPEAL from the Circuit Court of the United States for the District of California.

The libel was filed in the United States District Court for the District of California, by the appellee, to recover for a certain cargo of coal, and for a part of the freight paid thereon, on the ground of the alleged failure of the said ship and her owners to deliver the said coal according to contract. A decree was entered in said court in favor of the claimant of said ship, which, upon appeal, was reversed by the circuit court; whereupon the said claimant took an appeal to this court.

The case is fully stated by the court.

Mr. Wm. M. Evarts, for claimant and appellant:

The propositions of the claimant and appellant are:

That, by the terms of this contract of affreightment, the Spanish fleet was the destined terminus of the voyage for the deposit of cargo, with a stipulated situs of that fleet, for the purposes of performance of the contract on both sides.

That, by action and upon motives with and for which the owner had no share of responsibility, the fleet was withdrawn at the terminus of the voyage, and the situs for performance in actual delivery and receipt of cargo, voluntarily abandoned.

That, therefore, the performance of the voyage and readiness to deliver the cargo completes the earning of freight, and the continued possession of the cargo by the owner was by involuntary agency for the freighter, and in maintenance of the owner's lien for freight.

These propositions are sustained in the decree and opinion of the district court.

The interpretation of any contract brought into judicial question, involves the consideration of its express stipulations, and of what is to be supplied by usage or law, when the expression is incomplete or indeterminate.

The judgment of the Court of Claims is reversed, See 9 WALL.

The rules of law have been determined:

That the voyage, being without fault, failing from the perils of the sea, falls upon the owner, even when the operation of these perils is expended upon the cargo alone, from its perishable nature, and the ship would be able to transport the cargo and deliver it, were it capable of transportation.

This is the doctrine of *Miston v. Lord*, 1 Blatchf., 357.

That the voyage failing, from political restraints, as of embargo preventing departure, or blockade preventing delivery, falls upon the owner and defeats the earning of the freight.

This is the doctrine of *Scott v. Libby*, 2 Johns., 340, in case of blockade, and of *Atkinson v. Ritchie*, 10 East, 580, in case of embargo, and of numerous cases cited in respondent's brief.

But the law gives to the owner a recovery of freight, when the failure of transportation or delivery arises from the fault of the freighter, or from such inevitable accident or necessity as the law casts the burden and consequence of upon the freighter.

Glendaniel v. Tuckerman, 17 Barb., 184; *Morgan v. Ins. Co.*, 4 Dall., 455; *Boulay-Paty*, and *Valin*, as cited in *Judge Hoffman's* opinion; *Hills v. Sughrue*, 15 Mees. & W., 253; *Barker v. Hodgson*, 3 M. & S., 267; *Sonton's* case (cited 1 Pritch. Adm., p. 271, sec. 116).

The rule of law which saves either party from the burden of ill consequences of the fault or shortcoming of the opposite party, needs neither illustration nor vindication.

The rule of law which throws the burden or ill consequences of inevitable accident or necessity, which frustrates the contemplated execution of the contract, upon one party or the other, as the case may be, is pointed out in this proposition in Aleyn:

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

Paradine v. Jane, Aleyn, 27.

It is impossible, under the above propositions and authorities, to assign the absence of the Spanish Fleet from the stipulated *situs*, for the deposit and discharge of the cargo, to the fault or responsibility of the owner.

The perils of the sea, which the owner bears the misfortune of, are those that attend the navigation of his own vessel on its voyage, and no others.

The frustration of this voyage rests wholly upon the voluntary action of the real freighter and consignee.

The proof discloses no state of facts which makes the withdrawal of the Spanish fleet from the stipulated *situs* for the deposit of this cargo, before the performance of the voyage of the charter-party, otherwise than voluntary.

Upon the plainest principles, therefore, the defeat of the delivery of the cargo to the consignee, the sole frustration of the voyage, was the willful act of the freighter.

But if, from the perils of the sea or other overwhelming disaster, the Spanish fleet had been unable to keep the engagement of the charter-party, that would have been a situation of which the risks and the misfortune must rest upon the freighter.

The freighter might have provided against it by his contract, but not having done so, and having by his own contract created a duty or charge upon himself, he is bound to make it good.

Paradine v. Jane (*supra*).

The owner, as soon as any doubt had arisen at San Francisco, as to the possibility of unloading the cargo under the charter-party, endeavored to lighten the freighter's obligation in respect to return freight, by applying for the wishes of the freighter on such a contingency.

The claimant was also entitled to retain the proceeds of the cargo in his hands for the return freight, which he had earned in the service of the freighter, upon the duty cast upon the ship by the fault of the freighter.

The decree of the circuit court, in adjudging that the stipulated payment required by the charter-party at the outset of the voyage should be refunded, was certainly erroneous.

I. Because the whole freight was earned, as had been insisted above.

II. Because the terms of this charter-party and the nature of the engagement make the payment definitive, and earned by the sailing of the vessel, and not an advance or credit upon the future earning of freight.

Blakey v. Dixon, 2 Bos. & P., 321; *DeSilvale v. Kendall*, 4 M. & S., 37; *Saunders v. Drew*, 3 Barn. & Ad., 445; *Manfield v. Maitland*, 4 Barn. & Ad., 582; *The John*, 3 W. Rob., 177.

The American doctrine, as adjudicated in *Phelps v. Williamson*, 5 Sandf., 578, is not inconsistent with those authorities or this proposition.

The decree of the circuit court should be reversed, and the decree of the district court either affirmed or modified, according as the judgment of this court shall be on the question of the earning of freight on the return voyage.

Messrs. B. R. Burtis and C. O'Connor, for appellee:

Looking at the charter-party, completed as it was by the instructions of May 14, designating Valparaiso as the first port of destination, the contract was clear and explicit to proceed to that port.

Such being the contract, was it subsequently varied so as to release the vessel from the obligation of proceeding to Valparaiso? The only pretense for asserting that any such change in the contract was made, is found in the letter of May 17, containing an extract from a letter of the charterer's correspondent in Panama, suggesting that it was probable that the Spanish fleet might have changed its base of operations, and that if any vessels chartered by him with supplies for the Spanish fleet had not already sailed from San Francisco, they should be directed to seek for the Spanish fleet between the Chinchas and Valparaiso. Mr. Emerick, the charterer, requested Captain Swenson to comply with these instructions "so far (he is careful to add) as it is in your power."

The inference which Captain Swenson was bound to draw from the letter of May 17, was, that Emerick, in chartering the vessel, was acting under the instructions of the same party who made the suggestions contained in that letter, with which Captain Swenson was requested to comply, so far as was within his

power. If that party, in giving those instructions, did not suggest the substitution in the charter-party of any other port for Valparaiso—if Emerick did not make or propose any such substitution, but only directed that his correspondent's suggestion should be complied with, so far as lay in the power of the master, what right had the master or his principal, Jansen, to suppose that the original contract was superseded and a new one substituted in its place, by which the ship's duty was limited solely to seeking after the fleet between Valparaiso and the Chinchas?

But the master did not suppose that The B. L. Harriman left port under any such contract, nor did Jansen, nor Emerick suppose so.

We concede that, under a fair interpretation of the letter of May 17, if Captain Swenson had met the Spanish fleet between the Chinchas and Valparaiso, and the Spanish Admiral had there acted on the option given him in the instructions of May 14, such action would have been as valid and effectual there, as in the absence of the letter of May 17 it would have been at Valparaiso. But the Spanish commander was under no obligation to exercise the option given him, at any point short of Valparaiso. He was at liberty, if met short of that port, simply to refer Captain Swenson to his charter-party. The letter of May 17 merely provided for anticipating, if the Spanish Admiral consented, the time and place for the acceptance of the whole or part of the cargo, or for directing the partial or entire discharge of the cargo at some port to be designated by him in Peru, Chili or the Chinchas.

It is clear that the contract was not performed; inasmuch as the ship only proceeded to the Chinchas, and then not having found the Spanish fleet, immediately commenced her return voyage to San Francisco.

The charterer has stood on his legal rights from the moment of the completion of the contract to the present time. He has in no manner waived performance, nor has he prevented it by any fault of omission or commission.

As a necessary deduction from the foregoing premises, no freight has been earned. The owner, Jansen, must account for the full value of the cargo, and must refund the half freight paid in advance.

1 Pars. Adm., 223, n. 1; *B'k v. Stubbs*, 6 Mass., 426; *Benner v. Equitable Co.*, 6 Allen, 223; *Chase v. Alliance I. Co.*, 9 Allen, 811.

For aught that appears, the Spanish Admiralty may have left an agent at Valparaiso, empowered to accept a delivery of the coal and invoice the bill of lading.

The meaning of this contract is not to be influenced in any manner by the result of the warfare between Spain and Chili.

The contract to proceed to Valparaiso was absolute, subject only to the contingency of other directions from the Spanish commander. Emerick did not guaranty that it should be a "safe port"; the contract was made while war was raging, and the profit or loss involved was, from the very nature of the agreement, almost certain to be very materially affected by the result of pending hostilities.

Where a party undertakes positively to perform a certain act for a certain stipulated compensation, he cannot claim the compensation,

See 9 WALL.

however difficult or impossible performance may be, so long as the act remains unperformed, unless, indeed, the non-performance was owing to the fault or omission of the other contracting party.

Dermott v. Jones, 2 Wall., 1; (S. C., *Ingle v. Jones*, 69 U. S., XVII., 762;) *Scott v. Libby*, 2 Johns., 340; *Burrill v. Cleeman*, 17 Johns., 72; *Lorillard v. Palmer*, 15 Johns., 12; S. C., 16 Johns., 355; *Pole v. Cetecovich*, 9 C. B. (N. S.), 480; *Schilizzi v. Derry*, 4 El. & B., 873; *The "Hiram"*, 3 C. Rob. Adm., 180; *Atkinson v. Ritchie*, 10 East, 530; *Osgood v. Groning*, 2 Camp., 468; *Hadley v. Clarke*, 8 T. R., 265; *Medeiros v. Hill*, 8 Bing., 231; *Smith v. Wilson*, 8 East, 487; *Abb. Ship.*, 468, note; *Liddard v. Lopez*, 10 East, 526; *Abb. Ship.*, 452.

The whole law of the case may be summed up in the following quotation from *Mr. Justice Story's* opinion in *The Nathaniel Hooper*, 8 Sumn., 542: "I think the whole of the cases in which the full freight is upon the ordinary principles of commercial law, due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement that the non arrival has been occasioned by no default or inability of the carrier ship, but has been occasioned by the default or waiver of the merchant shipper. See, also, 1 Pars. Adm., 152.

Mr. Justice Clifford delivered the opinion of the court:

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the District of California.

The charter-party, which lies at the foundation of the controversy, bears date on the 4th of May, 1866. The parties to it were Jansen, the claimant and owner of the ship, and Emerick, the freighter. Both parties were merchants of San Francisco. The entire capacity of the ship was engaged to the freighter. He stipulated to furnish her a cargo of 786 tons of steam coal, and to pay "for the use of said vessel during the voyage aforesaid, \$15 per ton in United States gold coin, one half to be paid here to C. J. Jansen, of San Francisco, two days after the sailing of the vessel, less two and one half per cent. discount for cash, and the other half to C. J. Jansen, of San Francisco, on receipt of canceled bill of lading that the coal has been delivered." The owner stipulated "for a voyage from San Francisco to Cobija, Bolivia, or other ports in the Pacific; the port of discharge to be named before the vessel sails from San Francisco; such instructions to be given by letter in triplicate, which will contain the privilege which is hereby given, that if the vessel proceeds direct by the instructions given to Valparaiso, the commanding officer of the Spanish navy will have the right to receive only a part of the cargo, the whole or none, and to send her, if he desires, to another port in Chili, Peru, or the Chinch Islands, and in that case, the vessel will immediately proceed to the port which will be named by said commanding officer, and there complete her discharge." In pursuance of the condition of the charter-party Emerick, on the 14th of May, 1866, addressed a letter to Swenson, the master, in which he said: "I hereby name you the Port of Valparaiso, Chili, as the first port which you have to proceed to on leaving San

Francisco, and when there to report yourself to the commanding officer of the Spanish navy, who will have the right to take only a part of your cargo of coal, the entire cargo, or none, and if he desires, to send you to another port in Chili, Peru, or the Chincha Islands, in which case you will have to proceed immediately to the port named by said commanding officer, and there complete your discharge, these conditions and privileges being part of the charter-party. I herewith hand you a letter for the commanding officer of the Spanish navy at Valparaiso, which contains the bill of lading of your entire cargo of coal, indorsed to his order." On the 17th of May, Emerick addressed another letter to the master, in which he gave a copy of the instructions he had received from Panama, which were as follows: "On receipt of this letter, if you have not attended to all our outstanding orders, you are requested to suspend operations until further ordered, including even the last one thousand tons of coal, for it is more than possible that the naval forces down there will have changed their base of operation. In case, however, you should have taken up a vessel before the present reaches you, then you must instruct the ship to seek after the fleet between the Port of Valparaiso and the Chinchas." He added: "As far as it is in your power you are requested by me to follow the above instructions." On the 19th day of May, Emerick gave the master permission to make the Chincha Islands, if circumstances should be favorable, without, however, prejudicing his "rights under the charter-party, and instructions."

On the 22d of May, the vessel left San Francisco for the Port of Valparaiso. She was freighted according to the charter-party. On the 16th of June following, Jansen said to Emerick, by letter of that date: "In your charter of the ship, B. L. Harriman, there is no provision made for the possibility of there being nobody to receive her (the ship's cargo) on arrival, nor do I know that the captain of The Harriman had your private instructions on this point. At the time of making the charter we could hardly contemplate anything of the kind, hence the omission, and wish you will make some provision in the event such should be the case, and instruct me how to act, that I may communicate same to Captain Swenson."

Emerick made no reply. The ship proceeded to the Chincha Islands, and returned thence to San Francisco. Captain Swenson, in his protest, says that on the 4th of August he took a pilot on board and ran in near to the southernmost of those islands, and "lay in close to the land." He went ashore, and learned that the Spanish fleet had hauled off from the Chilian coast, and gone upon an unknown destination. After diligent inquiry, he became satisfied that any attempt to find the fleet would be "impracticable and fruitless." He became satisfied also that it was necessary to return at once to San Francisco, and took his departure the same day on his return voyage. He considered his original voyage broken up by the withdrawal of the Spanish fleet, and the absence from Valparaiso of its commander, the consignee of his cargo. Upon the return of the vessel Emerick refused to pay the balance of the freight money. Jansen thereupon landed and sold the cargo.

Emerick filed this libel, seeking thereby to recover back the freight money he had paid and the value of the cargo. The owner proved that at the time the charter-party was entered into, war existed between Spain and Chili; that the cargo was intended for the Admiral of the Spanish fleet, then supposed to be operating against Valparaiso; that on the 24th of May the Spanish fleet left the coast of Chili and went to parts unknown, and did not return there. He proved by the master the facts stated in his protest and, further, that he was informed at the Chincha Islands of the bombardment of Callao by the Spanish fleet; that the fleet had been badly shattered, and had sailed away. The master feared his coal would be seized at the Chincha Islands, if he betrayed the object of his voyage. The feeling there was very bitter. He believed the coal would have been instantly seized at Valparaiso.

Thus the case stood upon the proofs. The district court decreed for the owner. The circuit court decreed against him, and he has brought the case to this court for review.

In settling the rights of the parties, the inquiries which demand our attention are: what was the contract between them? was it fulfilled by the ship? And if not, was the non-fulfillment excused by fault or waiver on the part of the charterer, or by other facts, disclosed in the proofs, so as to entitle the owner to all, or any part of, the freight money stipulated for in the charter-party?

According to that instrument, the destination of the vessel was to be fixed by letter before her departure upon her voyage. If it were Valparaiso, the commanding officer there of the Spanish fleet was to be the consignee, with the right to direct the ship to proceed further, and deliver all or a part of her cargo elsewhere. By the charterer's letter of the 14th of May, Valparaiso was designated as the port to which she was first to proceed.

This destination was not subsequently changed, either in fact or according to the understanding of the parties. Emerick's letter to the master, of the 17th of June, requested him to search for the Spanish fleet between Valparaiso and the Chincha Islands, but it gave no intimation of a purpose or willingness that he should abandon the voyage to Valparaiso, as originally prescribed, and certainly no authority to that effect.

The charterer's letter of the 19th of May, authorizing the master to make the Chincha Islands, expressly reserved his rights "under the charter-party and instructions."

Jansen's letter of the 16th of June admits that the vessel had sailed from Valparaiso, and asks instructions as to the disposition of the cargo if the Spanish commander should have left there before her arrival. The master states in his protest that his destination, upon leaving San Francisco, was Valparaiso. He went no further than the Chincha Islands, which were short of that point about twelve hundred miles. He made no search for the fleet between the two points, and gave no reason for breaking up the voyage and not proceeding to the port of delivery, but the probable absence of the consignee and the peril there to ship and cargo.

The existence of the war was known to both parties when the contract was entered into. The

owner made no provision against any contingency. His engagement was simple, direct and unconditional, that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial. If absent it was the right and duty of the master to place the cargo in store. *Fisk v. Newton*, 1 Denio, 45. The contract was not fulfilled. For this the shipper is in nowise responsible. Such are the relations of the parties.

The contract of affreightment is governed by the same principles as other special contracts. There are none to which these principles are more stringently applied. The contract is an entirety; and where there has been no complete fulfillment on one side, and no fault or waiver on the other, no freight money can be recovered. *Mr. Justice Story* says this is the result of all the cases. *The Nathaniel Hooper*, 8 Sumner, 555.

In *Paradine v. Jane*, Aleyn, 26, the court said: "When the party by his own contract creates a duty or charge upon himself he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have guarded against it by his contract." Such has always been the rule of the common law. If a lessee covenant to repair, and the house is burned down, he is bound to rebuild. If a party covenant to build a bridge and keep it in repair for a specified time, and it be swept away by an extraordinary flood before the time expires, he must replace it. A party agreed to secure in England for another the exclusive right to make, use and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an Act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine v. Jane*, and that the covenantor was liable for the breach of his agreement. *Beebe v. Johnson*, 19 Wend., 500. If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void; but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain to-morrow, the contract will be upheld and enforced. Comyn, Digest, 96; Rolle, 420, l. 20.

The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. *Toulong v. Hubbard*, 8 Bos. & P., 200. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance. 2 Pars. Cont., 672; *Beebe v. Johnson*, 19 Wend., 500. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts—not to make or modify them. When there is neither fraud, accident nor mistake, the exercise of dispensing power is not a judicial function.

A charterer agreed to load a ship at Liebeau with barley. The ship went there to receive the cargo. The factors of the shippers informed the master that the Russian Government had forbidden the exportation of barley, and

that no loading could be furnished. The ship returned in ballast. The charterer was sued for the breach of the contract. Lord Kenyon said: "I am decidedly against the defendant upon the point of law. It is said in Coke Littleton (1), that if a man be bound in an obligation to A, conditioned to enfeoff B, a stranger, and B refuses, the obligation is forfeited, for the obligor has taken upon himself to make the feoffment. The reason of this is clear. If a man undertake what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply the settled principles of the law to the regulation of commercial dealings." *Blight v. Page*, 8 Bos. & P., 295, note.

A charterer covenanted to freight a ship at Gibraltar with a homeward cargo. A pestilent disease broke out there, and all public intercourse was forbidden by law. The cargo could not have been put on board without danger to all concerned of contracting and communicating the disorder. Lord Ellenborough said: "If, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages." *Barker v. Hodgson*, 8 Maule & S., 271.

An owner, by a charter-party, agreed that his ship should proceed from Liverpool to Terceira, and deliver her cargo. Terceira was under blockade, and both parties knew it. There was no intention to break the blockade. The ship did not go. The owner was held liable. The rule laid down in *Paradine v. Jane* was cited and approved. *Medeiros v. Hill*, 8 Bing., 235.

A ship was chartered to proceed from Charleston to Rotterdam. She went to London, and the master learned that if she proceeded to Rotterdam she would be liable to seizure there and on the way, and to confiscation, under a decree of the Emperor Napoleon, for having touched at a British port. The master refused to proceed, and landed the cargo. Lord Ellenborough said: "Freight could only be earned by performing the terms of the charter-party." The goods "were brought here, instead of being conveyed to their port of destination." *Osgood v. Groming*, 2 Camp., 466. This case, in its essential points, is strikingly like the one under consideration.

In *Lorillard v. Palmer*, 15 Johns., 14, the vessel sailed on a voyage from Richmond to New York. Finding the Chesapeake Bay blockaded so that it was impossible to proceed without capture, she returned to Richmond. It was held that the shipper was entitled to receive back his goods without paying any freight.

A ship was chartered for a voyage from the City of New York to the City of St. Domingo. The latter was found to be blockaded. The ship was turned away by a blockading vessel, and returned to New York. It was held that the charter-party was dissolved, "and all claim to freight under it gone." The court said: "Nor is this a case for *pro rata* freight. Here was no acceptance of the cargo at an intermediate port." It was added that the owner of the ship may make himself liable for freight by accepting the goods short of the port of destination, upon the grounds of an implied

contract, resulting from the partial transportation of the goods and the benefit received. "But when the cargo, as in the present case, is brought back to the port of lading, no such presumption can arise. No benefit has accrued to the owner, nor has he done any act from which an implied contract to pay any freight can be raised." *Scott v. Libby*, 2 Johns., 836; see, also, *Abbott, Ship.*, 596; *Smith v. Wilson*, 8 East, 437; *Liddard v. Lopes*, 10 East, 526; *Benner v. Eq. In. Co.*, 6 Allen, 222; *Chase v. Alliance In. Co.*, 9 Allen, 311; *Atkinson v. Ritchie*, 10 East, 531; *Vlierbroom v. Chapman*, 13 M. & W., 230.

There is nothing in the record to excuse the conduct of the vessel, or to entitle the owner to any part of the stipulated compensation.

It is unnecessary to pursue the subject further. *We think the decree of the Circuit Court was in all things correct, and it is affirmed.*

Cited—13 Wall., 22; 5 Sawy., 619; 7 Sawy., 377; 2 Low., 176.

Ex parte MARK HOWARD ET AL.,
Petitioners,

AND

JOHN V. MCCOLLUM ET AL., *Appts.*,
v.

MARK HOWARD ET AL.

(See S. C., "In the *Matters of Howard*," 9 Wall., 175-187.)

Inferior courts must obey the mandate of this court—judgments bind only parties and privies—decree of distribution—claims under.

It is the duty of all inferior courts to yield a prompt obedience to the mandate of this court, as between the parties upon the matters involved.

Judgments at law or decrees in chancery, affecting rights of parties to property, bind only the parties before the court and those who stand in privity with them.

A decree of distribution will not preclude a claimant, not embraced in its provisions, but having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund.

In such case, the judges of the circuit court may withhold the distribution of the fund under the decree, until such claims can be considered and determined.

[No. 11, Orig., 408, 344, Doc.]

Argued Feb. 11, 1870. Decided Mar. 7, 1870.

I. PETITION and motion for a writ of *mandamus* to the Judges of the Circuit Court of the United States for the District of Iowa.

II. Motion to dismiss the appeal from the final decree.

The original bill in this case was filed in the Circuit Court of the United States for the District of Iowa, by Mark Howard and John Weber against the City of Davenport, and others. After various proceedings in the court below, and the intervention of several other parties, an interlocutory order and a final decree were entered, and appeals taken to this court.

A very full statement of the case appears in the opinion of the court.

Messrs. Samuel W. Fuller, B. C. Cook and Thomas F. Withrow, for appellants:

If the court shall be of the opinion that this was not a final decree, then the appeal will be dismissed, but without damages, for the following reasons:

This court has no jurisdiction of appeals from the Circuit Courts, except those which are taken from final decrees; and if an appeal is taken and prosecuted from a decree which is not final, this court can take no further cognizance of the case than to dismiss the appeal.

Judiciary Act, Sep. 24, 1789, secs. 22, 23; 1 Stat. at L., pp. 84, 85; Judiciary Act, March 3, 1803, sec. 2; 2 Stat. at L., 244; *Beebe v. Russell*, 19 How., 283 (60 U. S., XV., 668); *Boyce v. Grundy*, 9 Pet., 275.

We have not been able to find any reported case where damages were awarded to the respondents upon dismissing an appeal from an interlocutory decree.

The appellants had presented their respective petitions to the circuit court, stating their claims upon the funds in the hands of the receiver appointed by said court in that cause, claiming superior rights to the fund over those of Howard, Weber and others, who had been awarded the right to it, and asked the circuit court to hear and determine their rights upon the petitions which they presented, and the answers of the other parties to the suit, whether original complainants or defendants.

This mode of proceeding was sanctioned, as the petitioners' counsel thought, by authority and precedent directly in point.

Codwise v. Gelston, 10 Johns., 507; *Op. of Yates, J.*, and *Kent, Ch. J.*; *Winnall v. Sampson*, 14 How., 52; *Williams v. Gibbs*, 17 How., 239 (58 U. S., XV., 135).

Messrs. James Grant and Jno. N. Rogers, for appellees:

The circuit court had no right nor power after *Howard et al.* had, by their superior diligence, procured the payment of this fund into court, and a decree for its distribution to themselves as creditors of the M. & M. R. Co., and after affirmance of that decree in this court, to open it to let in other creditors having no superior rights to reap the benefit of the complainants' exertions.

Nothing is better settled than that a judgment creditor, by first filing his bill to reach equitable assets of the debtor, gains a lien thereon paramount to other creditors who subsequently file similar bills.

McDermutt v. Strong, 4 Johns. Ch., 687; *Weed v. Pierce*, 9 Cow., 728; *Beck v. Burdett*, 1 Paige, 305; *Edmeston v. Lyde*, 1 Paige, 639; *Eager v. Price*, 2 Paige, 333; *Corning v. White*, 2 Paige, 567; *Burrall v. Leslie*, 6 Paige, 445.

The appeal was from an interlocutory order of the court below, from which no appeal lies.

Carr v. Hoxie, 13 Pet., 460; *Young v. Smith*, 15 Pet., 287; *Craighead v. Wilson*, 18 How., 199 (59 U. S., XV., 332); *Beebe v. Russell*, 19 How., 283 (60 U. S., XV., 668); *Ogilvie v. Knox Ins. Co.*, 2 Black, 539 (67 U. S., XVII., 349); *Young v. Grundy*, 6 Cranch, 51.

We ask in this cause for the highest damages which the court can give. This appeal was taken solely for delay. There was not the most remote excuse for it.

We hold that the Circuit Court in Iowa is not only authorized but bound to execute the affirmed decree in *Howard v. Davenport*, which was affirmed in this court, and that no new parties can go into that court and make such a case as will arrest the execution of that decree, where there is no appeal and can be none from

that cause, and thus *supersedeas* operates as an appeal.

Mr. Justice Field delivered the opinion of the court:

These two motions were heard together, as they involve a consideration of similar questions, and grow out of the same facts. The first motion is for a *mandamus* to the Judges of the Circuit Court of the United States for the District of Iowa, commanding them to execute a decree of that court rendered in the case of *Howard v. City of Davenport*, by distributing certain funds in its custody. The second motion is to dismiss the appeal from the final decree rendered in a subsequent suit, affecting the distribution of those funds.

The facts out of which these cases arise, so far as they are material for the determination of the questions presented, are substantially as follows:

In 1854, the Legislature of Iowa incorporated a company, styled the Mississippi and Missouri Railroad Company, to construct a railroad from Davenport to Council Bluffs, in that State, with a branch to Oskaloosa. To raise the necessary funds for the construction of the road, the Company executed, previous to 1861, several mortgages upon its property, to secure its bonds, issued at different times, amounting to over \$6,000,000. The Company also received, previous to 1861, in payment of subscriptions of stock, bonds to a large amount, of certain cities and counties in the State, through which the road was located, the payment of which bonds was guaranteed by a special indorsement upon each. With the guaranty of this indorsement, it disposed of the bonds to different parties.

In 1865, the Company became embarrassed and insolvent, and in February, 1866, a suit was brought in the Circuit Court of the United States for the District of Iowa, for the foreclosure of its mortgages upon its property. In May following, the suit resulted in a decree for the sale of the property, and in July of the same year a sale was made under the decree, by a master in chancery, to the Chicago, Rock Island and Pacific Railroad Company, a corporation created by the State of Iowa. The foreclosure and sale were made pursuant to an arrangement entered into between the stockholders and the greater number, but not all, of the bond holders and other creditors of the Company, by which it was agreed that the sum of \$5,600,000, in bonds of the purchasing Company should be given for the property, and applied to the payment of the bonds secured by the different mortgages of the insolvent Company, in conformity with a specified scale, with the exception of an amount equal to sixteen per cent. on the capital stock of that company, namely, \$552,400, which should go to its stockholders.

Previous to this time, Mark Howard and John Weber had severally recovered judgments against the City of Davenport, and also against the Mississippi and Missouri Railroad Company, upon certain bonds issued by that City to aid in the construction of the railroad, and guaranteed by that company. In the distribution of the proceeds to be received upon the sale of the property of the insolvent company, no provision was made for the payment of these judgments, and on the 9th of July, 1866, the day on

which the sale mentioned under the decree of foreclosure was made, Howard and Weber brought a suit in equity in the same court against the parties to the foreclosure suit, to obtain payment of their demands out of the proceeds, which, by the arrangement mentioned, were to go to the stockholders. In their bill they set forth the judgments recovered by them against the Mississippi and Missouri Railroad Company; that the company was insolvent; that all its property had been sold under the decree of foreclosure; and that there was no other property out of which these judgments could be made than the \$552,400 which was to be received by the stockholders out of the proceeds of the sale.

During the progress of the suit, fourteen other persons appeared and presented claims of a similar character, to an amount exceeding \$700,000, against the same fund. These parties are designated in the proceedings as "intervening claimants joining in the bill." On application of the complainants and these intervening claimants, a receiver was appointed by the court, to collect and hold the fund which they were seeking to subject to the payment of their claims. This officer subsequently received from the Chicago, Rock Island and Pacific Railroad Company, the purchasing Company, in its first mortgage bonds, with interest and coupons attached, the amount which was to go to the stockholders of the insolvent company, and has ever since held the same in his custody, subject to the order of the court.

In May, 1868, a final decree was rendered in the suit, adjudging that the complainants and intervening claimants were entitled, as creditors of the Mississippi and Missouri Railroad Company, to so much of the purchase money of its property as was agreed to be reserved for the stockholders; and directing the purchasing company to pay the same, less a small sum allowed for overpayment, in cash or its bonds to the receiver; and directing the receiver, if paid in bonds, to convert the bonds into money, and after satisfying certain costs, distribute the proceeds to the complainants and intervening claimants *pro rata*, in proportion to the amounts of the respective claims, which were stated. On appeal to this court, this decree was affirmed, and the mandate to the circuit court, issued in pursuance of the judgment of the affirmance, commanded "that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Whilst the appeal was pending, Frederick A. Foster presented a petition to the circuit court, setting forth that he was a holder of certain bonds of the Mississippi and Missouri Railroad Company, secured by mortgage on its property, which had never been paid; that he was not a party to the arrangement by which, upon a sale of the property as already mentioned, a certain portion of the proceeds received were to be paid to the stockholders, and insisting that the fund thus realized was applicable to the payment of these bonds, and praying for an order restraining the distribution of the fund in the hands of the receiver, and directing that, upon proper pleadings, an issue be joined between the petitioner and other holders of bonds, who never

assented to the arrangement mentioned, and the complainants and intervenors, to settle the priorities of the parties in an application of the fund.

Subsequently three other parties, McCollum, Bardwell and McComb, presented similar petitions to the circuit court, setting forth that they were also holders of bonds of the insolvent Railroad Company which had never been paid, and asking that the proceeds derived from a sale of the property in the hands of the receiver be applied to the payment of these bonds, in preference to the claims of any parties to the suit of Howard and others.

In May, 1869, the court denied the prayer of the petitioners, but allowed them to file their petitions, and required them to file a consolidated bill at the next term of the court, against all the parties to the suit, setting up their respective claims with greater particularity than in the petitions.

In July following, the petitioners, Foster, McCollum, Bardwell and McComb, filed their consolidated bill against Howard and all the other parties to the original suit, asserting their claims as mortgage bond holders to the fund in the hand of the receiver. The bonds amounted to about \$72,000, with large arrears of interest, for which they claimed a lien upon the fund in preference to the claims of Howard and others, and if that was not allowed, then they claimed the right, as general creditors, to share with them in the distribution of the fund. No objection was made by them that after a final decree, affirmed by this court, directing a distribution of the fund, it was too late for the complainants to file their bill to reach the fund, or to share in its distribution.

In November, 1869, the circuit court heard the case and rendered a final decree, rejecting the claim of McCollum, and allowing the claims of the other three complainants, Foster, Bardwell and McComb, to a limited amount as general creditors.

From this decree the complainants appealed, McCollum because his claim was entirely rejected; Foster, Bardwell and McComb, because they were allowed to come in only as general creditors. This appeal is now pending in this court.

After this appeal was perfected, Howard and others, the complainants and intervening claimants in the original suit, applied to the circuit court for a rule on the receiver to proceed to execute the decree rendered therein, by the distribution of the fund in his hands, as provided by the decree in that case, notwithstanding the appeal of Foster and his associates, or of any of them; or in case the court should be of opinion that the motion could not be granted in full, that then the receiver should be ordered to proceed to execute the decree, except as to such portion of the fund as to which execution was suspended by order of the court, made at the May Term. This motion the circuit court denied.

The same parties now ask this court to issue a writ of *mandamus* to the judges of that court, commanding them forthwith to execute the decree rendered at the May Term, 1868, and affirmed by this court, or to execute the decree by distributing all the fund, excepting sufficient to cover the claims of the appellants.

There is no ground for supposing any intention on the part of the circuit judges, or of either of them, to evade or disobey the mandate of this court. Their action has been dictated entirely from an opinion held by them that parties asserting a right to share in a common fund in the custody of the court, and presenting a *prima facie* case in support of such asserted right, are entitled to be heard at any time before its actual distribution, although a decree ordering such distribution in a litigation between other parties may have been entered. Whether in this opinion they are sustained by the law, is the question presented for our consideration. We are not called upon to determine the character of the claims presented, whether they constitute liens upon the fund in the hands of the receiver, or stand as simple debts against an insolvent company, or whether the right, if any ever existed, of the holders to share in the fund has been lost by their laches. The question is not as to the merits of the claims, but whether the circuit court was forbidden by the force of its previous decree, when affirmed by this court, from considering the claims at all.

Undoubtedly, it is the duty of all inferior courts to yield a prompt obedience to the mandate of this court; or, in other words, to treat as conclusive the judgment of this court upon the law and facts presented to it in appropriate form for consideration. Any other conduct would be subversive of the relation which the Constitution intends that inferior tribunals shall hold to this court. But the obedience thus due is not a blind obedience, acting upon the letter of the judgment affirmed, or mandate ordered, without any consideration of the rights of persons not parties to the litigation in which the judgment was entered. The judgment of an inferior court, when affirmed by this court, is only conclusive as between the parties upon the matters involved. Viewed simply as an adjudication between them, it is not open to question. It must be followed and obeyed. The inferior court cannot re-open the case and allow new proceedings to be taken, or further evidence to be given, or new defenses to be offered, upon any ground whatever. It must execute the judgment or decree, and only for that purpose has it any authority over it. Such is the purport of the numerous cases cited by the counsel for the relators. But they go no further. None of them suggest even the proposition that the judgment or decree affirmed concludes the rights of third parties not before the court, or in any respect affects their rights. It would have been against all principle and all reason had they asserted anything of the kind. There is, indeed, a class of cases affecting the personal *status* of parties, in which a judgment necessarily binds the whole world, but it is not of these we are speaking. We refer to judgments at law or decrees in chancery, affecting rights of parties to property. They bind only the parties before the court and those who stand in privity with them.

The counsel of the relators seek to apply the conclusive character of such judgments and decrees between parties to persons not parties, under the supposition, it would seem from their argument, that they require some additional efficacy from their affirmance by this court.

But they acquire no additional efficacy by such affirmation. As adjudications upon the rights of the parties between themselves they have the same operation before as after their affirmation.

The decree in the case of *Howard v. The City of Davenport*, determined that the complainants and intervening claimants were entitled to the fund in the hands of the receiver as against the defendants. It did not determine, and could not determine that Foster and his associates had not equal or greater claims to the fund than either of those parties. They had, therefore, the same right to proceed by bill or other appropriate remedy if there be one, to assert any claims or equity to the fund which they possessed, as they might have done if no such suit as that of *Howard v. The City of Davenport* had ever been commenced or carried to final decree. And in the prosecution of their suit they were entitled upon a proper showing, to all the remedies by injunction or order, which a court of equity usually exercises to prevent the relief sought from being defeated.

The general doctrine, that where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but, having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund, is established by numerous authorities, both in England and the United States. Several of these are cited by counsel, to two of which we will refer. The first is that of *Gillespie v. Alexander*, 8 Russ., 130. That was a suit for the administration of the estate of General Gillespie. After several debts against the estate had been proved before a master and been paid, the court, in January, 1825, decreed a distribution of the residue of the fund in court to the unsatisfied legatees. In November, subsequently, a party appeared claiming to be a creditor of Gillespie, and petitioned the court for liberty to prove his demand, and liberty was given. In July of the following year the master reported that there was due the petitioner over sixteen hundred pounds. In the meantime the fund had been apportioned under the decree, and part of it had been paid in discharge of some of the legacies. The Master of the Rolls ordered that the debt to the petitioner should be apportioned among the funds of the different legatees, whose legacies still remained in court, observing that the legatees were not without remedy, as they could call on the other legatees to contribute. From this order an appeal was taken to the *Chancellor*, and the principal objection urged to the order was similar to the objection urged in this case, that the creditor was concluded by the decree directing distribution, but Lord Eldon, in deciding the appeal, said:

"Although the language of the decree, where an account of debts is directed, is, that those who do not come in shall be excluded from the benefit of that decree, yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the

residue, he is not without a remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees and bring back the fund, he may do so, but he cannot affect the legatees except by suit, and he cannot affect the executor at all."

And the *Chancellor* ordered that the debt should be apportioned to the shares of all the legatees, and that the petitioner should be paid the sums apportioned to the shares remaining in court, and be at liberty to apply against the legatees who had been paid, and against funds which might subsequently come in for the balance due him.

The other case to which we will refer is that of *Williams v. Gibbs*, decided by this court and reported in 17th of Howard, 239 [68 U. S., XV., 185]. In that case, the County Court of the Sixth Judicial District of Maryland had, by its decree, rendered in December, 1846, awarded to the executors of one Oliver, the proceeds of a share of one Williams in an association known as the Baltimore Company. Upon appeal to the Court of Appeals of the State, the decree of the County Court was, in this respect, affirmed. In 1852, six years after the entry of the decree, the administrator of Williams filed a bill, in the Supreme Court of Baltimore City, against the executors of Oliver, for the proceeds of Williams' share, averring that neither he nor Williams was present, or a party to, or bound by, any proceeding, or order, or decree of the County Court, or of the Court of Appeals, and that the settlement and adjustment of the amount of the partnership funds of the Baltimore Company, and of the charges, commissions, and costs to which they were liable in *solido*, and the distribution of the remainder of the funds by the decree of the court to the several shares, which the members of the company were entitled to, were not binding upon him or his intestate.

The case was transferred from the State court to the Circuit Court of the United States, where the bill was dismissed. On appeal to this court the decree of dismissal was reversed. *Mr. Justice Nelson*, speaking for the court, said:

"Now, the principle is well settled in respect to these proceedings in chancery, for the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or in case they have distributed the fund in pursuance of an order of the court, against the distributees."

And after referring to various cases from the English courts, and among others to that of *Gillespie v. Alexander*, already cited, said:

"The cases above referred to relate to the rights of creditors and next of kin; but the principle is equally applicable to all parties interested in a common fund brought into a court of equity for distribution among the several claimants."

These cases, and the general principles gov-

erning courts of equity in the disposition of a common fund, of which there are several claimants, are sufficient to show that the judges of the circuit court were justified in authorizing Foster and his associates to file their consolidated bill, and thus present for consideration, their claims to share in the fund in the hands of the receiver, and in withholding the distribution of the fund under the decree in the case of *Howard et al. v. The City of Davenport, et al.* until such claims could be considered and determined.

Whether in the determination of these claims the circuit court decided rightly or otherwise, can only be settled upon the hearing of the appeal from its decree.

It follows that the motion for a *mandamus*, and the motion to dismiss the appeal from the final decree, must both be denied.

Ordered accordingly.

JOHN V. MCCOLLUM ET AL., *Appts.*, }
v. } No. 344.

MARK HOWARD ET AL.

The decree in this case, made on the twentieth day of May, 1869, is interlocutory and not final. The appeal from it must, therefore, be dismissed.

Cited—8 Blatchf., 475.

THE STAR OF HOPE, ETC., *Appts.*

v.

W. C. ANNAN ET AL.

(See S. C., "*Star of Hope*," 9 Wall., 208-237.)

General average, what is—duty of master—presumption of—stranding—when voluntary—proper subjects of general average—master may sell cargo.

General average contribution is a contribution by all parties to make good the loss sustained by one, of part of the ship or cargo, to save the residue from an impending peril, or for extraordinary expenses incurred by one for the benefit of all.

The owners of the other interests are bound to make contribution in proportion to the value of their several interests.

Sacrifices, where there is no peril, present no claim for contribution.

The master must judge and determine whether the danger is so great as to render a sacrifice of a portion indispensable for the common safety of the remainder. It must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made.

A loss occasioned by a voluntary stranding of the vessel, is the proper subject of general average contribution, if the stranding resulted in saving the cargo.

Where the stranding was the result of a choice of perils, it was a voluntary act within the meaning of the commercial law.

The valuation of the ship, as given in the policy of insurance, is evidence of her contributory value in the statement for general average.

Repairs necessary to remove the inability of the ship to proceed on her voyage, are the proper subject of general average.

The master may sell a part of the cargo to raise the means to make the repairs, and such sacrifices are the subject of general average.

[No. 63.]

Argued Feb. 14, 1870. Decided Mar. 7, 1870.

APPEAL from the Circuit Court of the United States for the District of California.

NOTE.—*General Average.* See note to *Columbian Ins. Co. v. Ashby*, 38 U. S. (13 Pet.), 331.

Libels in admiralty were filed in the United States District Court for the Northern District of California, in each of the cases included herein, by the appellees, against the ship, *Star of Hope*. A decree having been entered in favor of the libelants in that court, the claimants of the ship took an appeal to the circuit court. The said decree having been affirmed in that court, the libelants took a further appeal to this court.

The case is very fully stated by the court.

Messrs. E. Casserly C. Cushing and W. W. Boyce, for appellant:

The law of general average, as it exists today in the United States, is founded on the Rhodian law, which is thus stated in the Digest (*De lege Rhodii de Jactu*, lib. 14, tit. 2, ch. 1): "*Lege Rhodia cavetur ut in levandis navis gratia jactus mercium pactus est, omnium contributione, sarcietur quod pro omnibus datum est.*"

The single case of a jettison is put obviously as the most common illustration of the general principle. For as Judge Story remarks (*Ins. Co. v. Ashby*, 13 Pet., 838), the same Digest applies this same rule to the case of a ransom paid to pirates for the ship (lib. 14, tit. 2, ch. 2, sec. 8), and to the case of cutting away or casting overboard the masts or other tackle in a stress of weather. *Id.*, tit. 2, ch. 3, ch. 5, sec. 1.

Also (he might have added), to the further case of goods put out of a ship into lighters to relieve her, and afterwards lost. *Id.*, tit. 2, ch. 4.

The fundamental principle is, that "all shall contribute to make good whatever is given up for the good of all."

For the purposes of the present case, it may be safely said the following conditions must exist:

1. The danger must be imminent and common to the ship, cargo and the lives of those on board.

2. To avert this danger from the whole, the ship or cargo, either entirely or in part, must be purposely put at risk in lieu of the whole.

3. By the loss incurred, the safety of the other interests involved must at least for the time be accomplished.

See Laws of Wisbuy, 20; 1 Pet. Adm. Dec. App., 21, 25; authorities cited, 2 Arn., 888, n.; *Ins. Co. v. Ashby* (*supra*); *Barnard v. Adams*, 10 How., 303.

In this case it cannot seriously be disputed, that the first and last of these essential conditions or their full equivalents existed. The agreed statement of facts is explicit, that all on board had every reason to believe the ship, cargo and their own lives in the most imminent peril; and that the captain was fully justified in acting on this belief. As to the danger and its character, there can be no question. Nor can there be any that, by the steps taken, the danger, if it existed, was averted. If it did not exist, still there was every reason to suppose it did; which, for the purpose of the law, is the same thing.

The only controversy is whether or not the second essential condition is found in this case. In other words, whether to avert the danger impending over the whole, the ship was purposely put to risk in lieu of the whole, so as to make the damage afterwards incurred by her (and of course the consequent expenses) matter of general average contribution.

The circumstances under which she was stranded are settled by the agreed statement of facts.

The question is, therefore, as to the legal effect of those facts. The decision below was that the effect of them is to establish a case of particular average; in other words, to render the ship alone liable for the damage done by the stranding. Appellant's counsel, on the contrary, contend that they make out a case for a general average and contribution by the different interests involved. He submits to the court the two following propositions, as being a just statement of the law which governs this case:

I. Whenever, to avoid an imminent danger, common to the ship, cargo and the lives of those on board, the ship is voluntarily or purposely exposed to a distinct and extraordinary peril out of the usual course of navigation, and of the ship's duties as a carrier for the voyage, any loss or damage to the ship consequent thereon is a subject of general average contribution.

II. It is immaterial, though this loss or damage to the ship is other or greater than was expected, or whether it was wrought directly and immediately by the act of exposure, or incidentally by reason of the ship being placed in the situation which made her liable to the injury.

The whole law of general average is pre-eminently a series of analogous equities drawn out from an original principle. There being no decided case precisely the same as this in its facts, it will be necessary to deduce the law of this case by the same process, aided by the decisions in analogous cases.

The most obvious general analogy to sustain both propositions, is that of goods put into a lighter to relieve the ship and cargo, and afterwards lost or damaged. This is a case of general average as ancient as the Digest (already cited), and so by all the authorities since, without exception.

Emerigon, by Meredith, 474, citing Ord. Mar. 19, *dujet*; Digest, *ante*, p. 7, loc. cit.; Jacobsen, Sea Laws, 849, and *note*, *rv*; Guignon, c. 5, sec. 28; Abb. Ship., 477; Stev. & Ben., 65; 2 Phil. Ins., sec. 1288, and *note* 2; *Lewis v. Williams*, 1 Hall, 480.

So in the highly analogous case of goods lightered out of a ship compelled to take refuge in a port to which she was not destined, and which she cannot enter without being relieved of a part of her cargo.

Abb., 477, *note* 1.

This latter case presents pointedly the feature which converts a loss of goods into a general average, namely: that the lightering is out of the usual course of navigation for the voyage. Where it is not so, as where the lighter is in the common course of navigation or business, the loss is particular average. The exception is fully recognized.

Emerig., 474; 2 Phil. Ins., sec. 1288, and *note* 3; Stev. & Ben., 184; *Lewis v. Williams*, 1 Hall, 487.

And confirms the rule, and both clearly establish our true proposition.

Mr. Benecke (Stev. & Ben., 183) very correctly deduces the general rule, that "where goods are exposed intentionally to an extraor-

inary danger for the benefit of the whole, they are entitled to compensation. For to expose another's property or destroy it without compensation, would be equally unjust.

Magens (1 Mag., 160, case IX., Stev. & Ben., 184, *note a*) mentions the case of goods put out of a leaky ship on board of another, which was afterwards captured, where the goods were contributed for in general average.

The damage to the ship in an engagement for the purpose of defending her against the enemy, and the expenses of curing and maintaining the wounded officers and men of the ship, are a general average.

Laws Hanse, t. 35; Ord. Mar., l. 3, t. 4, sec. 11; Code de Com., sec. 263; Jacobsen, Sea Laws, 849; 2 Phil. Ins., sec. 1310, and authorities cited; Stev. & Ben. 154, quoting Valin des Avar, art. 6; Flander, Mar. Law, sec. 316.

In *Taylor v. Curtis*, 6 Taunt., 608, this clear equity was denied by the English C. B. The Legislature, as is not uncommon in that country, has since relieved the harshness of the law maintained by the courts, by Statutes 11 and 12 William III., ch. 7.

And see the cases of extraordinary exposure or loss out of the common course, in 2 Phil. Ins., sec. 1295. Slipping the cable to run out to sea to escape going ashore. Sec. 1298. Sails let go to right the ship when on her beam ends. Ben. 112, sec. 1299. Applying a portion of the ship's tackle or equipment to an extraordinary use. Secs. 1308, 1309. Cutting the cable to keep with convoy or escape from an enemy. Sec. 1320. Expense of putting into a port out of the course of the voyage to refit, etc.

In like manner the general rule as to expenses is, that where they are extraordinary or out of the common course, they are general average. Emerig., 467, quoting *The Ord.*: Stev. & Ben., 61.

The whole doctrine embraced in point 1, is conceded by Mr. Arnould, 3 Ins., 885. Undoubtedly it furnishes the only certain test of a general average in all cases and under all circumstances. In the very late case of *Dupont v. Vance*, 19 How., 162 (60 U. S., XV., 584), the Supreme Court has stated the distinctive features of a general average sacrifice, in these words: "If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests," etc.

The district court rests its decision on the proposition that to make a loss by stranding, general average, "The stranding must be the immediate and direct result of an intention to effect that particular object."

The doctrine which prevailed below seems to have been that, to entitle a loss to come into general average, it must be not only the direct, but the immediate result of the act and will of man; so that, if the loss be by stranding, stranding must have been the very form of injury premeditated in making the exposure or sacrifice.

In the first place, the vital principle of general average is the motive of the act of sacrifice or exposure. That motive must be the common safety of the other interest concerned. It is that which gives its character to the act; not the fact that any particular damage was in-

tended or form of damage or injury "premeditated."

The doctrine is equally opposed to all the most authoritative cases in the United States.

Case v. Reilly, 3 Wash. (C. C.), 298, is a case in point in support of both our propositions, the reasoning of which has twice received "the unqualified assent" of the Supreme Court of the United States.

Ins. Co. v. Ashby, 18 Pet., 848; *Barnard v. Adams*, 10 How., 302.

There the master of a schooner, hard pressed by British cruisers, ran her upon the beach at Long Branch. The enemy, landing in boats, set fire to the vessel and burned her to the water's edge. The hulk floated ashore and was lost. About half of the cargo was saved, part before she was set on fire and part after the fire was extinguished. Two questions were raised as to the liability of the goods saved to a general average: first, for the value of the vessel; and second, for that of the freight and cargo lost. The first, which, in fact, involves the other, was the only one argued and decided. The court held in favor of the general average for the value of the vessel. The claim to the general average was opposed by an eminent lawyer of that day, Mr. Duponseau, on several grounds, some of which have a striking likeness to those taken against the ship in this case. One of them was, that the loss of the vessel was not contemplated as a consequence of the stranding. This was so far true that obviously her destruction was directly owing, not to her stranding, but to her being set on fire by the enemy, which was not the direct and immediate result of her stranding, but an incident of it and of being placed thereby in a situation that exposed her to that form of injury. Of course it could not have been said to be premeditated by the master, or intended by him more than any other form of destruction possible to follow his beaching his vessel.

The court, however, utterly repels the objection and says:

"The truth is, that it is the motive of the act in relation to the rest of the property, and not the intention of the jettison in relation to the fate of the thing sacrificed or exposed to danger, which gives rise to contribution."

Again; "If the exposure of the vessel be made for the common safety and be successful, it is of no consequence whether her total loss was produced immediately by the stranding, or subsequently by placing her in a situation by which her destruction was effected."

See, also, *Sims v. Gurney*, 4 Binn., 513, a case which, like *Case v. Reilly*, 3 Wash. (C. C.), 298, has twice received in the strongest manner the approval of the Supreme Court of the United States.

Ins. Co. v. Ashby (*supra*); *Barnard v. Adams* (*supra*).

From the violence of the storm in Delaware Bay, the ship in this case had to go ashore somewhere, and was in danger, if left to herself, of going upon certain flats where her situation would have been extremely perilous. The subsequent facts are stated by the court. It was held a case of general average, both as to the damage from striking on the ridge, and as to that from stranding on the beach at Cape May.

In that case the act of exposure was steering the ship to a dangerous shore, though less dan-

gerous than the flats where she must have gone but for the will and agency of the man.

The damage done by the loss of her boats and her stranding on Cape May, was not only not premeditated, nor the result of an intention to effect that particular object (as said by Judge Hoffman), but was contrary to the expectations of the ship's officers. It was, however, a consequence of the original act of exposure, and partook of its character because it was produced subsequently, by placing her in a situation which made her peculiarly liable to damage, namely: running her on the ridge, where she beat till she lost two of her masts and her rudder, and became unmanageable.

In *Sturges v. Cary*, 2 Curt., 59, the master slipped his cables and surrendered his vessel to the elements, to be by them swept ashore on the nearest land. The exposure in this case was the slipping of the cables. That having been voluntary, all damage consequent thereon was voluntary also. And in the language of *Case v. Reilly* (*supra*), it was not material whether the loss had been produced directly by the act of exposure, or subsequently by the vessel's being thereby placed in a situation in which she was greatly damaged.

In *Reynolds v. Ins. Co.*, 22 Pick., 191, the vessel having struck the bottom and being in danger of sinking, the master slipped his cable and she went ashore.

See, also, to the same effect, *Barnard v. Adams*, 10 How., 270; *Gray v. Wain*, 2 Serg. & R., 239, a case which has also been approved as to its reasoning, by the Supreme Court of the United States. *Barnard v. Adams* (*supra*).

Besides the authorities already cited in support of both propositions, as *Case v. Reilly*, and the case of the lightered goods, etc., there are others which, though bearing upon the first, apply more particularly in support of the second proposition.

Maggraith v. Church, 1 Cai., 196; *Ins. Co. v. Ashby*, 18 Pet., 848; see, also, 2 Phil. Ins., sec. 1286, and n. 2.

The case cited by His Honor, Judge Hoffman, a decree of the French court of Aix, from *Begron Code de Commerce*, art. 408, n., supported by the authority of Boulay-Paty, is in direct conflict with his own rule, and fully supports our doctrine; going further even than our case requires. In that case the ship's anchor and cable had been voluntarily slipped and lost for the general safety, and the master having gone ashore the next day to replace them, the ship was stranded in his absence.

Under such circumstances how can it be said that the particular damage was intended or premeditated, or that it was even the direct and immediate result of the act of man?

The attempt was made below to get rid of the principle and reasoning of certain cases of damage by stranding, cited for the ship, on the ground that in those cases the stranding was not only voluntary, but distinctly premeditated; as in the case of *The Brutus*, *Barnard v. Adams*, 10 How., 270; *The Hope Ins. Co. v. Ashby*, 18 Pet., 331; *Case v. Reilly*, 3 Wash. (C. C.), 298, etc.

This whole argument seems to confound two things entirely different: the act of exposure, and the particular form of injury consequent thereon. The former must be voluntary or intentional. The latter need not be; frequently

is not; in many well recognized cases cannot be. In *Case v. Reilly*, the act of exposure was stranding, but the damage was from the burning of the ship thus stranded.

"At length" (is the agreed statement) "he determined—as the best thing to be done for the general safety, and especially for the preservation of the cargo and lives on board—to make the attempt to run in without a pilot, preferring all risks to be thereby increased, rather than remain outside in the momentary apprehension of destruction to all. * * * In attempting to enter the bay the lead was kept going, showing successively eight, seven, six, five, four, four and a half, and four fathoms; and immediately afterwards the ship grounded, and after striking heavily, remained fast."

How is it possible to deny that here was an exposure, by the master, of his ship, to a distinct and extraordinary peril, purposely made by him, as the only escape from the instant destruction impending over ship, cargo and crew?

The agreed statement is, that "Stranding was one of the chief risks he had assumed in attempting to run in." The other facts show conclusively that he realized this danger fully. When at last he made up his mind to attempt to run in at all hazards, it was not because he overlooked or underrated the perils of the enterprise; but because it offered the only chance of escape from the far greater dangers that surrounded him, and which had become too pressing for further delay; and because, as the agreed statement says, "He preferred all the risks of running in, to those of remaining outside."

In the face of these facts, it seems very little to the purpose to urge that the particular reef on which the ship struck was unknown to the master; that he endeavored to get a pilot; or even that he hoped or expected to take her safely in.

Considerable stress has been laid throughout on the point that the master did not intend nor wish to strand the ship. This is not alleged in the "statement of facts" in the case, and is merely an inference from the fact that the rock or reef on which the ship struck was not visible and was unknown to him. It is expressly stated, however, as a fact, that "He determined to run in at all risks," and that the ship's stranding was one of the chief risks he assumed in undertaking to run in.

All this appears to be on the theory, that to constitute a general average loss, there must be an intent recklessly to destroy the thing selected for the exposure.

A theory somewhat like this was advanced by the court in *Walker v. U. S. Ins. Co.*, 11 Serg. & R., 61. It is fully reviewed and rejected by the Supreme Court in *Barnard v. Adams*, (*supra*).

In truth, the intention to injure by *jactus*, as distinguished from the intention to put in a situation of exposure out of the usual course, much less to injure it in any particular manner or by any particular rock or shoal, cannot be an element of general average. Otherwise, goods lightered would never be entitled to a contribution; because as to them (as already remarked), so far from there being any intention to injure them, the expectation commonly is, that they will be saved.

See *Case v. Reilly*, 8 Wash. (C. C.), 803, on the point.

The loss or injury in a case of general average is rarely the remedy proposed. It is mere—
See 9 WALL.

ly the result or the incident of the step taken with a view to a remedy.

The only remaining inquiry is: was the risk taken in this case, out of the usual course of navigation, and of the ship's duty as a carrier for the voyage, so as to entitle the loss consequent thereon to come into general average?

The place into which the master of The Star of Hope was obliged to venture with her, as his only chance of escape, was not his destined or any port, but a wild and desolate bay, far from the paths of commerce and forsaken by man, with a depth of water palpably dangerous and insufficient. The attempt to take her into such a place at all, was not only beyond his duty, but could only be justified by circumstances so desperate as to leave no alternative between that and destruction.

In any view, the expenses of the repairs at Montevideo were general average. The agreed statement of facts is that the expenses of repairs at Montevideo were necessary to enable the ship to resume her voyage.

The expenses amounted to \$35,359.90.

The ship's value at San Francisco, her port of destination, is fixed in the agreed statement of facts at \$40,000, and at Montevideo, the port of repairs, also agreed at \$33,000. Hence the actual cost of repairs exceeded one half of her value when repaired, and there was a constructive total loss.

Patapasco Ins. Co. v. Southgate, 5 Pet., 618; *Bradlee v. Ins. Co.*, 12 Pet., 398.

This presents for decision the question, whether all the repairs made in this case having been "necessary repairs to enable the ship to resume her voyage," are not general average, without regard to the nature of the original damage. Especially if considered in connection with the fact, that there was in this case a constructive total loss, upon which the master might have abandoned, but did not.

In *Plummer v. Wildman*, 8 Maule & S., 482, it was held by Lord Ellenborough and all the other judges, that the repairs necessary to enable the ship to resume her voyage, were general average. And *Judge Story* says, in his note to *Abb. Ship.*, 601, that the doctrine of that case has been generally followed in the reasoning of our American courts.

If the repairs are general average, the loss on the sale of goods to pay for them was also.

The decision of the district court was, that the damage and loss consequent upon the stranding of the ship, Star of Hope, at Montevideo, was a subject of particular average.

Upon that decision, and assuming it as a basis, the claimant of the ship filed a series of three exceptions to certain details of the report of the commissioner, which he contended were incorrect, even under the principle laid down by the district court.

The commissioner erred in charging the ship or the freight with any part of the alleged expenses of the pretended adjustment made or attempted in the Port of San Francisco by Annan, Embury & Hazzard, the successors of the original firm of Annan, Talmage & Co., the charterers and consignees of the ship.

To the libel filed for these expenses, the claimant put in a full demurrer.

It would seem that this whole question is disposed of by *Cutler v. Rae*, 7 How., 729; see

also, *Minturn v. Maynard*, 17 How., 477 (58 U. S., XV., 235).

There is not only no proof that the ship was still in the custody of the libelants when they filed their libel, but the fact was otherwise and was admitted in the argument.

The commissioner erred in assuming as the basis of his estimate of the contributory value of the ship, her valuation in the policy of the insurance at Boston, admitted to be \$65,000, from which deducting for repairs at Montevideo, \$32,560 (which should have been \$35,359.90), he arrived at \$32,400 as her contributory value in the adjustment.

The true basis of valuation is the value at San Francisco, her port of destination and adjustment, fixed in the statement of facts at \$40,000.

3 Kent, Com., 242; 2 Pars. Mar. L., 420; *Clark v. Ins. Co.*, 7 Mass., 365; *Wells v. Gray*, 10 Mass., 41.

The commissioner erred in bringing into particular average or subject to a destruction of "one third new for old," certain expenses at Montevideo which, though incidental to the repairs of the ship, were either not themselves a permanent benefit to her, or were not incurred for that purpose.

The American rule on this subject is stated as follows, in his work of high authority:

"Whatever the nature of the original injury, whether from a voluntary sacrifice or a mere peril of the sea, the wages and provisions of the crew from the time of putting away for the port, and every other expense necessarily incurred during the detention, for the benefit of all concerned, are general average."

Abb. Ship., 601, 602; *Story, Notes. Judge Story* says the reasoning of our court follows out the doctrine of Lord Ellenborough, in *Plummer v. Wildman*, 3 M. & S., 432; see, also, cases cited by him in his *n.* 601, 2; *Walden v. Leroy*, 2 Cal., 262; *Henshaw v. Ins. Co.*, 2 Cal., 274.

Whatever repairs were made over and above those required to remove her incapacity to proceed, will be considered as having incurred to the benefit of the ship alone, and to be borne by her only.

See *Plummer v. Wildman*, (*supra*), where the rule is fully stated with the exception by all the Judges.

The rule is stated on somewhat different principles by Phillips (2 Ins., sec. 1800). He makes the test to be, how much of the repairs is temporary in its nature, and how much is permanent.

For our argument, it is not very material which view is adopted; the agreed statement being expressly that the expenses incurred at Montevideo were necessary to enable the ship to resume her voyage.

This doctrine has been asserted more or less distinctly, in a great number of cases. For instance: *Walden v. Le Roy*, 2 Cal., 262, *vide* decision of court by Kent, *Ch. J.*, 264; 3 Kent, Com., 235; *Ins. Co. v. Parker*, 2 Pick., 8; *Barker v. Ins. Co.*, 8 Johns., 318; *Henshaw v. Ins. Co.*, 2 Cal., 274, and *vide* 277, showing what was decided in that case.

Messrs. C. Donohue and Beebe, for appellee:

To bring a loss sustained during the progress of a marine adventure within the definition of

general average, it must appear to have been voluntarily incurred for the common safety.

With regard to losses or damage by stranding, all the books and cases agree that the stranding must be voluntary.

In the case at bar, it was no part of the master's intention to strand the vessel. The stranding was not only involuntary and unexpected; except so far as he was aware that, in attempting to run into an unknown harbor, he incurred the risk amongst others, and that it was the chief risk he encountered. That he voluntarily subjected the vessel and cargo to whatever risks such a course involved cannot be doubted; but it is equally clear that he did not voluntarily and intentionally strand his vessel, that is, that the stranding was not the immediate and direct result of an intention to effect that particular object.

Boulay-Paty, Droit Marit., tom. 4, p. 455, after speaking of the case where the master adopts the course (*prend le parti*) of stranding his vessel, says: "But a stranding occasioned by any other event, even fortuitous, or of *vis major*, will only produce simple average, unless it has been the consequence and effect of a sacrifice for the common safety."

It may be said that the whole deviation to a port of distress, and especially entering this port, was a sacrifice for the common safety.

If, then, an accidental damage of this kind is to be allowed in general average, because it occurred during a voluntary deviation rendered necessary by *vis major* and, therefore, is the effect and consequence of the sacrifice for the common safety, the same principle would require that every loss incurred during such a deviation should be contributed for.

The practical result of the principle contended for would be, that in all cases of deviation, all the interests would be bound to contribute, or would become the insurer's against any accidental damage sustained by any one of them; and mutual relations would be established very similar to those created by the contract called *agernamento* mentioned in the *consulate*, ch. x., 95, by which the ship and cargo were confounded in a common mass, and all damages sustained were paid for by contribution.

In the case of loss or damage by stranding, the language of the English and American cases and books is uniform, that to make a stranding a general average loss, it must be the immediate result of the act and volition of man, directed toward that particular object. It will not include the case of an accidental stranding which was the consequence of risks incurred by deviating to repair damages occasioned by *vis major* or *causa fortuitus*, which is the case at bar.

The charter expressly provides that the party of the first part doth engage that the said vessel, on and during the voyage shall be kept staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage.

This charter contains no exceptions of the seas, acts of God or otherwise.

We say that outside of the ground on which the court held with us, the decree should be affirmed, because by an express contract, to wit: the charter party, the owner of the vessel expressly undertakes to keep the vessel in the condition she should be, at his own expense, the

charter makes no exception, he undertakes to do all this work himself. There is no law to prevent him making this contract, and the contract is a fair one.

Taking this view of the case, what part of the repairs should we contribute to? Why should we make contributions to what they were bound to do?

We can ask this principle to sustain our decree, because if the principle gives us more than the court below did, it will at least sustain what we have got.

12 N. Y., 561; 2 Duer, 285; 1 Blatchf. (C. C.), 360.

No question can be raised here that the party had the right to raise and failed to do below, to disturb the decree here, and it is clear that all the questions attempted to be raised here, except the question of contribution, are not in a situation to be raised.

1. The case of *La Tourette v. Burton, Commander-in-Chief*, 1 Wall., 43 (68 U. S., XVII., 609), and other cases, are clear, that the points of exception must fairly be raised to the report.

2. The attempt, after years of silence, to open the matter by getting in new facts or old facts not relied on at the time, is not to be favored, and should not be allowed.

3. In this case, the parties to the case had the right, after the hearing, to have another reference, to ascertain anything left open.

From this report, after the decision on the merits, the appeal is taken without any request in the district to have the new reference or to change the merits in any way; nor can the court, after looking at all the proceedings, say that anything remains open but the general one.

The only question that the appeal reaches has been fairly decided against the claimant, and to open anew all the accounts which the party had the right to have passed on, the report on which as to items they seem to be satisfied with, would be contrary to justice between the parties.

Mr. Justice Clifford delivered the opinion of the court:

These are appeals in admiralty, brought here by the claimants of the ship, *Star of Hope*, from a decree of the circuit court, rendered on appeal from a decree of the district court, in four suits *in rem* instituted against the ship in the latter court, three being for the non-performance of a contract of affreightment, and the other for services rendered, and liabilities and expenses incurred, as consignees of the vessel. Twelve other suits were also instituted against the ship by other shippers for the non-delivery of their respective shipments, in which no appeals were taken, as the amount in controversy in the several cases was less than \$2,000.

1. Reference to one of the libels for the non-performance of the affreightment contract will be sufficient, as they all contain substantially the same allegations. Take the first one for example, which was filed by the charterers. They describe the intended voyage as one from the Port of New York to the Port of San Francisco; they also allege that the goods were shipped on board the vessel; that she sailed on the 10th of February, 1856, from the port of shipment; that on the 18th of April following,

in entering or attempting to enter the Port of San Antonio, she accidentally grounded or stranded upon a bank or shoal there situated; that she thereby received such injuries that she was obliged, in order that she might be able to continue the voyage, to put back to Montevideo for repairs; that the master, after the vessel arrived there, being without money, credit, or other means to execute the repairs, sold a valuable portion of the goods shipped by and belonging to the libelants, of the value of \$44,700, and with the proceeds thereof paid for the said repairs; that the repairs having been thus made the ship resumed her voyage, and arrived safely at her port of destination; that by reason of the sale of their goods the libelants lost the whole amount sold, and that the master and owners of the ship neglect and refuse to make restitution.

2. Prior to the filing of the answer the fifteen affreightment suits were consolidated, and leave was given to the claimants of the ship to file one general answer to all those libels, and also to file one general stipulation therein for costs and expenses.

Pursuant to that leave the claimants filed their answer, in which they allege that the injury and damage to the ship at the Bay of San Antonio were incurred by the master voluntarily and deliberately for the general safety, and especially for the safety of the cargo and the lives of those on board, and that, consequently, all loss and damage sustained by the ship at that bay, and all costs and expenses of the subsequent repairs, and all other necessary costs and expenses incurred while at Montevideo and in getting to sea again, together with the costs and expenses incurred for the wages and provisions of the master, officers and crew, to the time when the ship resumed her voyage, are, of right and according to law, a subject of general average contribution, to be borne by the ship, her freight, and her cargo, and also by the owners thereof in their just proportions. They also allege that the goods of the libelants having been sold by necessity to execute the repairs, are, of right, to be included in the general average, together with all loss and damage to the libelants in consequence of the sale at the port of distress.

3. Brief reference must also be made to the libel filed by the consignees of the ship, as the fourth appeal under consideration is from that part of the decree relating to that suit. Annexed to the libel is a schedule setting forth the particular expenses and liabilities incurred for which the suit is brought, and the appellants, in response to that claim, allege, in the answer, that if any such disbursements were made, or any such expenses or liabilities were incurred, as is therein supposed, the same are a portion of the general average upon the ship, her freight, and cargo, to be borne by them all ratably, as alleged in the answer to the other libels.

Both parties consenting, the cause was referred to a commissioner to take and state an account and adjustment, upon the basis that the damage, loss, and expenses incurred by the ship are a subject of general average contribution, as contended by the claimants. Subsequent to that order, and before the hearing, the parties filed the agreed statement of facts set forth in the record. Although filed subsequent

to the order of reference, still it is quite evident that it was drawn up and agreed to prior to the order, as one of the conditions of the order is that it shall not affect prejudicially the agreements of the parties as contained in the agreed statement.

Other evidence was introduced in addition to what is contained in the agreed statement, and the commissioner having heard the parties reported his conclusions in writing to the court, as directed in the order of reference. Exceptions to the report were duly taken by both parties, and they were again heard in support of the same; but the court being of the opinion that the damage, loss, and expenses incurred by the ship, as described in the answer and in the agreed statement, are not the proper subject for general average contribution, sustained the exceptions filed by the libelants, overruled those filed by the claimants, and entered the decree set forth in the transcript. Appeal was taken by the claimants from that decree to the circuit court, where the decree of the district court was in all things affirmed. Dissatisfied with the decree as affirmed, the claimants appealed to this court, and still insist that the damage, loss, and expenses incurred by the ship are the proper subject of general average between the ship, her cargo, and freight, as alleged in the answer, which is the principal question presented for decision.

4. Much less difficulty will attend the solution of the question than is usual in cases of this description, as all the facts material to be considered in deciding the case are set forth in the agreed statement signed by the counsel of the respective parties.

Part of the cargo was furnished by the charterers, but large quantities of goods were also shipped by the libelants in the other libels, numbered from two to fifteen inclusive, and the owners of the ship also, by the consent of the charterers, shipped two hundred and forty-four and a half tons of coal on their own account. They were not interested in the other shipments, nor is it necessary to describe the goods composing the residue of the cargo, except to say that among the merchandise shipped were five hundred casks and packages of spirituous liquors, and forty or fifty kegs of gunpowder, prepared as "patent safety-fuses," and the agreed statement shows the spirituous liquors were stowed next to the coal shipped by the owners.

With a full cargo on board, the ship sailed for her port of destination on the day alleged in the pleadings, and during the voyage, to wit: on the 14th of April following; it was discovered that great quantities of smoke and vapor were issuing from the fore and after hatches of the ship. She was proceeding on her voyage, at the time the discovery was made, in latitude forty-six degrees south, longitude fifty-three degrees west, but the weather was squally and the sea was rough. Precautions, such as are usual on such occasions, were immediately adopted: the hatches were fastened down, and "everything made tight," in order to check as much as possible the progress of the fire, at least until a port of succor could be reached.

Great alarm was felt, and the fears of all were much increased by the fact, well known to all, that the cargo contained prepared gun-

powder and large quantities of spirituous liquors. Under the circumstances the crew refused to continue the voyage, and the master determined, very properly, as the parties agree, to make for the Bay of San Antonio, on the southeast coast of Patagonia, as the nearest anchorage, and at the end of four days the ship arrived off that bay, and set the usual signal for a pilot.

Throughout that period the signs of fire continued to increase, and in getting up the chains, so as to be ready to cast anchor without delay, they were found to be quite hot, and there were other indications of fire, which greatly heightened the general alarm. Unwilling to run into a bay, unknown to him, without a pilot, the master set his signal as aforesaid, and waited three hours for one, but no one came, and it became evident that none could be expected, as the coast was wild and desolate.

Something must be done, as the alarm increased as the impending peril became more imminent. Haul off, the master could not, as the wind and waves were against any such movement. He could not resume the voyage for the same reason, and also because the crew utterly refused their co-operation; nor could he with safety any longer attempt to "lie to," as the ship was gradually approaching the shore, and because she was exposed both to the impending peril of fire on board, and to the danger, scarcely less imminent, of shipwreck from the wind and waves. Nothing, therefore, remained for the master to do, which it was within his power to accomplish, but to run the vessel ashore, which it is agreed by the parties would have resulted in the "certain and almost instant loss of vessel, cargo and all on board," or to make the attempt to run into the bay without the assistance of a pilot. Evidently he would have been faithless to every interest committed to his charge if he had attempted to beach the vessel at that time and place, as the agreed statement shows that the weather was rough, that the wind was high and blowing towards the land with a heavy sea, and that the shore was rocky and precipitous.

What the master did on the occasion is well described by the parties in the agreed statement in which they say he at length determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and the lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all, and the parties agree that he was fully justified in his decision as tested by all the circumstances, although the ship in attempting to enter the bay grounded on a reef, and before she could be got to sea again sprung a leak and sustained very serious injuries in her bottom.

Great success, however, attended the movement, notwithstanding those injuries, as the water taken in by the ship extinguished the fire, and the ship remained fast and secure from shipwreck until the winds subsided and the sea became calm.

Repairs could not be made at that place, and the parties agree that the injuries to the ship were such as fully justified the master in returning to Montevideo for that purpose, as that

was the nearest port where the repairs could be made. He arrived there on the twenty-seventh of the same month, and it appears by the agreed statement that the just and necessary expenses incurred by the ship at that port to enable her to resume the voyage were \$100,000, including repairs, unloading, warehousing, and reloading of the cargo, and that the master, being without funds or credit, was obliged to sell a considerable portion of the cargo to defray those expenses.

Repaired and rendered seaworthy by those means the ship, on the 11th of September, in the same year, resumed her voyage and arrived at her port of destination on the 7th of December following, and the master, without unnecessary delay, delivered the residue of the shipments in good order to the respective consignees, as required by the contract of affreightment.

5. General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to average are usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

2 Arn., Ins., 770; *McAndrews v. Thatcher*, 3 Wall., 365 [70 U. S., XVIII., 159].

Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure. 2 Pars., Ins., 210; 1 Pars., Ship., 346; 2 Pars., Ins., 277; *McAndrews v. Thatcher*, *supra*.

Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, but in order to constitute a basis for such a claim it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril; that they were of an extraordinary character; that they were voluntarily made with a view to the general safety; and that they accomplished or aided at least in the accomplishment of that purpose. 2 Phill., Ins., 61.

Authorities may be found which attempt to qualify this rule, and assert that where the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value, but the correctness of the position cannot be admitted unless it appears

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that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices, where there is no peril, present no claim for contribution, but the greater and more imminent the peril the more meritorious the claim for such contribution, if the sacrifice was voluntarily and contributed to save the associated interests from the impending danger to which the same were exposed. *M. & P., Ship., 320; Macl., Ship., 356; Barnard v. Adams*, 10 How., 270.

Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution: first, there must be a common danger to which the ship, cargo, and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interests to save the remainder. Second, there must be the voluntary sacrifice of a part for the benefit of the whole, as, for example, a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Third, the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case. *Barnard v. Adams*, 10 How., 303; *Patten v. Darling*, 1 Cliff., 262; 2 Pars., Ins., 278.

Equity requires, says Emerigon, that in these cases those whose effects have been preserved by the loss of the merchandise of others shall contribute to this damage, and commercial policy as well as equity favors the principle of contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the associated interests and the lives of those on board from impending destruction; and if not present, the moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned. Emerigon, 467.

Masters are often compelled, in the performance of their duties, to choose between the probable consequences of imminent perils threatening the loss of the ship, cargo and all on board, and a sacrifice of some portion of the associated interests in their custody and under their control, as the only means of averting the dangers of the impending peril in their power to employ. They must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, courts of justice are not inclined to overrule their determinations.

Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case, the law imposes upon the master the duty, and clothes him with the power, to judge and determine at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made. *Lawrence v. Minturn*, 17 How., 110 [58 U. S., XV., 62]; *Dupont v. Vance*, 19 How., 166 [60 U. S., XV., 585]; *Patten v. Darling*, 1 Cliff., 264.

Controversies respecting the allowance or adjustment of general average more frequently arise in cases where the sacrifice made consisted of a jettison of a portion of the cargo than in respect to any other disaster in navigation. *Birkley v. Presgrave*, 1 East, 227.

Explanations and illustrations upon the subject, therefore, whether found in treatises or in judicial decisions, are usually more particularly applicable to cases of that description than to a case where the vessel was stranded, but the leading principles of law by which the rights of parties are to be ascertained and determined in such cases are the same whether the sacrifice made consisted of a part of the cargo or of a part or the whole of the ship, as the controlling rule is, that what is given for the general benefit of all shall be made good by the contribution of all, which is the germ and the substance of all the law upon the subject.

Doubts at one time were entertained whether a loss occasioned by a voluntary stranding of a vessel, even though it was made for the general safety, and to avoid the probable consequences of an imminent peril to the whole adventure, was the proper subject of general average contribution, but these doubts have long since been dissipated in most jurisdictions, and they have no place whatever in the jurisprudence of the United States.

Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding, says Mr. Arnould, is to be made good by general average contribution, and the writer adds that there is no rule more clearly established than this by the uniform course of

maritime law and usage. 2 Arn., Ins., 784; *Lewis v. Williams*, 1 Hall., 440.

Sustained as that proposition is at the present day by universal consent, it does not seem to be necessary to refer to other authorities in its support, nor is it necessary to enlarge that rule in order to dispose of the present controversy, but to prevent any misconception as to the views of the court it is deemed proper to add that it is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was voluntary and was designed for the common safety, and it appears that the act of stranding resulted in saving the cargo. *Ins. Co. v. Aahby*, 13 Pet., 381; *Case v. Reilly*, 3 Wash. (C. C.), 298; *Sims v. Gurney*, 4 Binn., 513; *Gray v. Wals*, 2 S. & R., 229; 1 Para., Ship., 373; *Moriches v. Sampson*, 4 Allen, 192.

Undoubtedly the sacrifice must be voluntary and must have been intended as a means of saving the remaining property of the adventure, and the lives of those on board, and unless such was the purpose of the Act it gives no claim for contribution, but it is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary, it is sufficient that the property was selected to suffer the common peril in the place of the whole of the associated interests, that the remainder might be saved. 1 Para. Ship., 348.

6. Suggestion is made that the act of stranding of the vessel in this case was not a voluntary act, as the reef where she grounded was not visible at the time and was unknown to the master, but the agreed statement shows that in undertaking to run into the bay the master knew that the chief risk he had to encounter was the stranding of the ship, and the precautions which he took to guard against that danger show to the entire satisfaction of the court that the disaster was not altogether unexpected. As the ship advanced the lead was constantly employed, showing eight fathoms at the first, then seven, then six only, and so on, the depth continuing to diminish at each throw of the lead until the ship grounded and remained fast.

Grant that the master did not intend that the ship should ground on that reef, still it is clear that he was aware that such a danger was the chief one he had to encounter in entering the bay, and the case shows that he deliberately elected and decided to take that hazard rather than to remain outside, where, in his judgment, the whole interests under his control, and the lives of all on board were exposed to imminent peril if not to certain destruction. Under these circumstances it is not possible to decide that the will of man did not in some degree contribute to the stranding of the ship, which is all that is required to constitute the stranding a voluntary act within the meaning of the commercial law. 2 Arn., Ins., 785; *Emerigon*, 334.

Suppose the storm outside the bay was irresistible and overpowering, still it does not follow that there was no exercise of judgment, for there may be a choice of perils when there is no possibility of perfect safety. *Sims v. Gurney*, 4 Binn., 525; 2 Para., Cont. (5th ed.) 535, and note, y.

Destruction of all the interests was apparently certain if the ship remained outside, but the master under the circumstances elected to enter the bay, without the assistance of a pilot, knowing that there was great danger that the ship might ground in the attempt, but his decision was, that it was better for all concerned to make the attempt than to remain where he was, even if she did ground, and the result shows that he decided wisely for all interests, as damage resulted to none except to the ship, and she would, doubtless, have been destroyed if she had continued to remain outside of the bay. *Rea v. Cutter*, 1 Sprague, 136.

Guided by these considerations, our conclusion is, that the loss and damage sustained by the ship at the place of the disaster, and the costs and expenses of the repairs, and all the other costs and expenses as charged in the adjustment, are the proper subject of general average contribution, as alleged by the claimants in their answer.

Details will be avoided, as the decrees must be reversed and the cause remanded for further proceedings.

7. Apart from the error in the principle of the decree there is a manifest error in the amount allowed in the first case, but inasmuch as there must be a new hearing and a new decree, the correction of the error can best be made in the circuit court.

Brief consideration must also be given to the exceptions, taken by the claimants, to the report of the commissioner, which were overruled by the court. They are three in number, and they will be considered in the order in which they were made.

1. That the commissioner erred in charging the ship or freight with any part of the expenses incurred by the charterers in the *ex parte* adjustment procured by them prior to the order of reference to the commissioner.

Unusual difficulty attends the inquiry, on account of the indefinite character of the exception and the uncertain state of the evidence, but the conclusion of the court being that the case is one for general average, it seems to the court that those expenses constitute a matter to be adjusted between the charterers and the libellants irrespective of the controversy presented in this record, unless the results of that adjustment were adopted and used by the commissioner. Influenced by those suggestions the exception is sustained, but the matter is left open for further inquiry when the mandate is sent down.

2. That the commissioner erred in assuming that the valuation of the ship as given in the policy of insurance is the proper basis of her contributory value in the statement of the amount for general average.

As a general rule, the value of the ship for contribution, where she had received no extraordinary injuries during the voyage, and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage, but if she met with damage before she arrived, by perils of the sea, and had been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. Neither party gave any evidence as to the value of the ship prior to the disaster except what appears in the policy of insurance,

and under the circumstances it is difficult to see what better rule can be prescribed than that adopted by the commissioner. *Hopkins on Av.* (3d ed.), 104; 2 Arn. on Ins., 812; *Palapoco Ins. Co. v. Southgate*, 5 Pet., 604; *Clark v. U. S. Marine Ins. Co.*, 7 Mass., 370; *Dodge v. Marine Ins. Co.*, 17 Mass., 471.

Strictly speaking, the rule is the value of the ship antecedent to the injuries received, but as that requirement can seldom be met, the usual resort is her value at the port of departure, making such deduction for deterioration as appears to be just and reasonable. 1 Para. on Ship., 448; *Mutual Safety Ins. Co. v. The George. Olcott, Adm.*, 157.

No proofs on that subject, except the policy of insurance, was offered by either party, and inasmuch as ships are seldom insured beyond their actual value, the exception is overruled.

3. That the commissioner erred in carrying into particular average certain expenses incurred by the master at the port where the repairs were made, which should have been regarded as the proper subject of general average.

Considerable difficulty also attends this inquiry for the want of a more definite statement of the grounds of the complaint. We think it plain, however, that the exception must be sustained, as some of the matters charged as particular average, in whole or in part, ought clearly to have been included at their full value among the incidental expenses necessarily incurred in making the repairs, but in view of the circumstances we shall not attempt to do more than to state the general principles which should regulate the adjustment in the particulars involved in the exception, and leave their application to be made in the case by the court below, where the parties, if need be, may again be heard.

8. Whatever the nature of the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing a part of it or in voluntarily stranding the vessel, the wages and provisions of the master, officers and crew from the time of putting away for the port of succor, and every expense necessarily incurred during the detention for the benefit of all concerned, are general average. *Abbott, Ship.*, 601; *Plummer v. Wildman*, 3 M. & S., 482; *Walden v. Le Roy*, 3 Cai., 263; *Henshaw v. Ins. Co.*, 2 Cai., 274; *Nelson v. Belmont*, 21 N. Y., 38; *The Brig Mary*, 1 Sprague, 18.

Repairs necessary to remove the inability of the ship to proceed on her voyage are now regarded everywhere as the proper subject of general average. Expenses for repairs beyond what is reasonably necessary for that purpose are not so regarded, but it is not necessary to examine the exceptions to the rule with any particularity in this case, as the parties agree that all the expenses incurred were necessary to enable the ship to resume her voyage.

The wages and provisions of the master, officers, and crew are general average from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs. *Padelford v. Boardman*, 4 Mass., 548; *Potter v. Ocean Ins. Co.*, 3 Sumn., 27.

Towing the ship into port, and extra expenses necessarily incurred in pumping to keep her afloat until the leaks can be stopped, are to be

included in the adjustment. 3 Phil., Ins. (8d ed.), sec. 1326; *Orrok v. Com. Ins. Co.*, 21 Pick., 469.

Surveys, port charges, the hire of anchors, cables, boats, and other necessary apparatus, for temporary purposes in making the repairs, are all to be taken into the account as well as the expenses of unloading, warehousing, and re-loading the cargo after the repairs are completed. *Potter v. Ocean Ins. Co.*, 3 Sumn., 42; *The Mary*, 1 Sprague, 18.

Repairs in such a case cannot be made by the master unless he has means or credit, and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest. *Orrok v. Com. Ins. Co.*, 21 Pick., 469; 1 Pars., Ship., 400.

Governed by these rules, it is believed the rights of the parties may be adjusted without serious difficulty or danger of mistake.

Decree reversed in respect to each of the four cases before the court.

Cited—12 Wall., 114, 117; 93 U. S., 400, 407, 408; 8 Blatchf., 226; 3 Cliff., 464; 73 Pa. St., 104; 10 Am. Rep., 728 (22 Ohio St., 62); 12 Am. Rep., 720 (100 Mass., 430).

HANNAH RILEY, *Appl.*,

v.

WILLIAM B. WELLES.

Possession without right is no basis for a preemption claim.

Where the husband of the plaintiff entered on a lot of public land without right, and the possession was continued without right, permission of the register to prove up the possession and improvements and to make the entry under the preemption laws were acts in violation of law and void; as was also the issuing of the patent.

Wolcott v. The Des Moines Co., XVIII., 680, followed.

[No. 897.]

Submitted Feb. 14, 1870. Decided Mar. 7, 1870.

APPEAL from the Circuit Court of the United States for the District of Iowa.

This case arose upon a petition filed in one of the state courts of Iowa by the appellee, to quiet his title to a certain tract of land. On petition by the complainant, the case was subsequently removed into the court below. Said court having entered a decree in favor of the complainant, the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Thomas F. Withrow, Galusha Parsons, and Wm. H. Kelsey, for appellant.

Mr. Edwin C. Litchfield, for appellee.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Iowa.

This case is not distinguishable from that of *Wolcott v. The Des Moines Co.*, 5 Wall., 681 [72 U. S., XVIII., 689].

Welles, the plaintiff below, derives his title

by deed from this company, the same as *Wolcott* in the former case. The suit in that case was brought to recover back the consideration money from the Des Moines Company, the grantors, on the ground of failure of title. The court held that *Wolcott* received a good title to the lot in question under his deed.

In that case it was insisted that the title was not in the Des Moines Company, but in the Dubuque and Pacific Railroad Company.

In the present case, the defendant claims title under, and in pursuance of, the Preemption Act of September 4, 1841.

Her husband took possession of the lot in 1855, and she was permitted by the register to prove up her possession and occupation, May, 1862. The patent was issued October 15, 1863.

It will appear from the case of *Wolcott v. The Des Moines Co.* [*supra*] that the tract of land, of which the lot in question was a part, had been withdrawn from sale and entry on account of a difference of opinion among the officers of the Land Department as to the extent of the original grant, by Congress, of lands in aid of the improvement of the Des Moines River, from the year 1846 down to the Resolution of Congress of March 2, 1861, and the Act of July 12, 1862, which Acts, we held, confirmed the title in the Des Moines Company. As the husband of the plaintiff entered upon the lot in 1855, without right and the possession was continued without right, the permission of the register to prove up the possession and improvements, and to make the entry under the preemption laws, were acts in violation of law, and void, as was also the issuing of the patent.

The reasons for this withdrawal of the lands from public sale to private entry are stated at large in the opinion in the case of *Wolcott v. The Des Moines Co.* [*supra*] and need not be repeated. The point of reservation was very material in that case, and we have seen nothing in the present one, either in the facts or in the argument, to distinguish it.

The decrees below affirmed.

HIRAM BARNEY, Collector for the Port OF NEW YORK, *Plff. in Err.*,

v.

C. F. SCHMEIDER ET AL.

(See S. C., 9 Wall., 248-254.)

Testimony of former trial—when should be read to jury—certified copies of papers filed with Secretary of the Treasury, evidence—how obtained.

Where the case was decided upon the testimony taken on a former trial, which was not read on the second trial before the jury, because the court had heard it in the first case and did not deem it necessary to be heard by the jury in the second case, this was error.

If there had been no disputed fact for the jury to pass upon, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury.

Where there is any discrepancy in the testimony, however slight, the court must submit the matter to which it relates to the jury.

Papers filed with the Secretary of the Treasury became part of the records of his office, and the originals need not be produced in any trial, but copies of them certified by such officer may be used in evidence with the same effect as the originals.

The government is not bound to furnish either the originals or certified copies to suitors, unless upon demand at the proper office, and tender of the lawful fees.

[No. 70.]

Argued Feb. 17, 1870. Decided Mar. 7, 1870.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The defendants in error brought an action in the court below, to recover for duties alleged to have been unlawfully collected from them upon certain goods. Judgment was given in that court for the plaintiffs; whereupon the defendants sued out this writ of error.

The case is fully stated by the court.

Messrs. E. R. Hoar, Atty-Gen., and W. A. Field, Asst. Atty-Gen., for plaintiff in error:

If there was any competent evidence in the case, it should have been submitted to the jury, under proper instructions from the court upon the law applicable to it.

The case was not submitted to the court without a jury, pursuant to the 4th section of the Act of Mar. 3, 1865.

12 Stat. at L. 501; *U. S. v. Laub*, 12 Pet., 5; *Park v. Ross*, 11 How., 362; *Schuchardt v. Allen*, 1 Wall., 359 (68 U. S., XVII., 642).

Messrs. A. W. Griswold, Wm. Everts and Charles Levi Woodbury, for defendant in error:

The notice to the attorney of record, who was the attorney of the United States, to produce the appeals addressed by the defendants in error to the Secretary of the Treasury, was proper and sufficient to entitle them to offer secondary evidence, because the United States, represented by the Secretary of the Treasury, is the real party in interest.

See, sec. 12, Act, Mar. 3, 1863, 12 Stat. at L., 741; 2 Phil. Ev., 4th ed., p. 531; *Brown v. Littlefield*, 7 Wend., 454; *Lagou v. Patterson*, 1 Blackf., 327; *Baldney v. Ritchie*, 1 Stark., 338. (The arguments upon the merits are not deemed of value.)

Mr. Justice Miller delivered the opinion of the court:

The defendants in error, who were plaintiffs below, sued in the circuit court in an action of *assumpsit*, with the common counts only, to which the defendant, Barney, pleaded the general issue. A jury was called and sworn, and directed by the court to find a verdict for plaintiffs, which was done and judgment rendered for the amount claimed.

A singular paper is found in the record under the caption of "case and exceptions," signed and sealed by the judge who presided at the trial. This paper sets forth some things which are said to be shown by the evidence, some things which appeared in evidence, and a large part of it is the evidence itself. There is also the full charge of the court, the prayer for instructions on the part of the defendant, which were refused, and the exceptions of the defendant.

Among other matters found in the bill of exceptions, is this statement in the charge of the court to the jury: "The testimony taken on a former trial has, with the consent of both sides, and with the approbation of the court, been put in. It is very voluminous. It has not been read before this jury, nor was it necessary that it should be, for it was delivered in the hearing of

. See 9 WALL.

U. S., Book 19.

the court only a few days since, and is fresh in its recollection. There is very little discrepancy in the testimony."

The court then proceeds to tell the jury what this evidence shows, that it is immaterial to the issue, and to make a very able argument on the law of the case, and directs the jury to find for the plaintiffs; or rather says: "The verdict ought to be for plaintiffs." To this part of the charge the defendants excepted specially.

The 7th Amendment of the Constitution declares, that in suits at law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved.

This right may be waived by the party. The Act of March 8d, 1865 (18 Stat. at L., 500), provides a mode by which the parties to a suit may submit the matter proper for a jury to the court; and the case of *Norris v. Jackson*, decided a few days ago [*ante*, 608], gives the mode of proceeding under that statute, and explains what may be received in such cases, and how the matter proper for review may be brought before this court.

If, then, the parties in the present case had been willing to waive a jury and permit the court to find both the law and the facts, there was no difficulty in doing this, and in presenting the law to this court for review. For it is never to be forgotten that, in common law cases, it is the ruling of the inferior court on the law alone which this court is authorized to review. The common law admitted of no re-examination of the facts found by a jury, except by granting a new trial in the same court in which the verdict was rendered, and the constitutional amendment just referred to, forbids any other mode of re-examination than that which accords with the rules of common law.

As the defendant in this case did not waive his right to have the facts tried by a jury, it was the duty of the court to submit such facts to the jury that was sworn to try them.

It is needless to say that this was not done. The statement is clear that the case was decided upon the testimony taken on a former trial, and not read before this jury, because the court had heard it in the first case, and did not deem it necessary to be heard by the jury in this case.

It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, or any competent evidence, the jury finds for the defendant for that very reason. And in such case it is strictly correct, if the plaintiff does not take a nonsuit, for the court to instruct the jury to find for the defendant. But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court. It is obvious that if such a verdict can be supported here, when the very act of the court in doing this is excepted to and relied on as error, the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility.

It is insisted, with much ingenuity, that in this case there was no disputed fact for the jury to pass upon, and that the only issue in the case being one of law, it was proper for the

court to dispose of it. If this were so, the instruction of the court might be sustained, provided the undisputed facts necessary to sustain the verdict had been submitted to the jury. But let us see if this assumption is supported by the record. The form of the pleadings shows nothing and admits nothing. The plaintiff then must make a case by evidence to the jury. Looking into the case stated, and as though it had been read to the jury, we find that plaintiff's claim is for duties on certain goods unlawfully collected of him by defendant as Collector of the Port of New York. The Act under which the goods were rated for duties provides that on all delaines, cashmere delaines, muslin delaines, barege delaines, comprised wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding fifty cents in value per square yard, two cents per square yard shall be paid. And the point in dispute was whether the goods of plaintiffs, on which the two cents per yard had been assessed, were goods of a similar description to those above mentioned, within the meaning of the Act. Now, it is clear that this question alone is one of mixed law and fact, because until we are informed by testimony as to the nature and character of plaintiff's goods, no construction or view of the law can be applied to them. The court can only know by evidence what kind of goods were assessed by the collector, and this at once dispels the idea that the case could in any sense present an abstract question of law. But before the court or the jury could get to these questions there were several others, purely matters of fact, to be decided. The rate at which the goods were actually assessed; the payment of the duties as thus assessed; the protest at the time of payment, and the appeal to the Secretary of the Treasury, were all essential to the plaintiff's recovery and necessary to be found to the satisfaction of the jury. The judge also tells us that "there is very little discrepancy in the testimony." But where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony and not the court's. The proposition, is not, therefore, sustained, that nothing but a question of law was to be decided.

There is another error, however, which, although unimportant in this case, may arise very often in the numerous suits to recover back taxes paid under protest in the customs and in the internal revenue departments.

The plaintiffs having given the defendant due notice to produce at the trial the original appeals made by them to the Secretary of the Treasury, were permitted to use copies proved by witnesses who mailed the originals, because defendant did not produce the originals. This was excepted to and was error, and it would be equally error if the United States had been the nominal, as it was the real, defendant in the suit. The papers showing this appeal, when filed with the Secretary, became part of the records and archives of his office, and the law is well settled that in such case the originals need not be produced in any trial, but that copies of them, certified by the officer in whose charge they properly are, may be used with the same effect as the originals. If the government needs these copies it produces them when it pro-

poses to use them. If anyone else wants to use them the law provides the means by which such copies can be produced. They are the best attainable evidence, and must be produced, unless some sufficient reason is shown for not doing so. The government is not bound to furnish either the originals or certified copies to suitors with whom it is contending, unless upon demand at the proper office, and tender of the lawful fees.

For this and for the other errors mentioned, the judgment must be reversed, and a venire facias de novo is ordered.

Cited—95 U. S., 228.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, *Pf. in Err.*,

ISAAC WALKER AND PATRICK RYAN.

(See S. C., 9 Wall., 608, 604.)

Rehearing, how applied for.

Where the court does not, on its own motion, order a rehearing, counsel may submit, without argument, a brief petition or suggestion of the point or points thought important.

If, upon such petition or suggestion, any judge who concurred in the decision move for a rehearing, the motion will be considered; if not, the rehearing will be denied.

[No. 29.]

Denied Mar. 7, 1870.

IN ERROR to the Supreme Court of the State of Missouri.

On petition for rehearing.

This case, as decided earlier in the present term, is reported *ante*, 576

The case on this petition is sufficiently stated by the court.

Messrs. M. Blair and F. A. Dick, for plaintiff in error.

Messrs. L. Janin, Albert Todd and Grover & Shepley, for defendants in error.

Mr. Chief Justice Chase delivered the opinion of the court:

A petition for rehearing has been prepared in this case by the counsel for the plaintiff in error; but as no member of the court who concurred in the judgment desires a re-argument, the petition must be denied.

The rule on this subject, long since established, was stated by *Chief Justice Taney* at the December Term, 1852, in these words:

"No re-argument will be granted in any case unless a member of the court who concurred in the judgment desires it, and when that is the case, it will be ordered without waiting for the application of counsel."

The grounds of this rule were fully explained in that case, and need not be re-stated. *Brown v. Aspden*, 14 How., 25; *U. S. v. Knight*, 1 Black, 489 [66 U. S., XVII., 80.]

Where the court does not on its own motion order a rehearing, it will be proper for counsel to submit without argument, as has been done in the present instance, a brief written or printed petition or suggestion of the point or points thought important. If upon such petition or sug-

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gestion, any judge who concurred in the decision thinks proper to move for a rehearing, the motion will be considered. If not so moved, the rehearing will be denied as of course.

Cited—14 Wall., 22; 102 U. S., 107, 108; 104 U. S., 415; 6 Sawy., 580.

THE BARK GRAPESHOT, GEORGE LAW,
Claimant, *Appl.*,

v.

WALLERSTEIN, MASSET ET AL.

(See S. C., "*The Grapeshot*," 9 Wall., 129-145.)

Provisional court in insurgent territory—transfer of causes into circuit court, effect of—lien for supplies and repairs of vessels, how enforced—presumption of necessity—necessity, what is—order of master, evidence—bottomry.

* (1) When, during the late civil war, portions of the insurgent territory were occupied by the national forces, it was within the constitutional authority of the President, as Commander-in-Chief, to establish therein provisional courts for the hearing and determination of all causes arising under the laws of the State or of the United States; and the Provisional Court for the State of Louisiana, organized under the Proclamation of October 20, 1862, was, therefore, rightfully authorized to exercise such jurisdiction.

(2) When, upon the close of the war, and the consequent dissolution of the court thus established, Congress, in the exercise of its general authority in relation to the National Courts, directed that causes pending in the Provisional Court, and judgments, orders and decrees rendered by it, which, under ordinary circumstances, would have been proper for the jurisdiction of the Circuit Court of the United States, should be transferred to that court and have effect as if originally brought, or rendered therein, a decree in admiralty rendered in the Provisional Court, as upon appeal from the district court, became at once, upon transfer, the decree of the circuit court; and an appeal was properly taken from it to this court.

(3) Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed upon due inquiry and credible representation to be necessary in a foreign port.

(4) Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit. The cases of *Pratt v. Reed* and *Thomas v. Osborn* explained.

(5) Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them; or to provide funds for the cost of them on the security of the ship.

(6) The ordering by the master, of supplies and repairs, on the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material man, or of the ordinary lender of money to meet the wants of the ship, who acts in good faith.

(7) To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required; and, if the fact of such necessity be left unproved, evidence is required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

*[Head notes by Mr. Chief Justice CHASE.]

NOTE.—*Liens on ships for repairs, necessities, supplies, salvage, freight, etc.* See note to *The General Smith*, 17 U. S. (4 Wheat.), 438; and note to *Blaine v. The Charles Carter*, 8 U. S. (4 Cranch), 328.

Bottomry and respondentia loans. See note to *Blaine v. The Charles Carter*, 8 U. S. (4 Cranch), 328; and note to *Conard v. Atlantic Ins. Co.*, 26 U. S. (1 Pet.), 386.

See 9 WALL.

[No. 38.]

Argued Nov. 3, 1869. Decided Mar. 14, 1870.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The libel in this case was filed in the District Court of the United States for the Eastern District of Louisiana, July 3, 1858, by the appellees, to enforce the payment of a certain bottomry bond given to the libelants, by the captain of *The Grapeshot*, at Rio Janerio, to secure the payment of \$9,769.45, and a premium thereon of 19½ per cent. The *Grapeshot* was seized and sold, and the proceeds were deposited in the registry of the court. The said court having entered a decree, early in 1860, in favor of libelants, the claimant took an appeal to the circuit court. Before that court had disposed of the case the rebellion broke out, and nothing further was done until Jan. 13, 1860, when it was removed to the Provisional Court of Louisiana.

That court entered a decree affirming the decree of the district court.

The decree of the Provisional Court having become that of the circuit court, under the statute, the claimant, Dec. 6, 1866, took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. C. Cushing, J. W. Ashmead and W. W. Boyce, for appellant:

The decree of *Judge Peabody* was a nullity for want of jurisdiction.

1. Because the President had no power, by virtue of conquest, upon the suppression of the insurrection at New Orleans, to establish such a judicial tribunal as the Provisional Court of Louisiana.

His power over such portions of the territory of the United States as was recovered from rebellion, was more limited than this power over foreign territory conquered in war. The President, as Commander-in-Chief, may erect a military government for a conquered territory.

Cross v. Harrison, 16 How., 164; *Holbrook v. U. S.*, 32 Law, 226.

So upon the conquest of New Mexico, the executive authority of the United States properly established a provisional government which instituted a judicial system, the legality of which was recognized by the Supreme Court. *Leitensdorfer v. Webb*, 20 How., 176 (61 U. S., XV., 891).

The conquest of a foreign country gives absolute sovereign rights. But a different rule prevails upon the suppression of an insurrection or rebellion. Then the government, the successful party, only re-establishes its legitimate authority. *The Amy Warwick*, 2 Spr., 143.

2. Because, since whatever power the President had in the premises was as Commander-in-Chief and derived from military necessity, without undertaking to say what the President could or could not do as a matter of military necessity, we submit that this power arising from military necessity cannot be extended beyond doing such acts as were necessary for the safety of the army and the suppression of the rebellion. Beyond this his acts would be *ultra vires*.

3. Because the judicial power exercised in this case by *Judge Peabody* was a part of the

judicial power of the United States, and such exercise of judicial power on his part is unconstitutional.

The Constitution provides as follows:

"Article III., sec. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

This is conclusive upon the point. *Jecker v. Montgomery*, 13 How., 498.

4. Because the President's order establishing the "Provisional Court of Louisiana" did not, in point of reasonable construction, authorize that court to take jurisdiction of cases pending in the United States courts; and *Judge Peabody*, therefore, had no authority to take jurisdiction in this case.

5. Because the President had no power, under the exercise of martial law, to establish such a court. Martial law, the mere will of the commanding general, is only excused when war renders it impossible for the courts to sit.

6. Because at the time the decree in this case was rendered, June 13, 1864, New Orleans was not, in fact nor in law, in an insurrectionary condition. *The Venice*, 2 Wall., 258 (69 U. S., XVII., 866).

7. Because the Provisional Court had no jurisdiction of claimant George Law's case, inasmuch as being a loyal citizen, living in a loyal State, he had a constitutional right to have his case decided by the United States Judiciary as known to the Constitution.

8. Because the Provisional Court could not render a decree against claimant; for to do so would be to deprive him of property, without due process of law, in contravention of 5th Amendment to Constitution.

An executive officer cannot make an order to violate this constitutional guaranty. Property and life are put on the same footing.

9. Atty. Gen. Ops., p. 200; *Wynehamer v. People*, 13 N. Y., 393; *Taylor v. Porter*, 4 Hill, N. Y., 145.

As to the merits.

The master has no power to bind the ship, if he can borrow on the personal credit of the owner.

1 Pars. Mar. L., 416; *Tunno v. The Mary*, Bee, 120; *Forbes v. The Hannah*, Bee, 348; *Rucher v. Conyngham*, 2 Pet. Adm., 295; *Cupisino v. Perez*, 2 Dall, 194; *The Lavinia v. Barclay*, 1 Wash. (C. C.), 49; *The Packet*, 3 Mas., 255; *Patton v. The Randolph*, Gilp., 457; *The Nelson*, 1 Hagg. Adm., 169; *The Rhodamante*, 1 Dod., 201.

Proper inquiry would have shown that the master was prosecuting a voyage at Rio, in violation of his orders.

It is laid down that the master cannot raise money to perform a voyage in violation of the owner's voyage; which voyage is, therefore, unlawful.

1 Pars. Mar. L., 420; *The Virgin*, 8 Pet., 538; *The Hunter*, 1 Ware, 249; *The Tartar*, 1 Hagg. Adm., 1; *The Reliance*, 3 Hagg. Adm., 66.

"If the necessity for the bond arises from his, the master's, acting contrary to the orders of the owners, he has no power to hypothecate the vessel."

1 Pars. Mar. L., 435; *The Mary Ann*, 4 Notes of Cases, 376; 10 Jurist, 353.

In any point of view, the bottomry bond could only be good for repairs and outfit, and would not cover previous indebtedness assumed by the master.

Hurry v. The John & Alice, 1 Wash. (C. C.), 293.

Mr. Thomas J. Durant, for appellees:

1. The war of the rebellion was a civil war; the inhabitants of the rebel territory were public enemies of the United States, and the latter had the same rights and powers against the former which could be exercised in regard to enemies in the case of a foreign war.

Prize Cases, 2 Black, 666 (67 U. S., XVII., 476), *et seq.*

2. The hostile soil and inhabitants of Louisiana, conquered by the arms of the United States were held, controlled and governed by the powers of the United States only, and the court was in the judgment of the Commander-in-Chief necessary to execute his powers and duties. Such court was, therefore, lawfully constituted.

Cross v. Harrison, 16 How., 164; *Leilensdorfer v. Webb*, 20 How., 176 (61 U. S., XV., 891).

3. The only exception that has been suggested to the power of the executive in the organization of courts in a conquered district, is found in the case of *Jecker v. Montgomery*, 18 How., 111 (59 U. S., XVI., 311), *et seq.*, which, while admitting the power to establish all other species of court, holds that it does not extend to the establishment of prize courts. That case, if it be law, does not affect the present one, which is not a prize case.

4. The Provisional Court in Louisiana founded by lawful authority, was not a constitutional court over which this court could exercise appellate jurisdiction; it was analogous to the territorial courts; and as in these the creative power, Congress has the right to vest admiralty jurisdiction, so in the Provisional Court, the creative power, the Executive had the right to vest a like jurisdiction.

See, *Ins. Co. v. Canter*, 1 Pet., 511.

5. By the order of the Executive, constituting this Provisional Court in Louisiana, its judgments were to be final and conclusive, *i. e.*, without appeal.

6. If there be any doubt as to the right of the Commander-in-Chief of the Army and Navy to establish, by his own will and power, the Provisional Court, then that defect suggested by the doubt is cured by the Act of Congress of July 28, 1866, 14 Stat. at L., 344, which recognizes and confirms the court with all its acts and doings.

7. But if this court can take jurisdiction of the case, the judgment of the lower court should be confirmed.

8. It is true the master can only hypothecate the vessel to secure the bond when there is a necessity for making the loan; and the lender must see that the necessity exists, but this he is presumed *prima facie* to have done.

The Fortitude, 3 Sumn., 268; *The Duke of Bedford*, 2 Hagg., 300; *The Karnak*, Law Reps. for Mar. and Apr., 1869, p. 288.

And in the case at bar there is no proof to the contrary.

9. The burden of proof was on the claimant, to show the master had within his reach either the funds required for the exigency, or a suf-

ficient personal credit of the owner to raise funds without hypothecating the vessel, but no such proof was made. *The Mary Ann*, 4 Notes of Cas., 379.

Mr. Chief Justice Chase delivered the opinion of the court:

The first question to be examined in this case is one of jurisdiction.

The suit, shown by the record, was originally instituted in the District Court of the United States for the District of Louisiana, where a decree was rendered for the libellant. From this decree an appeal was taken to the Circuit Court, where the case was pending, when, in 1861, the proceedings of the court were interrupted by the civil war. Louisiana had become involved in the rebellion, and the courts and officers of the United States were excluded from its limits. In 1862, however, the national authority had been partially re-established in the State, though still liable to be overthrown by the vicissitudes of war. The troops of the Union occupied New Orleans, and held military possession of the city and such other portions of the State as had submitted to the General Government. The nature of this occupation and possession was fully explained in the case of *The Venice*, 2 Wall., 259 [69 U. S., XVII., 866].

Whilst it continued, on the 20th of October, 1862, President Lincoln, by proclamation, instituted a Provisional Court for the State of Louisiana, with authority, among other powers, to hear, try and determine all causes in admiralty. Subsequently, by consent of parties, this cause was transferred into the Provisional Court thus constituted, and was heard, and a decree was again rendered in favor of the libellants. Upon the restoration of civil authority in the State, the Provisional Court, limited in duration, according to the terms of the proclamation, by that event, ceased to exist.

On the 28th of July, 1866, Congress enacted that all suits, causes, and proceedings in the Provisional Court, proper for the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders and decrees of the Provisional Court in causes transferred to the circuit court should at once become the orders, judgments and decrees of that court, and might be enforced, pleaded, and proved accordingly. 15 Stat. at L., 866.

It is questioned upon these facts whether the establishment by the President of a Provisional Court was warranted by the Constitution.

That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said on that point.

The object of the National Government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National Government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to pro-

vide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National Government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as Commander-in-Chief, and intrusted as such with the direction of the military force by which the occupation was held.

What that duty is, when the territory occupied by the national forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer v. Webb*, 20 How., 176 [61 U. S., XV., 891], the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker v. Montgomery*, 13 How., 498, and 18 How., 110 [59 U. S., XV., 811], and *Cross v. Harrison*, 16 How., 164 (see, also, *U. S. v. Rice*, 4 Wheat., 246; and *Texas v. White* (ante, 227), may also be cited in illustration of the principles applicable to military occupation.

We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during the war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.

The case then being regularly here, we will proceed to dispose of it.

The object of the original suit was the enforcement of a lien upon the bark, *Grapeshot*, created by a bottomry bond, executed by her master, one Joseph S. Clark, in favor of Wallerstein, Massett & Co., at Rio Janeiro, upon the 15th of April, 1858.

The libel, filed by Wallerstein, Massett & Co., on the 3d of July, 1858, alleged that the bark *Grapeshot*, lying in the Port of Rio, during the month of April, 1858, was in great need of reparation, provisions and other necessities to render her fit and capable of proceeding thence on her intended voyage to the Port of New Orleans; and Joseph S. Clark, the master of the bark, not having any funds or credit there, and the owner of the said bark not residing in Rio, and having no funds or credit there, that the libellants, at the request of Clark, advanced and lent to him \$9,767.40, on the bottomry and hypothecation of the bark, at the rate of 19½ per cent. maritime interest; that Clark, as master, did really expend the sum borrowed for the repairing, victualing and manning of the bark in order to enable her to proceed to New Orleans; that the bark could not possibly have proceeded with safety upon her voyage without such repairs, and other necessary expenses attending the refitting of her; that she sailed and arrived safe at New Orleans on or about the 7th of June, 1858; and, that the bond was, at the proper time, presented for payment to Clark, who refused to discharge it.

Upon this libel, process was issued, and the vessel and her freight were seized. Subsequently the vessel was sold under an order of the court, and the proceeds, together with the freight money, amounting in the whole to \$18,805.85, were deposited in the registry on the 2d of September, 1858.

On the 1st of November, 1858, George Law, the claimant of the vessel and freight, filed his answer, denying the necessity of the repairs and supplies, alleged to have been paid for by the money raised upon the bottomry bond, and alleging fraudulent collusion between the master and lenders, to the prejudice of the claimant. The answer set out at large the history of *The Grapeshot*, from the time she left New York, on or about the 9th of February, 1857, to the date of her arrival in New Orleans, on or about the 7th of June, 1858. It is represented that the bark, when she left New York, was stout and staunch, well fitted, and supplied for her then intended voyage to Constantinople, and for the return voyage to New York; that instead of returning from Constantinople to New York, the master, Clark, embezzled the freight earned in the voyage out, and engaged the vessel in voyages for his own benefit, until he caused her to be stripped at Rio of her copper, which was replaced by second-hand and indifferent metal, owned by Clark, and put on her in fraud of the claimant; that the dishonest practices of Clark were well known at Rio, and that the libelants were fully cognizant of them. The answer further denied the charge of the libel, that the claimant had no funds or credit at Rio, and averred that he had credit to procure and obtain the necessary funds, and that the master was under no necessity to resort to the bottomry upon the vessel. The answer further alleged that there was no inspection or survey of the vessel with reference to the necessity for repairs; and that the alleged expenses for repairs and provisions far exceeded the sums actually expended, of all which the libelants had notice.

Before proceeding to examine the evidence, taken under these pleadings, it will be proper to consider the principles of maritime law applicable to the case.

A bottomry bond is an obligation, executed, generally, in a foreign port, by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void and of no effect in case of her loss before arrival. *Carrington v. Pratt*, 18 How., 67 [59 U. S., XV., 268]; *The Atlas*, 2 Hagg., 57, 58.

Such a bond carries usually a very high rate of interest, to cover the risk of loss of the ship as well as a liberal indemnity for other risks and for the use of the money, and will bind the ship only where the necessity for supplies and repairs, in order to the performance of a contemplated voyage, is a real necessity, and neither the master nor owners have funds or credit available to meet the wants of the vessel.

Sometimes bonds, bearing only the ordinary rate of interest, or executed under circumstances more or less different from those just stated, are called bottomry bonds, and are enforced as

such (*The Trident*, 1 W. Rob., 29; *Brig Draco*, 2 Sumn., 157; 1 Pars., Ship., 116, 120); but the general description just given embraces most instruments known under that name, and is sufficiently accurate for the case presented by the record.

There is no question in this case as to the character of the bond; nor as to the safe arrival of the ship; nor as to the validity of the bond if the lien can be held valid. The controversy turns on the question of necessity for repairs and supplies, and for credit.

We are to consider, therefore, what degree of necessity for supplies or repairs, and what degree of necessity for credit in that form, will warrant a master in borrowing upon bottomry.

Where the claim of the material man is against the owner only, and no privilege is given upon the vessel, no necessity need be shown affirmatively. The master, in the absence of known fraud, is fully authorized to represent the owners in all matters relating to the ship; and it will always be presumed that supplies and repairs, ordered by the master, were reasonably fit and proper, unless there is clear proof to the contrary, and also proof of collusion by the material man.

But something more is required when the claim is against the ship itself. Such a claim can be asserted only as a lien or privilege upon the vessel. And the rule is that such a lien for supplies and materials, or for money advanced for the ship, since it is created and exists without record, or other public notice, can only be established upon circumstances of actual necessity.

Proof of absolute and indispensable necessity, however, is not required in order to the establishment of such a lien, where supplies and materials are furnished on the credit of the ship, or of the ship and owners, in a foreign port. In such cases, courts of admiralty do not scrutinize narrowly the account against the ship. They will reject, undoubtedly, all unwarranted (*The Cognac*, 2 Hagg., 387) charges; but upon proof that the furnishing was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported (*The General Smith*, 4 Wheat., 448; *Peyroux v. Howard*, 7 Pet., 324; *The Nestor*, 1 Sumn., 78); unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the material man knew, or could, by proper inquiry, have readily informed himself of the facts. *The Fortitude*, 8 Sumn., 246, 247.

It has been supposed that a more stringent rule than that just stated was sanctioned by this court, at the December Term, 1856, in the case of *The Sultana*, reported under the title of *Pratt v. Reed*, 19 How., 359 [60 U. S., XV., 660].

In that case, coal for generating steam was supplied to *The Sultana* of Buffalo, in New York, at Erie, in Pennsylvania. The master was sole owner, and known as such by the fur-

nisher of the coal. The supplies were furnished from time to time during a period of nearly two years, and formed the subject of a running account of debit and credit extending through that time. The evidence warranted the impression, confirmed by the fact of sole ownership in the master, that the credit was given to the master and not to the ship. It was held that no lien attached to the steamer for the supplies thus furnished.

We have no doubt that the case was rightly decided. There are, however, expressions in the opinion which, separated from the case, appear to sanction the doctrine that, in order to the creation of a lien on the vessel, express proof of an unforeseen emergency creating a necessity for supplies is necessary, and also of the existence of a necessity for credit on the ship.

But that it was not intended by the court to establish any other rule than that previously recognized, sufficiently appears from an opinion pronounced in the case of *The Neversink*, Southern Dist. of N. Y., Nov., 1867, by the learned judge who delivered its judgment in the case of *The Sultana*. What was said in the former case sufficiently shows that the latter judgment was intended only to affirm that there must be an apparent necessity for the credit as well as an actual necessity for the supplies, and that in the case before the court there was, in fact, no such necessity as was essential to the creation of a lien upon the steamer. It was not intended to deny that this apparent necessity might be presumed from the necessity for supplies, from the general authority of the master, and from general good faith in the particular transaction.

It has been supposed also that the judgment of this court in the case of *The Bark Laura*, 19 How., 29 [60 U. S., XV., 537], reported as *Thomas v. Osborn*, required affirmative proof of the necessity of credit to the ship, in order to the creation of a lien on the vessel. The court said, that "The limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it that apparently such a case of necessity exists, are as ancient and well established as the authority itself." There is nothing in the language which necessarily denies that proved necessity for repairs may be received as presumptive evidence, sufficient, in the absence of other information, to establish a case of apparent necessity upon which the lender or furnisher may safely act. And the citations from the Digest and the Consolato del Mare, made to show the antiquity of the doctrine, seem to have reference only to the condition of the ship, and not to the condition of the credit of the owners or master.

We are satisfied that neither of the two cases just referred to, when properly considered in connection with the proofs before the court, can be regarded as in conflict with the rule we have stated, which, prior to these decisions, had been, undoubtedly, received upon the general consent of authorities as the true rule on the subject of implied hypothecation for repairs and supplies, or for advances having the same relation to the ship.

We have been induced to state this doctrine

of implied hypothecation somewhat fully, not only because it seemed desirable to correct a common misunderstanding of these cases, but because of the close analogy in origin, effect and incidents between implied hypothecation and express hypothecation by bottomry.

It is, indeed, difficult to trace, either in reason or in the authorities, any marked line of discrimination between them. In the case of *The Aurora*, decided in 1816, this court said: "To make a bottomry bond, executed by the master, a valid hypothecation, it must be shown by the creditor that the master acted within the scope of his authority; or, in other words, that the advances were made for repairs or supplies necessary for effecting the objects of the voyage, or the safety and security of the ship. And no presumption should arise in the case that such repairs or supplies could be procured on reasonable terms with the credit of the owner, independent of such hypothecation." 1 Wheat., 96.

And it was further said, in the same case, that "It is incumbent on the creditor who claims an hypothecation to prove the actual existence of those things which give rise to his demand; and if it appear on his own showing, or otherwise, that he has funds of the owners in his possession which might have been applied to the demand, and he has neglected or refused to do so, he must fail in his claim." 1 Wheat., 105.

And this, undoubtedly, is the general rule also in respect to implied hypothecation. The principles on which it rests were fully explained and illustrated by *Mr. Justice Story*, in 1838, in the case of *The Fortitude*, 3 Sumn., 232.

It has been thought that a distinction between the lien for repairs and supplies, or ordinary advances to pay for them, and the lien of bottomry, may be found in that "superadded necessity" of which the learned judge speaks, in the case last cited, as distinguishing the former from the latter. There must, he said in substance, not only be a necessity for the repairs, but a necessity for resorting to a bottomry loan. *Ibid.*, 234. But this ruling must be taken with the qualification previously established by this court in the case of *The Virgin*, 8 Pet., 554, where it was held that "the necessity of the supplies and repairs being once made out, it is incumbent on the owners, who assert that they could have obtained upon their personal credit without bottomry, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case." It is only when such competent proofs have been adduced or the practicability of raising funds on credit has been made to appear from circumstances, that the lender is held responsible for failing to make due inquiry.

In the absence of such proofs or circumstances, an apparent necessity for credit by bottomry must be regarded as established when the necessity for repairs is proved.

A more substantial distinction between the implied and the express hypothecation may, perhaps, be found in the greater diligence required of the lender on bottomry than of the material man in inquiry concerning the necessity for repairs. The authorities on this subject are not easily reconciled; but they may be best harmonized, perhaps, in the proposition

that, if no necessity for repairs is established, a bottomry bond will not be supported in the absence of proof that the lender, after using reasonable diligence to ascertain the facts, had good reason to believe, and did believe, that the necessity really existed. And this is warranted by good reason. The maritime law seeks equally the general promotion of commercial intercourse and the most complete security in private transactions; and neither can well be reconciled with the support of hypothecations which partake largely of the nature of hazard, made where the owner cannot be consulted, at extraordinary rates of interest, agreed upon by the master and the lender, and under circumstances favorable to collusion and fraud, unless the lender be held to reasonable diligence in inquiring as to the existence of the facts of distress and necessity for repairs, which alone warrant such transactions.

The doctrine on the subject of maritime hypothecation, so far as it seems useful to consider it in this case, may be summed up, we think, in these propositions:

1. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary.

2. Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit.

3. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship.

4. The ordering, by the master, of supplies or repairs upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material man, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith.

5. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required and, if the fact of necessity be left unproved, evidence is also required, of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

These principles are now to be applied to the case before us. The pleadings make distinct issues upon the necessity for repairs, the necessity for credit, and exercise of due diligence in inquiry for the lender.

On examining the proofs we find great contrariety in evidence, but we think it sufficiently established that Clark, the master of *The Grapeshot*, if not guilty of actual fraud, was very negligent of his duties as master.

It is alleged in the answer, and the allegation is supported by credible testimony, that the voyage for which she was originally destined was from New York to Constantinople and back. The bark sailed from New York in February, 1857, and the voyage to Constantinople was accomplished in due time; but, instead of obtaining a return freight for New York, the master engaged the bark in a new voyage. He purchased

a cargo of salt, partly at Ivica and partly at the Isle de Sal, one of the Cape de Verde Islands, and carried it to Rio, where he lay for some time; then returned to the islands for another cargo of salt, with which he arrived at Rio early in January, 1858, and remained there until April, when he finally took a cargo for the United States; not then, however, for New York, but for New Orleans.

There is some evidence that the new voyages were for purposes of private speculation by the master, and this theory receives partial confirmation from a letter written by him to the owner from Constantinople, in which he admits that he could obtain a paying freight for New York, but states that he had determined to seek more profitable employment for the vessel, in a voyage to Rio with salt. On the other hand, it appears that nothing was kept secret from the owner, unless it be the fact of private speculation, for the letters of the master show that he was advised from time to time of all the movements of the vessel.

These transactions are adverted to only because, though having no direct bearing upon the case, they cast some light upon the subsequent conduct of the master.

The liabilities, except those charged under date of October 31st, 1857, which form the basis of the bottomry bond, were incurred, if incurred at all, while the ship remained at Rio, from January 2, to April 19, 1858. They consist of charges for supplies and repairs.

As to the necessity for repairs, the libelants have put in the depositions of Clark, the master, and of the furnishers at Rio. The respondent, on his side, has put in the depositions of several seamen who made part of the crew of *The Grapeshot*.

The evidence of these witnesses cannot be reconciled. The witnesses for the libelants are positively contradicted by the witnesses for the respondent. Clark, for example, says that on the last voyage to the Cape de Verde Islands and back to Rio, *The Grapeshot* leaked badly, and that she lost nine hundred bushels of salt by the water, from the leaking. And, as to the leaking, his testimony is, to some extent, corroborated by that of the repairer. But three of the crew, examined on this point, testify positively that there was no damage from leaking. As to injuries to the bottom of the vessel, and the necessity for recoppering, Clark says nothing in his deposition; he merely states that the accounts of the material men are just and correct, and they testify that the repairs and supplies were necessary. On the other hand, some of the crew testify that the repairs were quite unnecessary, that the copper put upon her was inferior to the copper taken off, and the vessel when nominally repaired was less staunch than before. There is more to the same effect.

It is said that the evidence of the seamen is unworthy of credit. It was certainly taken in a very loose and unsatisfactory way. But this was the fault of the commissioner, and not of the witnesses. On the main points at issue their testimony is clear and distinct enough and we perceive no reason for discrediting it.

We have examined it with care, and, taken in connection with the whole evidence on both sides, it has satisfied us that we cannot hold the necessity for repairs as established.

And this view is confirmed by the absence of any survey or examination by public authority, or by competent and disinterested persons for the purpose of ascertaining the necessity for repairs. In the case of *The Cognac*, 2 Hagg., 377, 387, the bottomry bond was authorized by the French Tribunal of Commerce at the port of repair, and also by the British vice-consul there, and yet the British Court of Admiralty disallowed some of the items covered by the bond. And in the case of *The Fortitude* the bottomry bond was supported by evidence of a survey, called by the master and conducted by persons skilled in nautical affairs. This was, as the learned judge observed, "what every prudent master ought to do under the like circumstances."

We do not say that such a survey is indispensable. No doubt proof of the necessity and of the extent of the necessity may be otherwise made. But where the repairs alleged to be made are extensive, and the necessity otherwise left in doubt, the absence of such an examination will go far to warrant the conclusion that no real necessity existed.

The evidence in respect to the bills for supplies covered by the bottomry bond is not so strong as to the absence of necessity for them. But there are some items included in these bills, and particularly a very considerable item stated as a general balance found due on a former account of the consignee of the ship, which can hardly be regarded as subjects of bottomry.

Under these circumstances, if there were any proof affecting the lenders with actual knowledge of the facts, it would be our duty to pronounce the bottomry wholly invalid. For there is no evidence that they made any inquiry whatever, and the maritime law holds them to reasonable diligence in this respect.

But mere omission to make inquiry will not invalidate the bond altogether. It may be good in part and void in part. And where, as in this case, part of the repairs and supplies have been shown to be necessary, and there is no reason to impute fraud or collusion to the lenders, the bond, though void as to the items of which the necessity is disproved or not shown, may properly be held valid as to those items, the necessity of which is shown.

Under the view which we have taken of this case it is not necessary to consider the evidence as to the necessity for credit. It may be of use, however, to observe that while there is evidence to show that the respondent, Law, was a man of large means, and known as such by some persons in Rio, the proof does not satisfy us that the sum named in the bond could have been raised on his credit at rates more advantageous than were actually obtained, much less that the lenders in this case could by any diligence of inquiry have learned that this might be done. It is matter of history, of which the court will take notice, that the year 1857 was a year of financial revulsion and distress throughout the greater part, if not the whole, of the commercial world, the effects of which were still felt in the spring of 1858. In such a time proof of the practicability of obtaining funds, in a port so remote, upon the credit of the owner, should be clear, indeed, in order to affect a lender upon bottomry with the duty of inquiry.

See 9 WALL.

On the whole, the decree of the circuit court must be reversed, and the cause must be remanded to that court with directions to refer the accounts for repairs and supplies to one or more commissioners experienced in commerce and of known intelligence and probity, to ascertain, under the instructions of the court, what portion of the repairs and supplies, actually furnished to the ship, were really necessary, and for the amount thus ascertained and approved by the court to enter decrees for the libellants.

S. C.—7 Wall., 568.
Cited—9 Wall., 759; 10 Wall., 201, 212, 217; 13 Wall., 335; 15 Wall., 384; 17 Wall., 609; 19 Wall., 524, 535; 20 Wall., 164, 384; 21 Wall., 88, 588; 22 Wall., 295, 305; 23 Wall., 469; 107 U. S., 428; 3 Biss., 101; 7 Blatchf., 373; 10 Blatchf., 514; 11 Blatchf., 241; 14 Blatchf., 35-42; 1 Brown., 539; 2 Ben., 324; 7 Ben., 181; 8 Ben., 23; 9 Ben., 88, 89; 1 Wood., 294; 2 Wood., 39-47; 1 Sawy., 130; 3 Sawy., 205; 5 Sawy., 490; 1 Dill., 381, 576; 2 Hughes, 55, 82; 5 Hughes, 485; 2 Low., 9-484; 7 Am. Rep., 198 (38 Ia., 302); 9 Am. Rep., 671 (35 Ind., 164).

EDWARD M. LINTHICUM, *Plff. in Err.*,
v.

ALEXANDER RAY.

(See S. C., 9 Wall., 241-243.)

Possession sufficient to recover against wrong-doer—right of using wharf—construction of grant of.

In an action for obstructing a wharf, possession of the defendant under color and with claim of title is sufficient to put the plaintiff upon proof of a better title to the wharf.

A grant of the right of using the wharf built, refers only to the structure then erected, when the right was not attached as an incident to any estate.

[No. 81.]

Argued Feb. 25, 1870. Decided Mar. 14, 1870.

IN ERROR to the Supreme Court of the District of Columbia.

An action of trespass on the case was brought in the court below by the plaintiff in error, to recover damages for the obstruction of a certain wharf. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Messrs. John A. Wills and Joseph H. Bradley, for plaintiff in error.

Messrs. W. S. Cox and W. D. Davidge, for defendant in error.

Mr Justice Field delivered the opinion of the court:

This is an action on the case for obstructing the plaintiff in the use of a wharf in the City of Georgetown, in the District of Columbia. The wharf is situated on the south side of Water Street, between Market and Frederick Streets, in that city, and extends one hundred and one feet on the Potomac River. The plaintiffs assert a right to its use under various *mesne* conveyances from Francis and Charles Lowndes. It appears from the evidence, that in the year 1800 these parties were the joint owners of a wharf occupying the site of the present wharf and of similar dimensions. At the same time Francis Lowndes owned in his own right two lots on the north side of Water Street, opposite to the wharf, which he had improved by the

erection thereon of two warehouses. These buildings were separated from each other by about twenty feet. In 1804 the two Lowndes united in a deed conveying to Richard and Leonard H. Johns the intervening lot between the two buildings with its appurtenances, and also to them, their heirs, and assigns the privileges and rights of using the wharf built "by the Lowndes," free of all expense, for the purpose, from time to time, of mooring their ships or vessels, and for loading and unloading the same, and for all goods imported or exported by them. The several *meane* conveyances, which bring the property to the plaintiff, cover the same lot and the same privileges and rights of using the wharf, describing both in similar language.

On the other hand, the defendant asserts a right to the wharf itself, as it now exists, and not merely a right to its use, and traces his title to the same original source, Francis and Charles Lowndes.

It appears from the deeds produced that in April, 1800, these parties conveyed to one Templeman, in trust, to indemnify him for his past indorsements and any future indorsements he might make for them, and one John Suter, on notes in the Bank of Columbia, the two improved lots on the north side of Water Street, and the wharf mentioned. The trust deed was accompanied with a power to the grantee to sell this property, and apply the proceeds to the payment of the notes indorsed by him, which were not taken up at maturity by their makers. In 1807, Templeman conveyed the property to Walter Smith, upon trust to sell the same, whenever requested by the Bank of Columbia to pay certain notes. In this conveyance Francis Lowndes joined. By sundry *meane* conveyances from Walter Smith, the property, as contended by the defendant, became vested in him in 1858. At this time the wharf, which existed in 1804, had perished, and a new wharf, the one now in existence, was constructed in its place by the defendant, and has ever since remained in his exclusive possession.

We do not deem it important to consider whether the conveyance to Smith from Templeman, the trustee, was authorized by the power contained in the deed to the latter, or whether the subsequent conveyances under Smith operated to vest a good title to the land upon which the present wharf is situated, or such a right of wharfage as to authorize the construction and exclusive use of the present wharf. The possession of the defendant under color and with claim of title is sufficient to put the plaintiff upon proof of a better title to the wharf, or, at least, of an equal right with the defendant to its use. And such proof he has not produced. The deed of the two Lowndes to the Johns in 1804, under which he derives all the claim he possesses, only conferred a right to the use of the wharf then in existence, and not any general right of wharfage, or any right to the land covered by the wharf. Its language is that it grants the right "of using the wharf built" by the Lowndes, referring clearly to the structure then erected. And the right to use the wharf is limited to that of mooring to it the ships and vessels of the grantees, for loading and unloading, and of passing over it goods imported or exported by them. The deed contains no pro-

vision for keeping the wharf in repair, or for building a new one in case of its destruction, or any clause indicating an intention to confer any right or privilege of greater duration than that of the structure then existing.

Nor was the right to use the wharf made appurtenant to the twenty feet lot situated on the north side of Water Street, by being conveyed to the Johns in the same instrument. It was in no way connected with the enjoyment or use of the lot, and a right not thus connected cannot be annexed as an incident to land so as to become appurtenant to it. *Ackroyd v. Smith*, 10 C. B., 164.

The right was not attached as an incident to any estate; it passed by a grant in gross, and was necessarily limited in its duration by the existence of the structure with which it was connected.

Judgment affirmed.

Cited—109 U. S., 682; 7 Sawy., 168; 26 Mich., 224.

THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DISTRICT AND FOR THE COUNTY OF GREENE, AND THE COUNTY CLERK OF SAID COUNTY, *Piffs. in Err.*,

THE UNITED STATES, *ex rel* ROBERT MURRAY and WILLIAM BUCKLEY.

(See 8 C., "*The Justices v. Murray*," 9 Wall., 274-282).

7th Amendment to U. S. Constitution—unconstitutional law.

The 7th Amendment of the Constitution of the United States applies to a cause tried by a jury in a state court.

So much of the 6th section of the Act of Congress, March 3, 1863, entitled "An Act relating to *Habeas Corpus*, and Regulating Proceedings in Certain Cases," as provides for the removal of a judgment in a state court, in a cause tried by a jury, to the Circuit Court of the United States for a retrial, on the facts and law, is not in pursuance of the Constitution, and is void.

[No. 12.]

Re-argued Feb. 16, 1870. Decided Mar. 14, 1870.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history and facts of this case are very fully stated by the court.

The case was twice argued.

Mr. Amasa J. Parker, for plaintiffs in error:

The latter clause of the 7th Amendment has no connection with the first clause, which secures a trial by jury, but it is to be read as a substantive and independent clause.

Curt. Const., 114, and cases there cited.

NOTE.—*Trial by jury, how affected by 7th Amendment to the Constitution.*

This amendment has no relation or application to suits in state courts, but is confined to courts of the United States exclusively. It does not forbid the restriction of trial by jury in state courts. *Livingston v. Moore*, 32 U. S. (7 Pet.), 469; *Edwards v. Elliott*, 88 U. S. (21 Wall.), 532; *Walker v. Sauvinet*, 92 U. S., 90; *Pearson v. Yewdall*, 95 U. S., 294.

The intention was to confine its application to

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The precise question here presented was decided by the Supreme Court of Massachusetts in *Weatherbee v. Johnson*, 14 Mass., 413, and the question is fully discussed by the Supreme Court of New York in *Patrie v. Murray*, 48 Barb., 331; *S. C.*, 29 How., Pr., 312, when this case was before the court, in which the court followed the decision made in Massachusetts.

Ch. J. Parker, in *Weatherbee v. Johnson*, 14 Mass., 420, gives the reasons, then fresh in the memory, which led to the adoption of this Amendment, viz.: that, after a trial by a jury in a state court in the vicinage, the facts should not be retried in the Federal Court, which might take place at an inconvenient distance, and that all appellate jurisdiction which before had extended to both law and fact, now should be restricted to both questions of law.

What is said by *Ch. J. Parker* is fully sustained by reference to the speech of Mr. Madison on the subject reported in Vol. 1, Debates in Congress, by Gales, O. S., p. 458; see, also, the latter part of No. LXXXI. of the "Federalist," where Mr. Hamilton states the objections made to the Constitution as it then stood, and discusses the proposed change. The only question was, whether the Federal Courts should have power to review questions of fact by a new trial, on appellate jurisdiction from state courts.

In *Davidson v. Burr*, 2 Cranch (C. C.), 515, and in *Maddox v. Stewart*, 2 Cranch (C. C.), 523, it was held that after a trial by jury before a justice of the peace, there could be no review of a question of fact in the Circuit Court of the United States, because of the 7th Amendment to the Constitution.

See, also, *Curt. Com. Const.*, sec. 17, and *note*.

The prohibition is broad and comprehensive. It makes no exceptions of a case first tried in a state court. "No fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law." How can the court make an exception which the framers of the Constitution did not make?

Mr. Wm. M. Evarts, Atty. Gen., on the first argument, and *Messrs. E. R. Hoar, Atty. Gen.*, and *W. A. Field, Asst. Atty. Gen.*, on the re-argument, for defendants in error:

The constitutionality of the Act of Mar. 8, 1863, so far as it provides for the removal of

certain suits from the state courts to the courts of the United States before a verdict of judgment thereon in the state courts, may be regarded as settled.

The Mayor v. Cooper, 6 Wall., 247 (73 U. S., XVIII., 851); *Hodgson v. Millward*, 3 Grant, 412; *Kulp v. Ricketts*, 3 Grant, 420; *Tod v. Fairfield Co.*, C. P., 15 Ohio St., 857; *McCormick v. Humphreys*, 6 Am. Law Reg. (N. S.), 552; *Jones v. Seward*, 17 Abb. Pr., 377.

It is undeniable that Congress, by the Act attempted to give the defendants a right to remove this suit to the Circuit Court of the United States, both before and after judgment, in such form that a trial according to the course of the common law by a jury might be had in the circuit court. The sole restriction of the Constitution relied on as prohibiting such a trial of facts, as well as of the law in the Circuit Court of the United States, is Article VII. of the Amendments to the Constitution.

It is plain that the first clause of the article, to wit: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," relates only to the courts of the United States.

The last clause of the 7th Amendment must be connected with the first clause, and means that no fact tried by a jury in such a manner as is prescribed by the first clause, shall be otherwise re-examined in any court of the United States than according to the rules of the common law. This article was not intended to prevent one full trial, both of law and facts, in any case arising under the laws of the United States in a court of the United States. *Mayor v. Cooper*, 6 Wall., 253 (73 U. S., XVIII., 858).

Is there any doubt that the 7th Amendment would not prevent the removal of a case at common law arising under the Constitution and laws of the United States, to a United States court from a state court, and a re-examination of the facts in the United States court by a jury, such as the laws of the United States require, if those facts had been previously examined only in a state court by a state jury, not such as the Constitution of the United States and laws require?

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of

common law suits of a civil nature, in which a jury, by the rules of common law, constitutes an element of the trial. It embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they assume to settle legal rights. *Parsons v. Bedford*, 28 U. S. (3 Pet.), 433; *Waring v. Clarke*, 46 U. S. (5 How.), 441; *Shields v. Thomas*, 59 U. S., 253, XV., 368; *Ins. Co. v. Comstock*, 38 U. S. (16 Wall.), 258; *Story, Constitution*, sec. 1799.

It does not extend to suits against the government. They are not suits at common law. *McElrath v. U. S.*, 12 Ct. of Cl., 312.

The amendment does not give a right of trial by jury, but preserves the right, which means it shall not be denied either party, but parties may, by mutual consent, waive a trial by jury. *Bank of Columbia v. Okley*, 17 U. S. (4 Wheat.), 230; *Parsons v. Arnott*, 28 U. S. (3 Pet.), 413; *U. S. v. Rathbone*, 2 Paine, 573; *Kelly v. Smith*, 1 Blatchf., 290.

The constitutional right to trial by jury, extends only to suits at common law. Suits in equity, such as suits to enjoin infringement of patents, are triable by jury in the discretion of the court, and the verdicts of the jury is not conclusive, but is only aid to the court. *Ely v. Monson, etc., Mfg.*

Co., 4 Fish. Pat. Ca., 64; *Motte v. Bennet*, 2 Fish., 642.

The right of trial by jury, secured by seventh amendment, is the trial, according to the course of common law, and is confined to matters of fact only. *Matter of Martin*, 2 Paine, 348.

As to construction of seventh amendment in reference to admiralty and maritime jurisdiction, see *Waring v. Clarke*, 46 U. S. (5 How.), 441; *The Genesee Chief v. Fitzhugh*, 53 U. S. (12 How.), 443.

Upon its binding obligation, see *Ex parte Milligan*, 71 U. S., 2, XVIII., 231; *Webster v. Reid*, 52 U. S. (11 How.), 437; *Baker v. Biddle*, Bald., 394; *U. S. v. Taylor*, 3 McLean, 539.

Congress cannot confer on the Supreme Court power to grant a new trial in a court below by a re-examination of the facts tried by a jury.

There are only two methods at common law for re-examination of facts tried by a jury, viz.: the granting a new trial by the court before which the issue was tried, or to which the record was returnable, or the awarding a *venue factas de novo* by an appellate court for some error of law in the proceedings. *Parsons v. Bedford*, 28 U. S. (3 Pet.), 433; *Ins. Co. v. Comstock*, 38 U. S. (16 Wall.), 258, 269; *U. S. v. Womson*, 1 Gall., 5, 20.

the United States for the Southern District of New York.

The case is this: Albert W. Patrie brought a suit for assault and battery and false imprisonment against Murray and Buckley, in the Supreme Court of the State of New York, to which the defendants pleaded the general issue, and further a special defense that the said Murray was Marshal of the Southern District of New York, and the said Buckley was his deputy; and that, as such Marshal, was, by order of the President, on or about the 28th August, 1862, directed to take into custody the plaintiff; that said Buckley as such deputy, was directed by the Marshal to execute said order; and that acting as such, and in pursuance of his directions, did, in a lawful manner, and without force or violence, take the said Patrie into custody, and that during all the time he was in his custody, he was kept and detained in pursuance of said order of the President, and not otherwise.

After the issue was thus joined, the cause was tried at the Circuit Court in Greene County, within the Third Judicial District, before a jury, the defendants appearing by counsel, and a verdict rendered for the plaintiff. No evidence was given on the trial on the part of the defendant in support of the special defense, set up under the order of the President. Judgment was regularly entered upon the verdict on the 8th June, 1864.

In December following, a writ of error was issued to the Supreme Court of the Third District, under the 5th section of the Act of Congress, passed March 3, 1863, to remove the cause to the Circuit Court of the United States for the Southern District of New York, which Act is as follows:

If any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, * * * or for any arrest or imprisonment made, * * * at any time during the present rebellion, by virtue or under color of any authority by or under the President of the United States, * * * it shall, * * * be competent for either party within six months after the rendition of a judgment in any such case, by writ of error or other process, to remove the same to the Circuit Court of the United States for that district in which such judgment shall have been rendered, and the said Circuit Court shall thereupon proceed to try and determine the fact and law in such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding.

The state court refused to make a return to the writ of error, upon which an alternative *mandamus* was issued by the Circuit Court of the United States, to which a return was made setting forth the suit, trial and judgment already referred to, to which there was a demurrer and joinder, and after due consideration the demurrer was sustained and a judgment for a peremptory *mandamus* rendered, from which judgment a writ of error has been taken to this court.

The case has been argued on two occasions by the learned counsel, and each time with ability and care, and has received the most deliberate consideration of the court. The second time the argument was confined to two questions, submitted by the court:

1. Whether or not the Act of Congress of March 3, 1863, providing for the removal of a cause after judgment by a state court to the Circuit Court of the United States, for a new trial, is an Act in pursuance of the Constitution of the United States.

2. Whether or not the provision in the 7th Amendment of the Constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law, applies to the facts tried by a jury in a cause in a state court.

As the court has arrived at the conclusion that the 7th Amendment applies to a cause tried by a jury in a state court, upon its true construction, this opinion will be confined to considerations involved in the second question submitted to us for argument at the bar. The decision of that in the affirmative disposes of the case.

The 7th Amendment is as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the common law."

It must be admitted that, according to the construction uniformly given to the first clause of this amendment, the suits there mentioned are confined to those in the Federal Courts; and the argument is, perhaps, more than plausible, which is that the words, "and no fact tried by a jury," mentioned in the second, relate to the trial by jury as provided for in the previous clause. We have felt the full force of this argument, and if the two clauses were necessarily to be construed together, and to be regarded as inseparable, we think the argument would be conclusive. But this is not the view that has been taken of it by this court. In *Parsons v. Bedford*, 3 Pet., 447, 448, Mr. Justice Story, in delivering the opinion of the court, referring to this part of the amendment, observed, "that it should be read as a substantial and independent clause;" and that it was "a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." The history of the amendment confirms this view. Deb. in Cong., by Gales & Seaton, Vol. 1, pp. 452, 458, 784. He further observed that "the only modes known to the common law to re-examine such facts was the granting of a new trial by the court where the issue was tried, or the award of a *venire facias de novo*, by the appellate court, for some error of law that had intervened in the proceedings."

Another argument mainly relied upon against this construction is that the ten amendments proposed by Congress, and adopted by the States are limitations upon the powers of the Federal Government, and not upon the States; and we are referred to the cases of *Barron v. The Mayor and City Council of Baltimore*, 7 Pet., 243; and *Lessee of Livingston v. Moore et al.*, 10, 551; *Twissell v. The Commonwealth* [ante, 283], as authorities for the position. This is admitted, and it follows that the 7th Amendment could not be invoked in a state court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below. But this would seem to be the only consequence deducible from these cases or from the

principles they assert. They have no pertinent, much less authoritative, application to the question in hand. That question is not whether the limitation in the amendment has any effect as to the powers of an appellate state court, but what is its effect upon the powers of the Federal appellate Court? Is the limitation confined to cases of writs of error to the inferior Federal Courts, or does it not also apply to writs of error to state courts in cases involving federal questions? The latter is the precise question for our determination. Now, it will be admitted that the amendment, in terms, makes no such discrimination. They are: "and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common law cases coming up from an inferior Federal Court, and also to the circuit court in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers in cases of federal cognizance coming up from a state court? The terms of the amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely: suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court.

It seems to us also that cases of federal cognizance, coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the Constitution, the laws of the United States, and treaties, or under some other federal authority; and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior Federal Court. No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior Federal Court on which appellate jurisdiction may have been conferred. The case must be one involving some federal question, and it is difficult to perceive any sensible reason for the distinction that is attempted to be made between the re-examination by the appellate court of a case coming up from an inferior Federal Court, and one of the class above mentioned coming up from a state court. In both instances the cases are to be disposed of by the same system of laws and by the same judicial tribunal.

Mr. Hamilton, in the 82d number of the *Federalist*, speaking of the relation that would subsist between the national and state courts in the instances of concurrent jurisdiction, observes that the Constitution, in direct terms, gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operations to the inferior Federal Courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, he observes, and from the reason of

the thing, it ought to be construed to extend to the state tribunals. "The courts of the latter will, of course, be national auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions."

This idea of calling to the aid of the Federal Judiciary the state tribunals, by leaving to them concurrent jurisdiction in which federal questions might be involved, with the right of appeal to the Supreme Court, will be found to be extensively acted upon in the distribution of the judicial powers of the United States in the Act of 1789, known as the Judiciary Act. Besides the general concurrent jurisdiction in the Judiciary Act, a striking instance of this is found in the 38d section of the Act, which provides "that for any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this Act has cognizance of the offense." And a series of Acts were also passed in the earlier sessions of Congress, conferring upon the state and county courts cognizance to hear and determine upon offenses, penalties, and forfeitures, and for the collection of taxes and duties arising and payable under the revenue laws, or under a direct tax or internal duties and which were continued down till the state courts refused to entertain jurisdiction of the same. *Brightly's Dig.*, p. 281, and *note g*, p. 282. The State Courts of New York continued to exercise jurisdiction under these Acts till as late as 1819. *U. S. v. Lathrop*, 17 Johns., 4.

The reasons, therefore, for the application of this clause of the 7th Amendment to cases coming up for review from the state courts were as strong as in cases from the inferior Federal Courts, and the history of the Amendment will show that it was the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury in the state courts that led mainly to its adoption.

The appellate jurisdiction of this court, after defining its original jurisdiction, is as follows: "In all other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make."

Mr. Hamilton, in the 81st number of the *Federalist*, after quoting the provision observes: "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law, but the clamors have been loud against it as applied to matters of fact. Some well intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied superseding of the trial by jury in favor of the civil law mode of trial." And he then enters into an argument to show that there is no real ground for alarm or apprehension on the subject, and suggests some regulations by Congress by which the objections would

be removed. He observes, also, that it would have been impracticable for the Convention to have made an express exception of cases which had been originally tried by a jury, because in the courts of some of the States all causes were tried in this mode, and such exception would preclude the revision of matters of fact, as well where it might be proper as where it might be improper. He then suggests that Congress has full power to provide that in appeals to the Supreme Court there should be no re-examination of the facts where the causes had been tried by a jury according to the common law mode of proceeding. Now, it is quite clear that the restrictions upon this appellate power by Congress, pointed out by Mr. Hamilton for the purpose of quieting the public mind, had a direct reference to the revision of the judgments of the state courts as well as the inferior Federal, and what is significant on the subject is, that the Amendment submitted in the first session of Congress, by Mr. Madison, adopts the restriction suggested by Hamilton, and almost in the same words. We will simply add, there is nothing in the history of the Amendment indicating that it was intended to be confined to cases coming up for revision from the inferior Federal Courts, but there is much found to the contrary. *Wetherbee v. Johnson*, 14 Mass. 412; *Patrie v. Murray*, 43 Barb., 381.

Our conclusion is, that so much of the 5th section of the Act of Congress, March 3d, 1863, entitled "An Act Relating to *Habeas Corpus*, and Regulating Proceedings in Certain Cases," as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the Circuit Court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void.

The judgment of the court below must, therefore, be reversed, and the cause remanded, with direction to dismiss the writ of error and all proceedings under it.

NOTE by the Court.—The alternative and peremptory mandamus against the Supreme Court of New York was allowed by consent of the counsel for the defendants, with a view to present the question raised and decided in the case. The circuit court had refused to issue it against the court, and only against the clerk. This is stated to prevent the case from being cited as an authority for the power, and without intending to express any opinion on this subject.

Cited—10 Wall., 25; 19 Wall., 576; 100 U. S., 295; 2 Dill., 564; 8 Am. Rep., 316 (106 Mass., 193).

UNITED STATES, Appt.,

v.

HENRY J. HOSMER.

(See S. C., 9 Wall., 432-435.)

Volunteer's bounty, when payable.

Under the Act of Aug. 6, 1861, a volunteer is entitled to the bounty of \$100, although he had not served two years when discharged.

[No. 102.]

Argued Mar. 3, 1870. Decided Mar. 14, 1870.

APPEAL from the Court of Claims.

The petition in this case was filed in the court below by the appellee, to recover a bounty of \$100.

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The case is fully stated by the court.

Messrs. E. R. Hoar, Atty. Gen., T. L. Dickey, Asst. Atty. Gen., and T. H. Talbot, Asst. Atty. Gen., for appellant:

The case does not show that the regiment in which the appellee enlisted was ever accepted into the service of the United States, or in any manner under the authority of said Proclamation. Act Cong., July 23, 1861.

Sec. 5 related to the pay of these troops, and *inter alia* provided that—

"Every * * * private * * * who enters the service under this Act shall be paid * * * when honorably discharged * * * if he shall have served for a period of two years, or during the war if sooner ended, the sum of one hundred dollars."

Beyond these provisions, there is no authority of law to give validity to the appellee's claim.

Mr. James Schouler, for appellee:

This regiment was one of many raised throughout the North under the President's Proclamation, May 3, 1861, and general orders War Department, No. 15, May 4, 1861, and No. 25, May 25, 1861. In these orders, every man who enters the service under this plan is promised, when honorably discharged, the sum of \$100.

The above Proclamation and orders were fully legalized by Act, Aug. 6, 1861, sec. 8, ch. 63.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal from the judgment of the Court of Claims.

The case was decided by that court upon a demurrer to the claimant's petition. The facts set forth in the petition were admitted by the demurrer. The only question before the court was the sufficiency of the facts alleged to warrant the judgment invoked. The case is presented for our consideration in the same manner. We cannot take cognizance of any fact beyond the scope of the record, as it was made up in the court below.

The petition sets forth that the claimant was a private in Company B of the 15th regiment of Massachusetts Volunteers; that he was enrolled and enlisted in the service about the 15th of July, 1861, and was honorably discharged by reason of a surgeon's certificate of disability on or about the 5th of January, 1863; that on the 3d of May, 1861, the President called for a volunteer force for the enforcement of the laws, and the suppression of insurrection, by a Proclamation, which stated that the details would be made known through the Department of War; that general order No. 15 of the War Department, of May 4th, 1861, and general order No. 25 of that department, of May 25th, 1861, provided that every private who entered the service under the plan set forth should be paid, when honorably discharged, the sum of \$100; that by the Act of Congress of August 6th, 1861, the proclamation and orders were legalized; that the petitioner had duly demanded the sum of \$100; that his claim had been rejected by the Paymaster-General; and that this rejection had been approved by the second comptroller. By consent, the petition was amended by inserting at the proper place that the regiment was organized

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ized and accepted under the Proclamation and orders before mentioned for the term of three years; and that the petitioner was duly enrolled in the regiment. The United States demurred. The Court of Claims overruled the demurrer, and gave judgment for the petitioner. The United States thereupon brought the case by appeal to this court. The Proclamation of the President and the orders of the War Department, relied upon by the claimant, are correctly set forth in the petition, and need not be more particularly adverted to.

The 8d section of the Act of August 6th, 1861, 12 Stat. at L., 326, declares that "all the acts, proclamations, and orders of the President of the United States, after the 4th of March, 1861, respecting the Army and Navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved, and in all respects legalized and made valid, to the same intent, and with the same effect, as if they had been issued and done under the previous express authority of the Congress of the United States."

This made the case of the petitioner complete. It was unquestionably within the Proclamation and orders thus legalized. Congress gave the same validity to the claim as if the petitioner had entered the service under an antecedent statute containing exactly the provisions of the orders under which the claim has arisen.

The attorney for the United States relies upon the Act of the 23d of July, 1861, 12 Stat. at L., 268. The 1st section of that Act provides that "All provisions of law applicable to three years volunteers shall apply to two years volunteers, and to all volunteers who have been or may be accepted into the service of the United States for a period not less than six months." The 5th section provides that \$100 shall be paid to privates "honorably discharged," who shall have served "two years, or during the war, if sooner ended."

This was the first Act passed by Congress for calling out troops to suppress the rebellion. It is insisted that it is retrospective as well as prospective in its operation; that it applies to volunteers who entered the service prior to its passage, under the Proclamation, as well as those who entered subsequently under its provisions; and that the petitioner, not having served two years at the time of his discharge, was hence not entitled to the \$100 in question. It is unnecessary to consider this subject. Conceding the construction contended for to be correct, the consequence insisted on by no means follows. The prior Act must yield to the later one. The Act of August 6th ratifies the Proclamation and orders in the strongest terms. It contains no exception or qualification. It gives to the orders the fullest effect, and leaves the claim of the petitioner in all respects as it would have been if the Act of the 23d of July had not been passed. We may add that it would not comport with the dignity of the Government thus to break faith with the gallant men who in that hour of gloom stood forth to peril their lives for their country. Viewing the two Acts together, we are confident such was not the intention of Congress.

The Judgment of the Court of Claims is affirmed.

See 9 WALL.

UNITED STATES, *Appt.*,

v.

THE SCHOONER "NONESUCH" AND CARGO, JOHN H. ALBURY, Master and Claimant;

AND

UNITED STATES, *Appt.*,

v.

THE SCHOONER "RISING DAWN" AND CARGO, WILLIAM RYAN, Master and Claimant.

(See S. C., "*The Nonesuch*," 9 Wall., 504, 505.)

This court cannot acquire jurisdiction by consent.

This court cannot acquire jurisdiction of a cause pending in a circuit court by transfer to this court by consent of parties.

[Nos. 115, 116.]

Submitted Mar. 11, 1870. Decided Mar. 14, 1870.

APPEALS from the District Court of the United States for the Southern District of Florida.

The libels in these cases were filed in the District Court of the United States for the Southern and Northern Districts of Florida, to have the vessels in question condemned as prizes. The courts decreed in favor of the claimants in both cases. Whereupon appeals were then taken to the court below by the libelants.

On November 2, 1868, in accordance with a stipulation of the parties in each case, filed in the circuit court, and without final decrees having been entered by said court, they were transferred to this court.

Messrs. E. R. Hoar, *Atty. Gen.*, and W. A. Field, *Asst. Atty. Gen.*, for appellant.

(No counsel appeared in this court for appellees.)

Mr. Chief Justice Chase delivered the opinion of the court:

This is an appeal from the District Court of the United States for the Northern District of Florida to the Circuit Court for the same District. There has been no decree rendered in that court, but consent of parties was given to the transfer of the cause into this court.

But this court cannot acquire jurisdiction of a cause pending in a circuit court, by transfer. This was determined at the last term in the case of *The Alicia* [*ante*, 84]. In that case the record had not been filed, and amotion was made to docket and dismiss. That motion was denied, on the ground that the court could not take jurisdiction. In this case the record has been filed, and the cause has been docketed here.

The order, therefore, must be that the cause be dismissed for want of jurisdiction.

The case of *The United States v. The Schooner Rising Dawn* is in the same predicament, and the same order must be made.

NOTE.—Jurisdiction of Federal Courts not given by consent. See note to Governor of Georgia v. Sundry African Slaves, 26 U. S. (1 Pet.), 110.

UNITED STATES, *Appl.*,

v.

LEWIS MERRILL.

(See S. C., 9 Wall., 614-617.)

When military officer not entitled to extra pay.

An officer honorably discharged from the volunteer service, but who at the same time resumed his duty and rank in the regular army, is not entitled to the three months' pay provided by the 4th section of the Act of Mar. 3, 1865.

[No. 105.]

*Argued Mar. 4, 1870. Decided Mar. 14, 1870.***A**PPEAL from the Court of Claims.

A petition was filed in the court below by the appellee, for money alleged to be due him as an officer upon his discharge from military service. A judgment having been given in favor of said claimant, the defendant took an appeal to this court.

The case is stated by the court.

Mr. E. R. Hoar, Atty. Gen., and T. H. Talbot, Asst. Atty. Gen., for appellant:

The provisions of the law affecting this claim are the 4th section of the Act of Mar. 3, 1865 (13 Stat. at L., 497), and the Act of July 13, 1866 (14 Stat. at L., 94).

The word "service," used twice in this Act of 1866, must be referred, for its precise meaning, back to the earlier Act, where the same idea is fully expressed by the words "military service."

This construction carries out the obvious intent of Congress in passing this Act of 1865. Its object was to induce men to remain in the military service.

Nor can Congress have intended to give three months' pay proper, additional, to any officer who, during the same three months, was actually drawing pay and allowances as an officer of the army. The object was merely to provide for that want of income which would befall the discharged volunteer officer, before he could resume employment in civil life.

Messrs. Chipman and Hoerner, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Congress provided, by the 4th section of the Act of the 3d of March, 1865, that all officers of volunteers now in commission, below the rank of Brigadier-General, who shall continue in the military service to the close of the war, shall be entitled to receive, upon being mustered out of said service, three months' pay proper. 13 Stat. at L., 497.

Subsequent to the passage of that Act, to wit: on the 13th of July, 1866, Congress passed another Act upon the same subject, in which it is enacted that the 4th section of the prior Act shall be so construed as to entitle all officers of volunteers to the three months' pay proper provided for therein, who were in service on the day when that Act was passed, and whose resignations were presented and accepted, and who were mustered out at their own request, or otherwise honorably discharged from the service, after the 9th of April of that year. 14 Stat. at L., 94.

Prior to the month of August, 1861, the appellee was an officer in the Regular Army of the United States, and on the twenty-third of that

month he was commissioned as a colonel of the second regiment of Missouri cavalry, which was a volunteer organization. He remained in such service until the 14th of December, 1866, when he was honorably discharged from the volunteer service, and resumed his duty and rank in the regular army.

None of those facts are controverted, and the appellee, by virtue of the premises, claimed that he was entitled to receive the sum of \$530 for the three months' pay proper as such military officer, because he was in service on the day when the first named Act was passed, notwithstanding the fact that at the time he was discharged from the volunteer organization in which he was commissioned as colonel, he resumed his duty and rank and became entitled to his pay and emoluments as an officer in the regular army.

Although he was never mustered out of the military service of the United States, still he claimed three months' pay proper by virtue of his discharge from the volunteer organization, and accordingly applied to the proper officer of the department for the payment of the amount so claimed to be due, as provided in those Acts of Congress; but the application was rejected because he was still in the military service under existing laws.

Payment being refused by the proper officers of the department, he filed his petition in the Court of Claims, setting forth the foregoing facts, and insisted that when he ceased to be an officer of volunteers in the manner prescribed by law he ceased to be in the military service as an officer of such volunteer organization, and that an honorable discharge from such volunteer service as much entitled him to the three months' pay proper as if he had been discharged altogether from the military service of the United States.

His theory of the law is, that it bestowed a gratuity upon officers of volunteers, and that it makes no difference that he found himself immediately transferred to another branch of the military service by virtue of a commission in the regular army which he held before he was commissioned as colonel of volunteers and throughout the entire period of that service; but it is not possible to concur in that proposition, as it seems much more reasonable to suppose that the object which Congress had in view was to provide for the loss to which the volunteer officers, when discharged from the military service, were exposed for the want of employment before they would be able to resume, to any considerable extent, their accustomed avocations in civil life. Most of the officers of that class left civil occupations to engage, for a period of uncertain duration, in the military service of the country, and the obvious purpose of that provision was, that when they came to be discharged they should not be left without any compensation during the period which, in all probability, would elapse before they would be able to establish themselves in remunerative business pursuits.

Grant that the allowance was intended as a gratuity, still it does not follow that it was intended as double pay, or to embrace any officer who was to remain in the regular service. Read separately from the amendatory provision the 4th section of the first named Act describes three

conditions, all of which must concur in order to establish the right to that allowance: (1) That the claimant was an officer of volunteers in commission at the date to that Act. (2) That he continued in the military service to the close of the war. (3) That he was honorably mustered out of the said service prior to the application, which means, unquestionably, that he was honorably mustered out of the military service of the United States.

Continuance in the service to the close of the war was essential under that provision; but the subsequent Act provides that the applicant shall be deemed to be entitled to the allowance if his resignation was presented and accepted, and he was mustered out at his own request, or was otherwise honorably discharged from the service, after the month of April of that year.

The word "service" as used in that Act, means, beyond question, the military service of the United States, and it is equally clear that no such officer is entitled to that allowance unless it is shown that he was mustered out of the military service of the United States, or was otherwise honorably discharged from that service subsequent to the time specified in the amendatory Act.

By the finding in the court below it appears that the appellee was honorably discharged from the volunteer service; but the same finding shows that he, at the same time, resumed his duty and rank in the regular army, which is totally inconsistent with the condition prescribed in the Act of Congress, that he must have been mustered out of the military service of the United States. He was honorably discharged from the volunteer organization, but that discharge did not terminate his connection with the military service of the country under his antecedent commission. On the contrary, he became thereby entitled to the pay and emoluments due to his rank as an officer in the regular army the moment his connection ceased with the volunteer organization.

None of the reasons which induced Congress to make the provision under consideration exist in the case of the appellee, as he has never been out of public employment for a moment since he accepted his commission in the regular army, and has no occasion to desire to re-engage in business pursuits.

Decree reversed and the cause remanded, with directions to dismiss the petition.

Ex parte IN THE MATTER OF BENJAMIN H. ZELLNER, Petitioner.

(See S. C., 9 Wall., 244-248).

Enlarged jurisdiction of a court—writs of error and appeals.

Where the jurisdiction of a court has been enlarged, the judgments or decrees founded upon the new subjects of jurisdiction are liable to the operation of the general provisions in respect to writs of error and appeals.

[No. 5, Orig.]

Argued Feb. 4, 1870. Decided Mar. 15, 1870.

PETITION for a *mandamus* to the Judges of the Court of Claims.

The history and facts of the case are stated by the court.

See 9 WALL.

U. S., BOOK 19.

Messrs. A. G. Riddle and T. J. Durant, for relator:

If the statute authorizing the relator to bring suit in the Court of Claims does not expressly grant him the right of appeal, it does not deny it, which is equivalent to a grant, because it places his claim unqualifiedly within the jurisdiction from which the general right of appeal was fully provided for, and that right attached at once to his case as the property and incident.

Mr. Robert S. Hale, special counsel for the United States:

The Act of Mar. 12, 1863, is not a mere enlargement of the powers of the court by giving a new remedy, but confers a new jurisdiction of a subject-matter entirely distinct from any of which they had jurisdiction under the general laws. In such a case it is settled that "The remedy cannot be extended beyond the provisions of the Act;" and the Act providing for no appeal from the court charged with this new jurisdiction, no appeal can be had.

U. S. v. Nourse, 6 Pet., 470; *U. S. v. More*, 8 Cranch, 170.

Mr. Justice Nelson delivered the opinion of the court:

This is a petition on behalf of Zellner, the relator, for a *mandamus* to the Court of Claims, to compel them to allow an appeal from a decree against him in that court. The case is this: The relator was the owner of thirty bales of cotton, stored in a warehouse at Macon, Georgia; that on or about the 21st of February, 1866, a special agent of the Treasury Department seized and carried away the same, which was afterwards shipped by another agent of that department to the City of New York, and there sold by Simeon Draper, an agent of the Government, for \$3,076.71, after deducting all charges and expenses. On this state of facts, the relator applied to the Court of Claims for a judgment against the Government, in his favor, to this amount.

The court, on full consideration, denied the claim and dismissed the petition. Whereupon he prayed an appeal from the decree of dismissal, which was refused. The single question presented is: whether or not the relator was entitled to an appeal.

The Act of 24th February, 1855 (10 U. S. Stat., 612), amended by the Act of 3d March, 1863 (12 *Ib.*, 765), conferred jurisdiction upon the Court of Claims "To hear and determine all claims founded upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government," "and also upon all claims which may be referred to said court by either House of Congress." The Act of 23d March, 1863, conferred jurisdiction, in addition to the above cases, "of all set-offs, counter claims, claims of damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the government in said court." The 5th section of this Act of 1863, provided "That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court, wherein the amount in controversy exceeds \$3,000, under such regulations as the said Supreme Court may direct."

The Act providing for the collection of abandoned property in insurrectionary districts, passed March 8, 1863, under which the property in question was seized, provided, in the 8d section, that "Any person claiming to have been the owner of any such abandoned or captured property, may at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and, on proof to the satisfaction of the said court, of the ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of proceeds, after deducting expenses," etc. This Act contains no provision for an appeal from the judgments or decrees of the court. It was passed by Congress on the same day that the Act of 1868, above referred to, was passed, reorganizing the Court of Claims, and authorizing it to render judgments against the Government, with the right of either party to appeal to the Supreme Court, as already stated, though it was not approved by the President till nine days afterwards.

It is supposed, as the Act Concerning Abandoned and Captured Property conferred upon the Court of Claims a new subject of jurisdiction in addition to those previously provided for, and at the same time made no provision for appeals to the Supreme Court from their judgments or decrees, no right of appeal existed in respect to either party, and that the general provision in the 5th section of the Act reorganizing the court, and conferring what may be called its general jurisdiction, could not be invoked.

We cannot agree to this. The language of that section is general: "Either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court." This court was organized as a special judicial tribunal to hear and render judgment in cases between the citizen and the Government; the subjects of its jurisdiction were defined in the Act, and, generally, the mode of conducting its proceedings, subject, of course, to such alterations and changes as Congress from time to time might see fit to make. The subjects of its jurisdiction could be enlarged or diminished, but this would not disturb or in any way affect the general plan or system of its organization. If new or additional subjects of jurisdiction were conferred the effect would be, simply, to increase the labors of the court, the cases to be heard and determined under the existing organization.

In the regulation of the jurisdiction of the United States Circuit and District Courts, by the Judiciary Act of 1789, the 22d section of that Act, together with the 2d section of the Act of 8d March, 1808, provided for writs of error and appeals from all final judgments or decrees of the District to the Circuit Courts and from all final judgments and decrees of the Circuit, to the Supreme Court. The jurisdiction of both these courts has been enlarged from time to time, since this organization; and it has never been doubted but that the judgments or decrees founded upon these new subjects of jurisdiction were liable to the operation of these general provisions in respect to writs of error and ap-

peals. The case of *U. S. v. Ferreira*, 13 How., 40, illustrates the principle.

The power to hear and adjudicate upon certain claims under the Treaty of 1819, between this Government and Spain, was conferred upon the District Judge of the United States for the Northern District of Florida. In a case before him he rendered a decision against the Government, from which the United States District Attorney appealed to the Supreme Court, which, it was admitted, would have been regular if the adjudication had been rendered by the judge as a court, and the decree, that of the district court. But it was held, that the power was not conferred upon the judge in his judicial capacity, sitting as a court, but upon him as a commissioner; and hence, an appeal under the 22d section of the Judiciary Act would not lie. The same principle is stated in *U. S. v. Circuit Judges*, 8 Wall., 675 [70 U. S., XVIII., 118].

The case of *U. S. v. Nourse*, 6 Pet., 470, 494, 495, relied upon against this motion, was a case of special and summary jurisdiction, under the Act of 15th May, 1830, in which the mode of proceeding is particularly pointed out, and in which a special mode of taking an appeal is prescribed, and in respect to the proceedings before the district judge they could be taken at chambers as well as in court.

As it respects the Act of Congress in question, no special proceedings are prescribed to the Court of Claims or to the claimant. Any person claiming to be the owner of abandoned or captured property within the meaning of the Act may, at any time within two years after the suppression of the rebellion, present his claim for the proceeds to the Court of Claims, and they are to proceed in the usual way, to hear and adjudicate upon the question of ownership and right to the proceeds, according to the proofs and law of the case.

We are referred to the 1st section of the Act of 25th June, 1868, 15 Stat. at L., 75, as bearing upon this motion, which provides for the allowance of an appeal by the Government from all final judgment of the Court of Claims adverse to it, whether such judgment shall have been rendered by virtue of the general or any special power of said court. We can only say that, in the view the court have taken of this case, this section has no application to it. The judgment has not been rendered by the court under any special power conferred; and it is not pretended that the effect of it is to take away the right of the claimant to appeal from a judgment under the general jurisdiction of the court.

Motion for peremptory mandamus granted.

Cited—11 Wall., 22; 32 Wall., 96; 8 Blatchf., 475.

MATTHEW BONNER, Executor of CADWALLADER WALLACE, Deceased, Appt.,
v.

UNITED STATES.

(See 8. C., 9 Wall., 156-161.)

Court of Claims has no equity jurisdiction.

The Court of Claims has no equitable jurisdiction given it, and cannot inquire into rights in equity set up by claimants against the United States.

[No. 76.]

Argued Feb. 24, 1870, Decided Mar. 21, 1870.

76 U. S.

APPEAL from the Court of Claims. The petition in this case was filed in the court below, to obtain satisfaction in land or money or certain military bounty land-warrants. Judgment having been entered dismissing the petition, the plaintiff appealed to this court.

The case is fully stated by the court.

Inasmuch as this court considered the case only with reference to jurisdiction, the arguments of counsel, except upon that point, are omitted.

Messrs. A. G. Thurman, and J. J. Coombs, for appellant.

Messrs. E. R. Hoar, Atty-Gen., and T. H. Talbot, Asst. Atty-Gen., for the United States:

So far as this claim demands an issue of land scrip for its satisfaction, it is ample defense that thus far it is not a money claim, and accordingly not within the jurisdiction of the Court of Claims.

U. S. v. Alire, 6 Wall., 573 (73 U. S., XVIII., 947).

The petition sets forth a case for the interposition of a court of equity. The allegation is of property held in trust by the United States for the satisfaction of these bounty warrants.

Over the subject of trusts, courts of equity have exclusive jurisdiction. 2 Story, Eq. Jur., secs. 960, 151.

This court being created by statute, its equitable jurisdiction must be sought for in the Acts of Congress defining its powers; and there no such jurisdiction can be found; it is not authorized to give judgment except upon the basis of an Act of Congress, a regulation of an Executive Department or a contract, which terms do not include a case of trust arising out of a Virginia bounty land-warrant.

Mr. Justice Davis delivered the opinion of the court:

It appears from the findings of the Court of Claims, that Cadwallader Wallace, being the owner and holder of unsatisfied military bounty land warrants, issued by the State of Virginia for the services of her troops on the continental establishment in the War of the Revolution, located them, in 1838 and 1839, on lands which he claimed to be within the district reserved to Virginia, to satisfy warrants of this class, in her deed of cession to the United States of March 1, 1784.

The lands on which the attempt was made to locate these warrants had long before that time been disposed of to other parties, and the Government declined to recognize the validity of Wallace's proceedings, and refused to issue patents to him. Wallace has since then died, and his executor claims that the Government wrongfully appropriated the lands on which these warrants were laid, and as he cannot get the lands themselves, he should be paid the amount of money received into the Treasury from their sale, with interest, or in lieu thereof, have land scrip issued to him.

The court below took a different view of the obligations of the Government, and decided adversely to the claim on its merits. It is insisted, however, by the counsel for the United States, that the Court of Claims had no jurisdiction to hear a case of this character, and if this position be well taken, we are relieved of the necessity of deciding the merits of the controversy.

See 9 WALL.

A short history of the nature of this claim, and the grounds on which it is based, is necessary to a proper understanding of the point of jurisdiction. The State of Virginia, during the Revolutionary War, promised bounty lands to her troops, on continental establishment, and at an early day set apart for their benefit a tract of country within the limits of the present State of Kentucky, which it was supposed at the time would be sufficient for the purpose. Recognizing, however, that this reservation might prove insufficient to satisfy the claims of these troops, Virginia, in ceding to the United States the territory beyond the Ohio River, reserved all lands lying between the Scioto and Little Miami Rivers to supply any deficiency of lands in the Kentucky district. It was very soon manifest that the apprehended deficiency existed, and the second reservation, therefore, became operative. In order to ascertain the limits of this reservation, it was necessary to find the sources of these two rivers and to run the line between them. The execution of this object has been the occasion of much difficulty and the cause of frequent legislation by Congress. Two lines were run by different surveyors—one by Ludlow and the other by Roberts. Ludlow's line excluded the land on which the claimant located his entries, while Robert's line included them. It is unnecessary for the purpose of this suit to trace the history of these lines, or to show which is scientifically correct. It is enough to say that Congress, in 1818 (8 Stat. at L., 424), established Ludlow's line as the true boundary, and excluded entries upon the west side of it, where the entries in dispute were made in satisfaction of the Virginia military bounty land-warrants.

The claimant insists that there was no power to do this as Virginia did not assent to this action on the part of Congress, and as it is demonstrable that this line does not include all the lands between the two rivers.

If this position be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them.

Immunity from suit is an incident of sovereignty, but the Government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an executive department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine cases of this nature. 10 Stat. at L., p. 612.

The inquiry then arises whether the present case, in view of this limited jurisdiction, is one that the Court of Claims had a right to con-

sider. The answer to this question seems to us of easy solution. It is not pretended that there was any regulation of a department to justify the entries in dispute, and it is certain, instead of having a law of Congress to rest upon, they were made in violation of the whole course of legislation by Congress on the subject. Congress has not only, in fixing the boundary line of the reservation, excluded these entries, but has also limited the time in which the holders of warrants of the class in question should have the right to locate them, and, in addition to this, has forbidden their location on tracts of land for which patents had been previously issued, or which had been previously surveyed. See the following Acts of Congress: March 23, 1804, 2 Stat. at L., 274; March 2, 1807, 2 Stat. at L., 425; April 2, 1818, 3 Stat. at L., 423; March 1, 1823, 3 Stat. at L., 772; July 7, 1838, 5 Stat. at L., 262.

As the land in question had been previously patented to individuals, or granted for the use of schools, it follows that the attempt on the part of the claimant to locate his warrants on them was contrary to law, and that the claim which he now makes for compensation, because of the failure of this proceeding, cannot be said to be founded on a law of Congress. Nor can it be said to be based on a contract in the sense of the law conferring jurisdiction on the Court of Claims. That court was authorized to enforce legal rights and obligations, but it could not proceed further and judge of the equities between the citizen and his government. In the absence of legislation by Congress the holder of a Virginia military bounty land-warrant can have no legal right against the United States for compensation on the allegation that the Government has wrongfully appropriated to other uses the lands ceded for his benefit.

It is only a contract authorized by law that the Court of Claims can consider, and as there is no law of Congress on this subject, there is nothing on which that court could base a judgment against the United States if, in the opinion of that tribunal, it had not fulfilled its duties towards the beneficiaries under the Virginia deed of cession. The liability of the Government, if at all, arises out of the breach of an accepted trust, and that liability cannot be enforced at law. The claimant is in no better position because the Government is the trustee than he would be if a private person occupied that relation; and it is very clear, if such were the case, that a court of equity would alone have the power to deal with him.

As the Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with Congress.

The judgment of the court below is reversed, and the case is remanded to that court, with directions to dismiss the petition for want of jurisdiction.

Cited—96 U. S., 412; 102 U. S., 404.

JOHN B. FRISBIE, *Appt.*,
v.
LEVI H. WHITNEY.

(See S. C., 9 Wall., 187-197.)

Settlement on public lands gives no right—proof necessary, and payment of purchase money.

Settlement on the public lands of the United States, no matter how long continued, confers no right against the government.

The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money.

Rights created by the statutes must be governed by their provisions, whether they be hard or lenient.

[No. 101.]

Argued Mar. 3, 1870. Decided Mar. 21, 1870.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below to compel the conveyance of certain lands. A decree having been entered for such conveyance to the complainant, the defendant took an appeal to this court.

The case is sufficiently stated by the court.

Messrs. W. M. Everts, M. Blair and F. A. Dick, for appellant:

Article IV., section 3, of the Constitution of the United States provides: "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The patent to the defendant, Frisbie, does dispose of this land. This power of Congress is intended by the Constitution to be absolute.

Burgess v. Gray, 16 How., 48; *Berthold v. McDonald*, 22 How., 334-341 (63 U. S., XVI., 318, 321); *Landes v. Brant*, 10 How., 348; *Menard v. Massey*, 8 How., 293; *Wilcox v. Jackson*, 13 Pet., 498; *Bagnell v. Broderick*, 13 Pet., 436; *Lafayette's Heirs v. Kenton*, 18 How., 197 (59 U. S., XV., 345); *Doe v. Braden*, 16 How., 636; *Forster v. Neilson*, 2 Pet., 253; *Garcia v. Lee*, 12 Pet., 511; *Mattheus v. Zane*, 7 Wheat., 164; *Foley v. Harrison*, 15 How., 433; *Leslie v. Price*, 12 How., 59; *Rector v. Ashley*, 6 Wall., 142 (78 U. S., XVIII., 733).

If this absolute power may be diminished before being entirely parted with, it can only be by written act of some agent thereto specially authorized by law, as evidence of disposal of the public territory.

Leslie v. Price (*supra*); *Rector v. Ashley* (*supra*); *Burgess v. Gray* (*supra*); *Landes v. Brant* (*supra*); *Hale v. Gaines*, 22 How., 144 (63 U. S., XVI., 264); *West v. Cochran*, 17 How., 403 (58 U. S., XV., 110); *Mattheus v. Zane* (*supra*); *Kissel v. Schools*, 18 How., 25 (59 U. S., XV., 327); *Lytle v. Arkansas*, 9 How., 314; *S. C.*, 22 How., 193 (63 U. S., XVI., 308); *Garland v. Wynn*, 20 How., 6 (61 U. S., XV., 802); *Cunningham v. Ashley*, 14 How., 377; *Hastings v. McGugin*, 27 Cal., 85; *Higbee v. Bowers*, 9 Mo., 250; *Hutton v. Frisbie*, 37 Cal., 475; *Barnard v. Ashley*, 18 How., 43 (59 U. S., XV., 285); *O'Hanlon v. Perry*, 87 U. S., 794.

In the case at bar, Whitney never succeeded in making an entry of the land under the preemption laws; which laws were repealed by the Act of 1863, as to this land.

O'Hanlon v. Perry (*supra*).

He claims to be entitled in equity to enter the said land as a preemptor.

Whitney did not go upon land which was

NOTE.—Preemption rights. See note to U. S. v. Fitzgerald, 40 U. S. (15 Pet.), 407.

vacant; but, on the contrary, that which was held *bona fide* by the defendant, and which, under the preemption laws, no other person was entitled to enter upon.

The register and receiver were satisfied that, in consequence of Frisbie's possession, "The land was not open for settlement." This is plaintiff's proof and should end his case.

From the whole case it appears that the appellant has acquired a title to the land in question, not contrary to, or by evasion of, the Act of March 3, 1863, but under and based upon that law.

This bill should have been dismissed for want of jurisdiction, as no fraud was proven and no other grounds of trust alleged.

Mastie v. Watts, 6 Cranch, 148.

Messrs. Duncan S. Walker, Jas. A. Johnson, Benj. F. Butler, Geo. W. Julien and Fred. P. Stanton, for appellee:

It was not only public land the moment the Supreme Court rejected the Vallejo title, but was also subject to preemption. And if no other Act had been passed, making valid the settlements on unsurveyed lands, this last one would have that effect, and could have no other.

See, Act, May 30, 1862, 12 Stat. at L., 410.

But this land was really surveyed before plaintiff settled upon the land, although the survey had not been returned by the Surveyor-General to the local land office. Appellant's possession was by tenants, and was not to the entire tract, if inclosure or visible boundaries were required to make possession, and was without settlement, as required by the Act, he residing five miles distant, in the City of Vallejo—a locality specially exempted from the operations of the Act of Mar. 3, 1863, by that Act itself.

At the date of appellee's settlement, appellant certainly was not a preemptor. After the decision of the Supreme Court, he could have no right of any kind to this land, unless he acquired it under the homestead or preemption laws. After appellee had acquired a preemption right to the land, could Congress pass an Act giving it to appellant unconditionally?

By Acts of 1841, 1851, 1853, May 30, 1862, and June 2, 1862, heretofore cited, Congress disposed of this land to plaintiff. Appellant could claim under no Act before that of Mar. 3, 1863, and before that was passed, Congress had disposed of this quarter under the former Acts.

That appellee's rights were beyond the reach of Congress, is established by the following decisions:

Barnard v. Ashley's Heirs, 18 How., 44 (59 U. S., XV., 285); *Willot v. Sanford*, 19 How., 79 (60 U. S., XV., 549); *Garland v. Wynn*, 20 How., 6 (61 U. S., XV., 801); *Irvine v. Marshall*, 30 How., 565 (61 U. S., XV., 998); *Burgess v. Gray*, 16 How., 48; *Lyle v. Arkansas*, 9 How., 314; *S. C.*, 22 How., 198 (63 U. S., XVI., 806); *Berthold v. McDonald*, 22 How., 339 (63 U. S., XVI., 320); *Clements v. Warner*, 24 How., 394 (65 U. S., XVI., 695); *Brown's Lessee v. Clements*, 3 How., 666; *Lindsay v. Hawes*, 3 Black, 554 (7 U. S., XVII., 265); *Cunningham v. Ashley*, 14 How., 377; *O'Brien v. Perry*, 1 Black, 183 (66 U. S., XVII., 114).

See **9 WALL**.

Mr. Justice Miller delivered the opinion of the court:

The decree from which this appeal is taken orders the appellant to convey to the appellee a quarter section of land, for which the former had recently received a patent from the United States.

The land which is the subject of this controversy constitutes a part of the Soscol ranch, a large body of land in the State of California, supposed by almost every one in that country to be private property until the decision by this court in the case of *The U. S. v. Vallejo*, 1 Black, 555 [66 U. S., XVII., 235].

The tract covered eighteen square leagues and included the City of Benicia, the Town of Vallejo, the Navy Yard of the United States, the depot of the Pacific Steamship Company, and hundreds of acres of land in cultivation and possession of a large rural population.

These parties all claimed under grants to Vallejo by the Mexican Government, made in 1843 and 1844, which had been presented to the Board of Land Commissioners and confirmed, and this decision also had been affirmed on appeal to the district court.

When this court felt compelled, in 1861, to declare the grant void, for want of authority in the Mexican Governor to make it, a decision which in no way impeached the good faith of the purchasers under Vallejo, the land was sold by hundreds of these innocent purchasers.

The 18th section of the Act of 1857, which organized the Board of Commissioners to determine the land titles in California, declared that when any of the claims presented to it should finally be decided to be invalid, the land should be considered as a part of the public domain.

The effect of the decision, therefore, in the case of Vallejo's claim, was, that the United States became the absolute owner in fee of all the property, as we have described it; the entire city, town, depot, ranch, the houses, the homes, the cultivated grounds and orchards, for which the men who had bought and paid for them, had built and cultivated them, had nothing left but an appeal to the equity and generosity of the government.

The Congress of the United States, however, in this emergency, showed themselves to be the representatives of a nation too magnanimous to take without consideration the improvements, the labor and money which had given to this land its principal value. As soon as they could assure themselves of the merits of the case, and within a few months after the effects of the decision became known, Congress passed an Act for the benefit of these occupants of the Vallejo claim.

This Act authorized the lines of the public surveys to be extended over the Soscol ranch, and enacted that *bona fide* purchasers from Vallejo or his assigns, might enter the lands so purchased and reduced to possession at the time of the adjudication of the Supreme Court, at \$1.25 per acre. The government thus sold to these *bona fide* purchasers the title at the minimum government price, and permitted them to secure their homes and the benefit of the labor and money which had been expended in making their land valuable.

The appellant, Frisbie, being one of the par-

ties entitled to the benefit of the Act, a fact which is scarcely controverted, paid his money, made his entry, and has finally received his patent. Of the substantial justice of his title, so far as he and the United States are concerned, there can be no question.

Frisbie having become possessor of the legal title to the land in controversy, the complainant, Whitney, claims that he shall be compelled to convey it to him, because he has the superior equity; for this is a suit in a court of equity, founded on its special jurisdiction in matters of trust. It is, therefore, essential to inquire into the foundation of this supposed equity.

As soon as it became generally known in Benicia and among the population on and about the Soscol ranch, that this court had declared the Vallejo claim void and that the whole eighteen leagues were public lands, a rush was made to secure all of it that was valuable, and which it was supposed had become subject to the preemption laws. The report of the Register and Receiver of the Land Office, who were required to investigate the claims set up to these lands, both by the Vallejo claimants and the settlers, presents in a vivid light the mode in which it was supposed they could be made the property of those who had previously claimed no interest in them. The parties desiring to make preemption claims generally went on the lands in the night, because they were resisted by those in possession; and in the morning a house, eight or ten feet square, with a shed roof, of redwood boards, set up edgewise, without window, fireplace or floor, was discovered, the evidence of the *bona fide* settlement occupation under the preemption laws of the United States. Complainant says he entered on his quarter section one afternoon, with his family, consisting of his wife, two children, a man and a carpenter, with his teams, goods and household furniture. He commenced building next day, and made a better house than those above described, having three rooms. This land had been inclosed with a fence, had a house on it, occupied by a tenant of Frisbie, and a crop not yet gathered. He was resisted by Frisbie, so far that a double-barrelled shotgun was brought into play.

When shortly after his settlement, Whitney applied to the land officers to make his declaration of intention to occupy and cultivate the land, they refused to receive it; first, because no surveys had been made by which the land could be identified, and afterwards because Congress had passed the Act already cited for the benefit of the claimants under Vallejo. He never paid any money to the government; never received a certificate of entry or preemption, though he offered to prove up his settlement; and he claims that his intrusion upon Frisbie's inclosed grounds by violence, and his offer to prove his intention to become a *bona fide* occupant of the land, create an equity superior to Frisbie's, which demands of a court of chancery to divest Frisbie of his legal title and vest it in him.

If there be any principle of law which requires this, the court must be governed by it, but it is idle to pretend that such a decree would be founded in natural justice.

It is claimed on the part of the defendant in error that such a principle is found in the leg-

islation of Congress granting the right of preemption to actual settlers on the public lands of the United States. The proposition is, that as soon as the decree of the Supreme Court was announced declaring the Vallejo claim invalid, the land covered by that claim became public land, subject to the operation of all the laws by which the actual settler could secure title to such lands; and that the steps taken by Whitney in this direction had so far effected this purpose, that the Act of Congress for the benefit of the Vallejo claimants was ineffectual to enable Frisbie to avail himself of the benefits which it was intended to confer. We say the benefits it designed to confer, because we entertain no doubt of the intention of Congress to secure to persons situated as Frisbie was, the title to their lands, on compliance with the terms of the Act, and if this has not been done it is solely because Congress had no power to enact the law in question.

The learned court, whose decision we are reviewing, place their judgment on the ground that, before the passage of that Act, the complainant had acquired a vested right in the land, which could not be divested by any legislation of Congress. On the other hand, it will hardly be contended that anything short of a vested right in this land could deprive Congress of the right which it has as owner and holder of the legal title, and, by the express language of the Constitution, to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. The essential inquiry in this case, therefore, is whether complainant had acquired such a vested right, before Congress by law withdrew these lands from the operation of the preemption Acts.

It has been argued that no law existed at the time Whitney went upon the land by which unsurveyed land could be legally entered upon with a view to preemption. But in the view which the court takes of the matter, it may be assumed that the lands were open to preemption. In this concession we also propose to waive the discussion of another question which presents serious difficulties to our minds, in regard to complainant's right to make a valid preemption by a forcible intrusion upon land cultivated, inclosed and peaceably occupied by another man.

But resolving this difficulty in favor of complainant for the present, we are still of opinion that he had not acquired a vested right in the land when Congress acted upon the subject.

What had he done? He had gone upon the land, built a house and barn and, perhaps, inclosed some of the ground. He had also applied to the Register of the Land Office, and offered to make a declaration that he had done these things with the intention of making a permanent settlement, and claiming the land under the right of preemption. This is all. He had paid no money, nor had he then tendered any. The land officers refused to receive his declaration, and denied his right to preempt the land. He never has paid any money; has never received any certificate of preemption; and the Register and Receiver have never, in any manner, acknowledged or admitted his right to make preemption of that land. So far as anything done by him is to be consid-

ered, his claim rests solely upon his going upon the land and building and residing on it. There is nothing in the essential nature of these acts to confer a vested right or, indeed, any kind of claim to land, and it is necessary to resort to the preemption law to make out any shadow of such right.

The Act of Congress on this subject, to which all the subsequent Acts refer, and which prescribes the terms and the manner of securing title in such cases, is the Act of September 4th, 1841. 5 Stat. at L., 453. That was an Act full of generosity, for it gave the proceeds of the sales of all the public lands to the States. The 10th section of the Act provides that any person of the class therein described who shall make a settlement upon public lands, of a defined character, and who shall inhabit and improve the same and who shall erect a dwelling thereon, shall be authorized to enter with the register of the proper land office, by legal subdivisions, one quarter section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Section 11 provides that conflicting claims for preemption shall be settled by the Register and Receiver; section twelve, that prior to such entry, proof of the settlement and improvement required shall be made to the satisfaction of the Register and Receiver; and section 13 requires an oath to be made by the claimant before entry; section 15 requires a person settling on land with a view to preemption, to file, within a limited time, a statement of this intention and a description of the land.

When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the Register and Receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal title to the land.

The construction of this Act, and others passed since *in pari materia*, in regard to the nature of the rights conferred on occupants of the public lands, has, of course, received the consideration of that Department of the Government to which the administration of these land laws has been confided. The construction of that department and of the Attorneys-General to whom the Secretaries of the Interior have applied for advice, cannot be better expressed than in the language of some of those opinions.

Attorney-General Cushing, in an opinion given in 1856 (8 Opinions Attys-Gen., 72), says: "Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no rights against the United States, except such as the Acts of Congress confer; and these Acts do not confer on the preemptor, *in posse*, any right or claim to be treated as the present proprietor of the land, in relation to the government."

In the matter of the Hot Springs Tract of Arkansas, Attorney-General Bates says (10 Opinions, 57): "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, See 9 WALL,

a privilege of preemption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the government."

In the matter of the same Socol ranch (11 Opinions, 463), Attorney-General Speed asserts the same principle. He says: "It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. * * * The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase money."

These opinions, written for the guidance of the Land Department, have been received and acquiesced in by the Secretaries of the Interior, and have come to be the recognized rule of action in that department.

This construction of the law has also been asserted by the courts of last resort in Missouri, Mississippi, Illinois and California—States in which the population is largely interested in the liberal operation of the preemption laws. *Bower v. Higbee*, 9 Missouri, 261; *Phelps v. Kellogg*, 15 Illinois, 185; *Grand Gulf v. Bryan*, 8 Smed. & M., 268; *People v. Shearer*, 80 California, 650; and *Hutton v. Frisbie*, in the Supreme Court of California, July Term, 1869.

We are satisfied that this is a sound construction of the preemption laws on the question now under consideration.

A series of cases decided in this court, in which the equitable rights of persons claiming under those laws have been protected by the court against the legal title acquired by other parties, through the disregard of their rights by the officers of the Land Department, is supposed to assert principles inconsistent with the construction just stated. We cannot here examine these cases in detail, but we may state that in nearly all of them it will be found that the party whose equitable title was thus protected had, by the action of the officers of the Land Department, and the payment and acceptance of the price, acquired a vested right, which these officers afterwards disregarded, in violation of law. And if in any of these cases the party, asserting successfully his equitable interest, had not acquired a vested right in the just sense of that term, the cases are still widely different from the one under consideration. In all those cases the successful party had established his legal right of preference of purchase over the other, under the law as it stood when the land officers decided the case. And it was the action of those officers, and their disregard of the law in refusing to the party the benefit of this preference in purchase, which this court corrected, by compelling the conveyance of the legal title acquired by this violation of law. But in the case before us, and in those to which the opinions of the Attorneys-General refer, it was Congress, the law making power, which intervened, and, by a new law, withdrew the land from the operation of the preemption laws, while the right of preference in purchase remained unexercised, and amounted to no more than this preference.

The courts may very properly correct the in-

justice done by the land officers, in refusing to accord rights, however inchoate, which are protected by laws still in existence; while they can only consider vested rights when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they were founded.

The argument is urged with much zeal, that because complainant did all that was in the power of anyone to do towards perfecting his claim, he should not be held responsible for what could not be done.

To this we reply, as we did in the case of *Rector v. Ashley*, 6 Wall., 142 [73 U. S., XVIII., 733], that the rights of a claimant are to be measured by the Acts of Congress, and not by what he may or may not be able to do; and if a sound construction of these Acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient. That was a case, also, in which it became important to ascertain when a right to public land became vested, and though it arose under statutes somewhat different from the general preemption law, the principles asserted there and in the previous cases of *Bagnell v. Broderick*, 13 Pet., and *Barry v. Gamble*, 3 How., 32, strongly support our conclusion in the present case.

The decree of the Supreme Court of the District of Columbia is reversed, and the case remanded, with instructions to dismiss the bill.

Cited—15 Wall., 87, 89; 91 U. S., 333; 92 U. S., 319, 765; 96 U. S., 514, 518, 519; 97 U. S., 581; 98 U. S., 121; 101 U. S., 261; 3 Sawy., 645; 6 Sawy., 89, 155; 7 Sawy., 426, 473; 41 Cal., 493, 626; 51 Cal., 394; 29 Mich., 152; 31 Mich., 486.

HENRY M. BENNETT, *Plff. in Err.*,

v.

ALEXANDER HUNTER.

(See 8. C., 9 Wall., 326-338.)

Sale for taxes after tender of amount due—tax a lien—right to pay tax before sale—sale after payment invalid.

The commissioners, under the Act of June 7, 1862, could not make a sale for taxes, after a tender of the amount due.

The first clause of 4th section did not, *proprio vigore*, work a transfer to the United States, of the land declared to be forfeited.

The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt.

The title was forfeited by non-payment of the tax and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale.

The right to pay the tax continued until the sale, and was not limited to sixty days after the fixing of the amount of the tax.

A sale, made after the payment of the tax, was insufficient to vest the title to the land in the purchaser.

[No. 74.]

Argued Feb. 23, 1870. Decided Mar. 21, 1870.

IN ERROR to the Supreme Court of Appeals of the Commonwealth of Virginia.

This action was begun in the Circuit Court of Alexandria County, Virginia, by the defendant in error, to recover the possession of certain

lands. Judgment having been given for the plaintiff in that court, and affirmed upon appeal by the Supreme Court of Appeals of that State, the defendant sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. W. Willoughby, L. E. Chittenden and A. G. Riddle, for plaintiff in error.

Messrs. E. R. Hoar, Atty-Gen., and W. A. Field, who filed a brief by permission of the court, for the United States:

This case involves the constitutionality of the Act of Congress passed June 7, 1862, entitled "An Act for the Collection or Taxes in Insurrectionary Districts and for Other Purposes," and the Acts amendatory thereto, or at least of some of the powers contended by the plaintiff in error to have been granted by such Acts, and also the proper construction of several of the sections of these Acts.

For the purpose of meeting extraordinary demands upon the government at the commencement of the late civil war, Congress, by the Act of Aug. 5, 1861, imposed a direct tax upon the United States, and to the State of Virginia was apportioned the sum of \$487,550.66. By the terms of this Act the collection was to be made with the least possible annoyance and hardship to the owner, and privileges of redemption were granted in the most liberal manner.

This law having been found to be wholly inadequate to effect the objects designed, Congress passed the Act which we are now called upon to consider. The owner had sixty days in which to pay the tax whereby the land would become discharged of the tax and penalty.

Section 4 provides: "And be it further enacted, that the title of, in and to each and every piece or parcel of land, upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale in fee simple, free and discharged from all incumbrances, right, title and claim whatsoever."

By section 7 of the amended Act of 1863, it is provided that when such taxes are not paid, the commissioner shall advertise the land for sale and, provided the owner does not in person appear and pay the taxes before the sale, shall sell the same and issue to the purchasers a certificate of sale, which is made *prima facie* evidence of the regularity and validity of sale and cannot be affected as evidence of regularity of sale, except "By establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this Act."

In the first place, this Act cannot be unconstitutional by reason of any inequality of its operation. It applies to any and all States and Territories. Such as are so situated, are to be thereafter designated by proclamation. Nor is there any inequality so far as persons are concerned. Any person having land so situated, whether loyal or disloyal, whether residing in Virginia or Massachusetts, is equally subject to its provisions. The law relates to a condition of things and not to localities or persons.

It was claimed in the argument of the defendant and decided by the court of Virginia, that

in the first place, notwithstanding the plain language of this section, the title did not pass in any way to the United States; and in the second place, that the United States had no constitutional power to forfeit lands absolutely for the non-payment of taxes, even if such was the intention of the Act, and that the government could not acquire title only as a purchaser at the sale provided for.

The counsel for defendant and the court below were obliged to concede that the Legislature of the State had this power, which it denied to the Congress of the United States. This had been held so unmistakably by the courts of Virginia, that there was no escape from this conclusion.

Kinney v. Beverley, 2 Hen. & M., 318; *Wild v. Serpell*, 10 Gratt., 405.

See, also, *Staats v. Board*, 10 Gratt., 400.

The argument as stated is substantially this: that every owner holds his land upon the implied condition that he will pay his taxes; that on failure to do so, the paramount authority of the State from whom the land is holden, comes in on the ground of a breach of this condition, and for this declares the estate forfeited; that such a principle is applicable to a State from which the lands are holden, but not to the United States.

This argument starts out with an entire misapprehension of the origin and extent of the power of taxation. It is a power essential to the very existence of all governments. As is well said in *Cooley*, Const. Lim., 479, "It rests upon necessity, and is inherent in every sovereignty." See, also, *McCulloch v. Md.*, 4 Wheat., 316; see *McCarroll v. Weaks*, 2 Overt., 215; *State v. Allen*, 2 McCord, 56; *Livingston v. Moore*, 7 Pet., 469.

Judge Tucker says (1 Tuck. Bl., b. 2, p. 40): "By the Act of 1779, abolishing English tenures, the possession of all lands in Virginia become allodial, that is, independent and held of no superior at all.

In *Kinney v. Beverley*, 2 Hen. & M., 332, it is held, there can be no cause of forfeiture because of any condition in the grant, and only in consequence of the positive provisions of some public statute.

A statute ought not to be declared unconstitutional, unless its nullity and validity are placed beyond all reasonable doubt. 16 Pick., 95; see, also, *Fletcher v. Peck*, 6 Cranch, 128.

Upon the default which is complete at the expiration of the sixty days, the title of the owner is divested and becomes forfeited to the government in its character as a sovereignty.

Forfeiture as defined by Blackstone, Vol. 2, 267, "Is a punishment annexed by law to some illegal act or negligence in the owner of the lands, tenements or hereditaments, whereby he loses all his interest therein."

Title passes at the sale, not from the owner, but from the government.

Where the intention of the Legislature is clearly indicated, that the title shall pass by the mere force of the forfeiture, no inquisition of office is required. See 10 Gratt., 405; *Fairfax v. Hunter*, 7 Cranch, 603; *U. S. v. Repentigney*, 5 Wall., 211 (73 U. S. XVIII., 627).

The different rights of the government are, therefore, plainly prescribed. First, it has a lien. This continues until default, when for the

purpose of enforcing this lien, the title is forfeited to the government as a sovereignty; and in the third place, if a successful bidder at the sale, it holds the title in fee simple, free and clear from all incumbrances, etc.

The declaration that, in order to save the land from forfeiture, the owner must appear in person, is not beyond the constitutional power of Congress.

And when the government says that only the owner, and he in person, can avoid such consequences by payment in person, it is trifling to say that some other one may do it just as well, and that some other way will answer.

It is sufficient say: "*Ita lex scripta est.*"

The owner may redeem before the sale. When speaking of redemption after sale, it says, the owner or any person having any valid lien or interest.

The owner, if he redeems before the sale, may redeem without taking the oath. He may do it without paying the penalty. He may do it without paying but the ten per cent. interest from the levy of the tax. These are privileges accorded to the owner alone. But the person having an interest must be loyal. He can redeem only after the sale. He must take the oath; he must pay the tax and penalty; he must pay interest at the rate of fifteen per cent. from the date of the President's Proclamation, together with the expenses of sale.

The power of the Legislature to make the deed of a public officer *prima facie* evidence of the regularity of the previous proceedings, cannot be doubted.

Thomas v. Lanson, 21 How., 340 (62 U. S., XVI., 85); *Freeman v. Thayer*, 33 Me., 76; *Smith v. Cleveland*, 17 Wis., 556; see, also, the able opinion of Mr. Justice Miller, in the case of *Lord v. M'ul. and Miss. R. R. Co.*, 17 Wis., 569; see, also, *Hand v. Ballou*, 12 N. Y., 541; *Allen v. Armstrong*, 16 Ia., 508.

It does not appear that the tax was paid before the sale. We concede that a lawful tender of the tax to the officer authorized to receive it would have been tantamount to payment, but deny that the tender in this case, if there was a tender, was lawful, it not having been made by the owner in person as the law required.

Messrs. Jas. A. Garfield, J. S. Black, Geo. W. Brent and S. Ferguson Beach, for defendant in error:

The sale was without authority and void for two reasons:

1. Because the full amount of tax, interest, penalty and costs was tendered to the commissioners before sale.

2. Because the commissioners sold the whole land, when a small portion might have been sold for enough to pay all dues and costs.

If the object of the sale was merely to raise the unpaid tax, with interests and costs, then the previous payment or tender of the tax, interests and costs, would remove all cause for a sale and, therefore, all authority for a sale. A sale under the Act is clearly not to be had merely for the sake of having a sale; it is to be had to accomplish some object, and if that object be accomplished beforehand, there is no cause or excuse for a sale.

Under the construction of the plaintiff in error, the sale is a device to get the land and not to get the tax.

No such forfeiture as that claimed by the plaintiff in error was intended by the Act. If it were intended, such a forfeiture was beyond the power of Congress.

The counsel are bound to show, not only that Congress has thus the power to strip the defendant of his estate for default in payment of the tax, but that it has the power so to do without notice to him, actual, constructive or presumptive, that any payment whatever is required of him. The Act contains no provision for demand upon the taxpayer; or for notice of any sort whatever to him, either of the amount to be paid, the time when it is to be paid, or the place where it is to be paid.

The plaintiff must show in Congress the power to strip a man of his entire estate for failing to pay a trifling tax within a short period of sixty days; keeping him all the while in utter ignorance of the fact that any tax has become payable.

In upholding the title of the plaintiff in error the court must affirm the power of Congress, not only to forfeit for default in the payment of the tax, but also to forfeit where there is no default.

Such a forfeiture is totally variant from the declared purpose of the Act, and the detailed provisions of the Act repel all idea of any such forfeiture.

1. The Act declares expressly what shall be the penalty for non-payment within the sixty days. What is it? Not the loss of the whole land by any means, but an additional charge of fifty per cent. that, *eo nomine*, is declared the penalty. And how absurd it was to charge the land with fifty per cent. of the tax as a penalty, if the loss of the whole land was to be the penalty.

2. The fact that the tax is made a lien on the land is, itself, conclusive against the construction that the United States was to take the land itself, if the tax was not paid, and as a consequence of the non-payment.

A lien on land as security for the payment of a claim, and an entire forfeiture of the land for its non-payment, are provisions inconsistent with each other.

3. The Act provides for two sales, namely: (1) A sale of the land on which the tax remains unpaid, and because it remains unpaid; and (2) A sale of land which the United States has previously purchased at the first sale. See, sec. 9, *et seq.*

Out of the proceeds of the first sale, the tax sale proper, the Act claims nothing for the United States beyond the tax penalty, interest and costs.

Quite otherwise is it with the second sales. Sec. 9, *et seq.* The proceeds of these sales are claimed wholly for the United States, and are directed to be paid into the Treasury of the United States. At the tax sale the land is sold as the property of the taxpayer, to satisfy a claim of the United States charged upon it. The second sale is a sale of government property acquired by successful bidding at the tax sale.

4. The United States can only acquire title to the forfeited lands by bidding, and bidding highest, at the tax sale. See, secs. 4, 7.

Suppose, after a sale is advertised, the owner appears in person and pays the tax and the sale is thus prevented, what then becomes of the land?

According to the plaintiff's counsel, the owner, on default of payment, was divested of all title; when, therefore, the owner comes forward in person, pays the tax and stops the sale, he simply thereby perpetuates his own loss; pays his tax with interest and costs, and loses his land besides.

See, *Dubois v. Hepburn*, 10 Pet., 1, for definition by the United States Supreme Court of an "owner" for the purpose of redemption after a tax sale.

The sale by the commissioners in this case was void, because they sold the whole land when the tax, etc., might have been realized, by the sale of a part, and that a very small part.

Blackwell, 287, citing 2 Blackf., 421; Blackwell, 437, *et seq.*, ch. Excess or Abuse of Authority.

But the plaintiff in error shelters himself here under the effect which is given by the Act to the certificate of sale.

The direct enactment on this point is: "Which said certificate shall be received in all courts and places as *prima facie* evidence of the regularity and validity of sale, and of the title of said purchaser or purchasers under the same.

But the direct enactment respecting the force of the certificate as evidence, is qualified by a proviso, the last proviso in section 7: "That the certificate * * * shall only be affected as evidence of the regularity and validity of the sale, by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed," etc.

The province of a proviso to a statute is not to enlarge the enacting clause; it can only restrain, fortify, explain it.

1 Scam., 259; 4 Scam., 352; 19 Vt., 129.

Suppose, for example, we were to sell at the expiration of ten days instead of waiting for the expiration of the sixty, that would clearly be a sale without authority. Yet, the title acquired would, nevertheless, be good under the certificate, if the certificate has the effect claimed; and thus a sale by a public officer having no authority to sell, would carry a perfect title.

Such legislation, in the language of Judge Caton (*Curry v. Hinman*, 11 Ill., 428, cited in Blackw. Tax Tit., 81), would be nothing less than a moral fraud. *Garrett v. Wiggins*, 1 Scam., 335.

Mr. Justice Chase delivered the opinion of the court:

Under the Act of Congress (12 Stat. at L., 422) providing for the collection of taxes in insurrectionary districts and for other purposes, passed on the 7th of June, 1862, a tax was assessed upon a tract of land, the property in remainder of the defendant in error, situate in Alexandria County, Virginia; and default having been made in payment, the land was advertised for sale. After advertisement, but before sale, the amount of the tax, expenses, penalties and costs was tendered to the commissioners appointed for the collection of taxes under the Act, who refused to receive the money, upon the ground that the tender was not made by the owner of the land in person.

The land was then sold and the lessor of the plaintiff in error became the purchaser. After the close of the war the defendant in error,

who had served as an officer in the rebel army, but against whose property no proceedings for confiscation had been instituted, brought suit to recover possession of the land. No question was made of his right to recover, if his title was not divested by the sale for taxes.

The case, therefore, requires the consideration and determination of one point only, namely: whether the commissioners under the Act could make a sale for taxes, notwithstanding a previous tender of the amount due.

Other important and interesting questions have been considered at the bar, which, under the view we take of the case, need not now be examined.

In order to a right understanding of the real point in controversy, however, it will be useful to notice briefly the occasion and the objects of the enactments which have given rise to it.

The necessities of the war, arising from the rebellion, demanded immediate provision of adequate funds. For this purpose Congress increased the duties on customs, imposed a duty on incomes, and laid a direct tax of \$20,000,000 upon lands. This latter tax was apportioned, agreeably to the direction of the Constitution, among the several States in proportion to their respective numbers; and it was provided that, if the Act could not be carried into execution in any State in consequence of rebellion, it should be the duty of the President to proceed, as soon as the authority of the United States should be re-established therein, to collect both the land tax and the income tax, with six per cent. interest.

The income tax thus imposed has never been collected; but provision was made by the Act of June 7, 1862, for the collection of the land tax in the insurgent States. This Act, or some similar provision, was necessary to enable the President to perform the duty devolved upon him by the Act of 1861. 12 Stat. at L. 292.

The Acts of 1861 and 1862 are, therefore, to be construed together. The general object of both was the same, namely: the raising of revenue by a tax on land. The first prescribed a mode of collection where the authority of the General Government was acknowledged, and no serious obstacle existed to the execution of the law; the second directed the mode of collection where this authority had been overthrown by insurrection, but had been sufficiently re-established to make collection, to some extent at least, practicable.

The provisions of the latter Act were necessarily adapted to the peculiar circumstances in which it was to be executed, and were in most respects more stringent than those of the former. The first Act, for example, directed the assessment of lands by assessors to be appointed under it; the second adopted the valuation made under the authority of the several States prior to the rebellion, and charged directly upon each parcel of land its proportion of the tax apportioned to the State. Under the first Act, delinquent taxpayers were permitted, at any time after advertisement for sale, and before actual sale, to pay the amount assessed with ten per cent. penalty, and thus relieve their lands. The second Act imposed on each tract, without respect to delinquency on the part of the owner, a penalty of fifty per cent. in addition to its proportion of the tax upon the State and, it is

contended, allowed payment only within sixty days after assessment. In the earlier Act indulgent provision was made for redemption after sale; in the latter, onerous conditions were imposed on such redemption.

Without adverting further to particular points of difference between the two Acts, it may be observed that their most striking contrast was in their practical application.

The several adhering States, under the Act of 1861, assumed and paid their respective quotas, and collected the amount of the tax from their own citizens under their own laws, so that in those States the machinery of the law was never really put in action; while in the insurgent States the Act of 1862, so far as it was executed at all, was carried into effect according to its terms by the officials of the National Government. In this way, the citizens of the adhering States were relieved from the processes of collection and from penalties and forfeitures for non-payment, while the citizens of the insurgent States who could not be thus relieved were exposed to their unmitigated operation.

Keeping these circumstances in view, we are to consider the effect of the sale for taxes made, as we have already stated, to the lessor of the plaintiff. And this must depend mainly on the construction to be given to the 4th section of the Act of 1862.

This section provides "that the title of, in and to each and every piece and parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States; and upon the sale hereinafter provided for shall vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever."

And we are first to consider whether the first clause of this section, *proprio vigore*, worked a transfer to the United States of the land declared to be forfeited.

The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the Act was, undoubtedly, revenue, to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government; a policy which had reference to the suppression of rebellion rather than to revenue. But this purpose did not affect the operation of the Act before sale, for until sale actually made there could be, properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt. And it seems unreasonable to give to the Act, considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed and relieve his lands from the lien. The first clause of the Act, therefore, is not to be considered as working an actual transfer of the land to the United States, if a more liberal construction can be given to it consistently with its terms.

Now, the general principles of the law of forfeiture seem to be inconsistent with such a transfer. Without pausing to inquire whether,

in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction. *Paisfax's Devisee v. Hunter's Lessee*, 7 Cranch, 625. In the case of lands forfeited by alienage the King could not acquire an interest in the lands except by inquest of office. 3 Bl. Com., 258. And so of other instances where the title of the sovereign was derived from forfeiture. And in the case of *United States v. Repentigny*, 5 Wall., 265 [72 U. S., XVIII., 645], where the forfeiture to the government of lands arose from omission to perform the conditions of the grant, this court held that before the forfeiture could be consummated by re-union of the land with the public domain, "a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent," should take place. The court said further that "a legislative Act directing the possession and appropriation of the land is equivalent to office found."

Applying these principles to the case in hand, it seems quite clear that the first clause of the 4th section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely: non-payment of taxes, while the second clause was intended to work the actual investment of the title through a public Act of the Government in the United States, or in the purchaser at the tax sale. The sale was the public Act, which is the equivalent of office found. What preceded the sale was merely preliminary, and independently of the sale, worked no divestiture of title. The title, indeed, was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale. It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States.

But it has been insisted that the right to pay the tax and relieve the land from sale expired at the end of sixty days after the amount was fixed by the proper authority.

It does not appear when the amount was fixed, or when the sixty days ended. It may be inferred, perhaps, from the fact of sale, that default for payment had continued at least through that time, for otherwise there could have been no power to sell.

If this inference be admitted, however, it by no means follows that the right to pay the tax and have land discharged from it expired with the sixty days. It is more reasonable to suppose that this right remained as long as the title of the land remained in the owner—that is, until after sale. And this view is confirmed by reference to another part of the Act. The 7th section gives direction as to sales, the issue of certificates of sale to purchasers, and proceedings for redemption after sale, and then provides

that "The certificate of sale shall only be affected, as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed according to the provisions of this Act." This provision makes it clear that proof of payment of taxes prior to the sale invalidates the certificate, and this could not be unless the right to pay the tax continued until the sale. This seems to leave no doubt on the point that the right to make such payment was not strictly limited to sixty days after the fixing of the amount of the tax.

But to whom did the right to make this payment belong? The obvious answer is to the owner, either acting in person or through some friend or agent, compensated or uncompensated. The terms of the Act are, that the owner or owners may pay; and it is familiar law that acts done by one in behalf of another are valid if ratified either expressly or by implication, and that such ratification will be presumed in furtherance of justice.

But it is insisted that the right of payment is limited by the Act to the actual owner in his proper person. But we perceive no such limitation in its terms. On the contrary, the fact that the privilege of redemption after sale is limited to the owner or the loyal person having a lien or other interest, appearing in proper person and taking a prescribed oath, appears to us to afford an irresistible inference that the right of payment before sale is not so limited. It is a right which, under the Act, belongs to the owner, and no oath is required in order to its exercise. It is a right to be exercised under the Act as a law for raising revenue. It is expressly distinguished from the privilege of redemption after sale and complete divestiture of title, which is accorded upon very different principles, and in pursuance of a very different policy. We cannot doubt that it might be properly exercised by the owner in person, or through any other person willing to act in his behalf and not disavowed by him.

The application of these principles decides the case before us. The title and possession of the land, at the time of assessment, was in B. W. Hunter for life, with remainder in fee to his son, the defendant in error. The life estate terminated, and the fee became vested in 1864. The sum due the United States for taxes, penalty and costs was tendered to the commissioners before sale, and it was their duty to accept it. The tender was not objected to as insufficient, but was refused solely because not made by the owner in person. This refusal not being warranted by the Act, the tender must be held good. The certificate of sale under which the plaintiff in error claims title cannot, therefore, be sustained. The sale must be regarded in law as having been made after the payment of the tax, and as insufficient to vest the title to the land in the purchaser.

It follows that the judgment of the Court of Appeals of Virginia must be affirmed.

The cases of *Robert Portner and Frederick Recker, plaintiffs in error, v. William G. Osborne*, and of *Henry S. Martin v. Robert Beverly and Edgar Snowden*, which were argued with the case just disposed of, are not distinguishable from it in principle. *The judgment of the Court*

of Appeals in each case must, therefore, be affirmed.

Cited—18 Wall., 550, 551; 22 Wall., 374; 99 U. S., 136; 104 U. S., 219; 105 U. S., 321; 106 U. S., 200, 226; 11 Bank. Reg., 476; 1 Hughes, 377; 3 Hughes, 112, 113, 142; 1 Filipp., 477; 9 Ben., 370.

MICHAEL S. MEPHAM AND WILLIAM G. MEPHAM, *Plffs. in Err.*

v.

PETER BIESEL.

(See S. C., 9 Wall., 370-373.)

Pay of master and pilot—Captain, when responsible for damage to cargo.

Compensation, allowed one who acted as master and pilot at \$900 per month, found to be a proper allowance.

Captain of a vessel is not responsible for damages to flour, from its being stowed in the hold without his knowledge or direction, and which damages arose from inherent causes.

[No. 117.]

Argued Ma. 11, 1870. *Decided* Mar. 21, 1870.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The libel in this case was filed in the District Court of the United States for the District of Missouri, by the defendant in error against M. S. and W. G. Mephams, owners of the steamboat Iron City, to recover wages as master and pilot. The district court having dismissed the libel, on appeal, the circuit court reversed this decree and entered a decree in favor of the libellants. Whereupon the respondents took an appeal to this court.

A further statement appears in the opinion of the court:

Messrs. M. Blair and F. A. Dick, for appellants.

Messrs. C. D. Drake and Geo. C. Leighton, for appellee.

The argument being confined to the facts, no abstract is here given.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the District of Missouri.

The only questions presented for our consideration are, the value of the services of the appellee as master and pilot of the Steamer Iron City during the period of his employment upon her in those capacities, and whether he can be held liable upon the principle of recoupment for the damage sustained by a part of the cargo of the vessel upon her first voyage after he took charge of her as captain, which was a voyage from St. Louis to Fort Benton, upon the Missouri River. The services commenced on the 16th of March, 1866, and terminated on the 26th of July following—making a period of four months and ten days. Four witnesses were examined. They were Biessel, the appellee; W. G. Mephams, one of the appellants;

Bush, the mate, and Stone, the pilot. The leading facts, as developed in the proofs bearing upon the subject of compensation, are as follows:

Biessel had been in the employment of the Mephams, as mate upon a steamer, at \$150 per month. He talked of seeking employment elsewhere, expecting to receive \$300 per month. Captain Hunter, also in the employment of the Mephams, to whom he made the communication, requested him to remain until the captain could consult the owners. An interview took place. Biessel told them he had never served as captain, and doubted whether he would suit them in that capacity. They employed him as captain. It was usual to employ two pilots. Biessel found two who asked jointly \$1,600 per month. Pilots were much in demand at that time. He proposed to the owners to employ Stone as a pilot at \$800 a month, and to serve himself as the other pilot, besides performing his duties as master. They assented, and assisted him to procure a pilot's license. The arrangement was carried out. Biessel testifies that he told them it would cost less than to employ two pilots, in addition to the captain. Mephams testifies that he said it should cost them nothing for pilotage but the wages of Stone. Here the parties are at issue, and there is no other testimony upon the subject.

The wages of pilots varied, according to the testimony, from \$200 to \$1,000 per month. Biessel says the usual compensation of captains was \$400 per month. Mephams testifies that they paid their three other captains \$200 per month. The proof is satisfactory that Biessel performed his duty as captain well and faithfully, and that, in addition, he did full as much service as Stone in discharging the duties of pilot. The boat was impressed into the service of the United States, and was thus employed during a period of twenty-six days. For that time we are satisfied from the evidence that the services of Biessel were charged against the government, and paid for to the appellants, at the rate of \$1,000 per month. Both parties agree that there was no special contract as to the compensation Biessel should receive. It is to be regretted that the proof is not fuller as to the wages at that time of both captains and pilots. It could have been easily made so, and would have relieved us from some embarrassment which we have felt in coming to a conclusion as to this branch of the case. The entire testimony of Biessel is characterized by a fairness and candor which have impressed us favorably in his behalf. The circuit court fixed his compensation as master and pilot at \$900 per month.

After a careful examination of all the testimony in the record, we have found no sufficient reason to dissent from this allowance.

The claim for recoupment cannot be sustained. The flour to which it relates was in sacks, which were inclosed in other sacks. According to the shipping phrase it was "double-sacked." The shipper directed it to be carried upon deck. A part of it was originally placed in the hold. Upon discovering this, Biessel caused it to be removed to the deck, and directed that no more should be put in the hold. During the voyage, Bush, the mate, says it became necessary for the boat to "double trip

NOTE.—Liability of carrier by water for loss or damage of goods. See note to Moore v. Amer. Trans. Co., 25 U. S., XVI., 674.

See 6 WALL.

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it," in order to pass a bar. A part of the cargo was landed below the bar and a part above it. This flour was landed above. All the passengers, some fifty in number, assisted in unloading and re-loading. Some of them in reloading put a part of the flour in the hold without the knowledge of the captain or mate. The mate subsequently saw it there, but allowed it to remain, and did not advise the captain. The captain knew nothing of it until the vessel reached Fort Benton. That part of the flour was then found to be soured. Mephram says the loss to the appellants was \$10 a sack upon a hundred sacks, amounting to \$1,000. It was the duty of the mate to see to the loading. According to the testimony, the captain was not blamable. There was other flour in the hold during the entire voyage, which arrived at Fort Benton uninjured. There is some reason to believe that the spoiling of the flour in question arose from inherent causes, and not from its being kept under the deck.

There is nothing in the record which would warrant us in holding Biessel responsible.

The decree of the Circuit Court is affirmed.

BENJAMIN F. FLANDERS, Deputy General Agent of the UNITED STATES TREASURY DEPARTMENT, *Plff. in Err.*,

v.

JOHN P. TWEED.

(See S. C., 9 Wall., 425-432.)

Statement of facts—when disregarded—when judgment affirmed—mistrial.

Where the statement of facts by the judge is filed nearly three months after the rendition of the judgment this court will disregard it.

Where there is no stipulation waiving the jury, nor any finding of the facts, and no question upon the pleadings, the judgment below should be affirmed.

But as the parties below supposed that they had made up a case according to the practice in Louisiana, that would entitle them to a re-examination of it here, the case being an important one, this court reversed the judgment for a mistrial and remands it to the court below for a new trial.

[No. 108.]

Argued Mar. 9 1870. Decided Mar. 21, 1870.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

A petition was filed in this case in the court below, by the defendant in error, to obtain the value of certain bales of cotton. Judgment having been given for the plaintiff, the defendant sued out this writ of error.

A full statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty. Gen., and W. A. Field, Asst. Atty. Gen., for plaintiff in error.

(The arguments of the counsel for the appellant, being entirely to the merits, are not given.)

Messrs. J. Hubley Ashton, T. D. Lincoln and E. C. Billings and Hughes, for defendant in error:

(In connection with the argument upon the merits.)

The statement of facts is not a part of the record of the cause in this court, and cannot be considered here.

This is so, independent of the 4th section of the Act of Mar. 3, 1865.

The court has directly ruled in a recent Louisiana case, that a statement of facts filed without consent of the parties after the cause is removed here, by the service or the issuing of the writ of error, must be treated as a nullity. *Generes v. Bonnemere* (ante, 227).

This has always been the rule of this court.

In *U. S. v. King*, 7 How., 846, *Mr. Chief Justice* Taney said: "This opinion appears to have been filed, not only after suit has been ended by a final judgment, but after a writ of error had been served, removing the case to this court." This statement of the judge cannot, therefore, be resorted to as a statement of the case.

In *Suydam v. Williamson*, 20 How., 437 (51 U. S., XV., 981), the writ of error was issued Dec. 18, 1854, and Jan. 29, 1855, a paper denominated the "case" was filed. The court, in an elaborate opinion by *Mr. Justice Clifford*, held that the fact that this document was filed after the writ of error issued, was decisive of the point that it could not be considered.

There are other authorities, but these are, it would seem, sufficient and conclusive.

But *a fortiori* is such a statement of facts a nullity under the regulation of the practice in cases at common law, tried without a jury, provided in the 4th section of the Act of Mar. 3, 1865.

13 Stat. at L., 501; *Ins. Co. v. Tweed* (ante, 65).

In *Norris v. Jackson* (ante, 608), *Mr. Justice Miller* says: "If the verdict be a general verdict, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings."

In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury.

If the parties desire a review of the law involved in the case, they must either get the court to find a special verdict which raises the legal proposition, or they must present to the court their propositions of law, and require the court to rule on them.

Objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.

What purports to be a "bill of exceptions" is not such; and the ruling on the admissibility of the evidence offered by the defendants as therein mentioned, cannot be reviewed upon it.

We suppose it to be settled, that "unless an exception is reduced to writing, and sealed by the judge, it is not a bill of exceptions within the meaning of the statute authorizing it, and does not become a part of the record." *Pomeroy's Lessee v. Bk.*, 1 Wall., 599 (68 U. S., XVII., 640).

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Louisiana.

This suit was brought by Tweed, in the court below, to recover some \$40,000 damages against Flanders, for the seizure and detention of 495 bales of cotton, in the City of New Orleans, on

or about the 6th of March, 1866. He had previously procured the possession of the cotton by a writ of sequestration, according to the practice of the courts in that State. The petition charges that the defendant was a Deputy General Agent of the Treasury Department of the United States.

The defendant pleaded and admitted that he was a Deputy General Agent as described in the petition, and denied all the other allegations therein. A large amount of evidence was taken in the case on both sides; the plaintiff insisting that he bought the cotton at private sale from the individual owners, and the defendant that it was, at the time, under seizure, and in his possession, as special Agent of the Treasury Department, holding it for the use of the government. There are some one hundred pages, consisting of the evidence and proceedings of the court in the record.

The court rendered judgment against the defendant for \$36,976.38. The judgment was rendered 26th February, 1868. A statement of facts by the judge is found in the record filed May 29, 1868, nearly three months after the rendition of the judgment. This is an irregularity for which this court is bound to disregard it, and to treat it as no part of the record. The finding of the facts begins by stating that "The cause came on to be tried on the pleadings by consent of the parties, by the judge presiding, and after hearing the evidence therein, and the argument of counsel, the court finds the following facts: The statement of the facts by the judge made out of court, and some three months after the trial of the cause and judgment is, of course, no evidence before us of the facts stated, and this is the only evidence relied on, of the consent of parties to waive a jury, except what may be presumed from the circumstance that both parties proceeded with the trial before the judge without objection in the court below. The objection is now taken here by the plaintiff in error."

The 4th section of the Act of Congress of March 3, 1865, provides, "That issues of fact in civil cases, in the Circuit Court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties or attorneys of record file a stipulation in writing with the clerk of the court waiving the jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of the jury. The rulings of the court in the cause in the progress of the trial when excepted to, at the time, may be reviewed by the Supreme Court of the United States, upon a writ of error, or upon appeal, provided the rulings be duly presented by a bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

It is impossible to misunderstand the condition upon which, according to the Act of March 3d, 1865, the parties are authorized to waive a trial by jury, and substitute the court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law. That condition is the filing with the clerk a written stipulation, signed by the parties, or their attorneys.

See 9 WALL.

The necessity of this law, for the purpose designed, will appear by a reference to a few of the decision of this court. One of the latest is the case of *Campbell v. Boyreau*, 21 How., 223 [62 U. S., XVI., 96]. It came up on error from the Circuit Court of the United States for the Northern District of California, and was an action of ejectment before the court, the jury having been waived by the express agreement of the parties. The opinion was delivered by the *Chief Justice*. He observed: "It appears by the transcript that several exceptions to the opinion of the court were taken at the trial by the plaintiffs in error—some to the admissibility of evidence, and others to the construction and legal effect which the court gave to certain instruments in writing. But it is unnecessary to state them particularly, for it has been repeatedly decided by this court that, in the mode of proceeding which the parties have seen proper to adopt, none of the questions, whether of fact or of law, decided by the court below, can be re-examined and revised in this court upon a writ of error." He also observed: "The point was directly decided in *Guild v. Frontin*, 18 How., 135 [59 U. S., XV., 290], which, like the present, was a case from California, where a court of the United States had adopted the same mode of proceeding with that followed in the present instance; and the decision was again re-affirmed in the case of *Suydam v. Williamson*, 20 How., 432 [61 U. S., XV., 980], and also in the case of *Kelsey v. Forsyth*, decided at the present term." 21 How., 85 [63 U. S., XVI., 32]. He then states the grounds of these decisions, namely: "That by the established and familiar rules and principles which govern common law proceedings, no question of law can be reviewed and re-examined in an appellate court upon a writ of error (except only where it arises upon the process, pleadings, or judgment, in the case), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts, and referring the questions of law to the court."

The opinion contains a very full exposition of the principles and proceedings in the common law cases, and the departure from them in trial of issues of fact before the court. This case, and those referred to by the learned *Chief Justice*, establish, beyond question, that the Act of Congress was essential in order to preserve to the parties submitting a cause to a trial before a court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court. The Act, while it provides specially the mode of submission, takes care to secure to the parties the right of review as it respects all questions of law arising out of the facts found by the court, giving to this finding the effect as if found by a jury, preserving, at the same time, the right of exceptions to the rulings of the court in the progress of the trial; and, when the finding is special, a right to the appellate court to determine the sufficiency of the facts found to support the judgment.

This Act of Congress is the first one that has authorized the parties to dispense with a jury, and try the issue of fact before the court, in respect to all the Federal Courts in the Union,

except two special Acts, one in respect to the State of Louisiana, in 1824, and California and Oregon, in 1864 (18 Stat. at L., 4). And it is quite important to settle the practice under it at an early day, and with a precision and distinctness that cannot be misunderstood. The Act passed May 26th, 1824, relating to the courts in Louisiana, directed that the mode of proceeding in civil causes, in the Federal Courts in Louisiana, should be the same as the practice and modes of proceeding in the district courts of that State, subject to certain modifications mentioned in the Act. The practice in these courts of the State was according to civil law proceedings, and the trial of issues of fact could take place before the court by consent of the parties. This Act, unfortunately, not prescribing the mode of procedure when a jury was waived, and the trial before the court, as in the Act of 1865, leaving the court to grope its way as best it could under the practice in civil law proceedings, the case to come up ultimately for re-examination before a common law appellate tribunal, has led to the most painful and oftentimes protracted litigation at nearly every term since its passage, and that, too, not upon questions involving the merits, but questions of mere practice. As observed by *Mr. Justice Grier* in *Graham v. Bayne*, 18 How., 61 [59 U. S., XV., 286]: "The very numerous cases on this subject, from *Field v. United States*, 9 Pet., 182, to *Arthur v. Hart*, 17 How., 6 [58 U. S., XV., 30], show the difficulties we have had to encounter in reconciling our modes of review to the Civil Code of practice as used in the courts of Louisiana;" and these cases have not diminished since the delivery of the opinion in that case.

The history of the proceedings in the Federal Courts in Louisiana under the Act of 1824 admonishes us, if we may expect to avoid the like difficulties and disorders under the Act of 1865, to require, in all cases, where the parties see fit to avail themselves of the privileges of the Act, a reasonably strict conformity to its regulations. We have already held (*ante*, 65), that this Act of 1865 applies to the Federal Courts in the State of Louisiana.

A copy of the stipulation of the parties, or attorneys, filed with the clerk, waiving the jury, should come up with the transcript in the return to the writ of error, so that the court could see that the Act had been complied with. There having been no stipulation, nor any finding of the facts, in this case, and no question upon the pleadings, it would follow, according to the general course of proceeding in like cases, heretofore in this court, that the judgment below should be affirmed. There are, however, cases which, under very special circumstances, the court have made an exception, and have simply dismissed the writ of error, as in the case of *Burr v. Des Moines Co.*, 1 Wall., 99 [68 U. S., XVII., 561], or have reversed the judgment below for a mistrial, and remand it for a new trial, as in the case of *Graham v. Bayne*, 18 How., 60 [59 U. S., XV., 265]. See, also, *Guild v. Frontin*, *ib.*, 135 [59 U. S., XV., 290]. In the present case it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of

it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record; and, under the circumstances, the case being an important one, and intended to be carried up here for re-examination, *we shall reverse the judgment for a mistrial, and remand it to the court below for a new trial.*

Cited—12 Wall., 282; 16 Wall., 514; 17 Wall., 410; 18 Wall., 262; 21 Wall., 160, 552; 91 U. S., 261; 93 U. S., 81; 95 U. S., 127, 143; 3 Dill., 108; 57 N. Y., 175.

BENJAMIN F. FLANDERS, Deputy General Agent of the UNITED STATES TREASURY DEPARTMENT, *Pfiff in Err.*,

v.

JOHN P. TWEED.

Flanders v. Tweed, ante, 678, *followed.*

For the reasons given in *Flanders v. Tweed, ante*, 678, the judgment in this case reversed for a mistrial, and the cause remanded for a new trial.

[No. 106.]

Argued Mar. 9, 1870. Decided Mar. 21, 1870.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court.

See the preceding case, *ante*, 678.

Messrs. E. R. Hoar, Atty-Gen., and W. A. Field, Asst. Atty-Gen., for plaintiff in error.

Messrs. J. Hubley Ashton, T. D. Lincoln and E. C. Billings, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Louisiana.

The suit was brought by Tweed in the court below, against Flanders, to recover 123 bales of cotton.

The answer of the defendant states that he was a Deputy General Agent of the Treasury Department of the United States; denies that the cotton belonged to the plaintiff, but was the property of the United States; that the cotton was shipped to him as such at New Orleans by a Treasury Agent at Shreveport, under a contract with the plaintiff and the Treasury Department, in relation to cotton known as Confederate States cotton, captured in war and turned over to the Treasury Department by officers of the army; that by virtue of this contract, and certain services rendered by the plaintiff, three fourths of the number of bales received by the defendant were to be turned over to him, and one fourth reserved for the United States; that the 123 bales in suit are the one fourth thus reserved; and that the 373 bales claimed by the plaintiff in his suit, No. 3783 of the docket of the court (*ante*, 678), are the three fourths coming to the plaintiff under the contract. The defendant also claims that the 123 bales in question are captured or abandoned property.

A large amount of evidence is taken in the cause on both sides, upon the issues thus raised. The cotton had been sequestered and delivered

to the plaintiff on his giving a bond as security for the same. The court rendered a judgment for the plaintiff. It was rendered on the 29th January, 1868. A statement of facts is found in the record, by the judge, filed May 13, 1868, some three months and a half after the rendition of the judgment.

The case, therefore, falls within the views expressed in the suit between these parties, involving the question of damages for the detention of these 123 bales of cotton, together with the 372 bales disposed of in a previous suit in the court below against the defendant, referred to in his answer, the opinion in which has just been delivered [*ante*, ¶ 678].

For the reasons given in that case the judgment must be reversed, for a mistrial, and the cause remanded for a new trial.

EDWIN C. LITCHFIELD, *Appt.*,

v.

CHARLES B. RICHARDS, Register, and
CHARLES POMEROY, Receiver of the
UNITED STATES LAND OFFICE, at FORT
DODGE, IOWA.

(See S. C., "*Litchfield v. Register and Receiver*," 9 Wall., 575-579).

Discretion of officers not restrainable by injunction or mandamus—bill to restrain, not entertained.

The judiciary cannot interfere with executive officers in the discharge of their official duties involving judgment or discretion either by *mandamus* or *injunction*.

Bill for injunction to restrain Register and Receiver of Land Office from receiving and acting upon applications to preempt land, will not be entertained.

[No. 176.]

Submitted Feb. 14, 1870. Decided Mar. 21, 1870.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The appellant filed his bill in the Circuit Court for the District of Iowa, to restrain the defendants from entertaining and acting upon certain applications to prove preemptions to certain lands lying within the district for which they were respectively Register and Receiver.

The court below having dismissed the bill, the case is now here on appeal.

Mr. Edwin C. Litchfield, complainant and appellant, in person:

The complainant is the absolute owner in fee simple of the lands in question. The United States has no remaining title or interest in them, either legal or equitable; and the defendants as officers of the government, have no authority to deal with them as public lands, or to grant preemption, or to allow homesteads or other entries.

The bill distinctly affirms "that the complainant is the owner in fee simple of the lands; that neither the defendants nor any other officer or officers of the government, have any right to grant preemptions or homestead entries therein;

Reza.—When injunction to restrain acts of public officer will be granted. See note to *Mississippi v. Johnson*, 71 U. S., XVIII., 437.

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that the attempt to do it is contrary to law, and in direct violation of the statute"; that the defendants well know that said lands are not subject to preemption or homestead entries, or belong to the complainant.

All these allegations being undenied, are admitted. As matter of fact, then, this point is admitted upon the record.

In addition to this admission, the court can see as matter of law from the facts stated, that the plaintiff's title to the lands in question is beyond controversy.

The proper officer of the United States decided in 1849 that these lands belonged to the State of Iowa, as a part of the grant made by the Act of Aug. 8, 1846; and in 1861-1863, in execution of that decision, they were certified and approved to the State under that Act. The Joint Resolution of Mar. 2, 1861, and the Act of 12th July, 1862, confirmed to the State and its grantees the title to all the lands which had been certified under the Acts aforesaid, including those of the complainant herein.

That such was the legal effect of these Acts, was determined by this court in *Wolcott v. Des Moines Co.*, 5 Wall., 681 (72 U. S., XVIII., 689).

The effect of a patent (or of the certified lists which are substitutes for patents) is well stated by this court in *Beard v. Federy*, 3 Wall., 478 (70 U. S., XVIII., 88). "In the first place (said the court), it is a deed conveying the interest of the United States in the land. In the second place, * * * it is record evidence of the action of the government upon the title of the complainant * * * as against the government. This record, so long as it remains uncanceled, is conclusive; and it is equally conclusive against parties claiming under the government by titles subsequent."

How could they be canceled? We submit that it could be done only in one way, and that is by filing a bill in a court of equity, to have them judicially canceled and set aside. No executive officer of the government could, by his own authority, cancel those lists, any more than he could cancel patents; nor could he disregard them while they remained uncanceled.

U. S. v. Stone, 2 Wall., 525 (69 U. S., XVII., 765); *Hughes v. U. S.*, 4 Wall., 236 (71 U. S., XVIII., 304).

Where the plaintiff's title is not controverted, it is considered as established, that a court of equity will always interpose to restrain irreparable mischief.

Eden, Inj., 140; *Jerome v. Ross*, 7 Johns. ch. 323.

"Chancery has undoubted jurisdiction to interfere by injunction where public officers are proceeding illegally or improperly, under claim of right; or where the exercise of such a jurisdiction is necessary to prevent a multiplicity of suits at law."

Belknap v. Belknap, 2 Johns. Ch., 468; *Livingston v. Livingston*, 6 Johns. Ch., 497; *Oakley v. Trustees, etc.*, 6 Paige, 262; *Mallow v. Hinde*, 12 Wheat., 193; *Heywood v. Buffalo*, 14 N. Y., 541.

Equity will interfere by injunction where public officers are proceeding illegally and improperly, under a claim of right to do any act to the injury of the rights of others.

2 Story, *Eq. Jur.*, sec. 955 a; *Foot v. Linck*, 5 McLean, 616; *Woolsey v. Dodge*, 6 McLean,

142; *Gardner v. Trustees, etc.*, 2 Johns. Ch., 163; *Hilliard, Inj.*, 574; *Smith v. Bangs*, 15 Ill., 399.

Also, to prevent an act from which a cloud upon the title must necessarily arise.

Pettit v. Shepherd, 5 Paige, Ch., 498; *Brooklyn v. Meserole*, 26 Wend., 132; *Bank of U. S.*, v. *Shultz*, 2 Ohio, 495; *Norton v. Beaver*, 5 Ohio, 178; *Carroll v. Safford*, 3 How., 441.

The persons claiming or who may claim the right of preemption or homestead entries in the lands, are not necessary parties to this suit.

This is private property, held by the complainant in his own right, by an absolute fee simple title, in which the government has no interest, and with which its officers have no right to meddle, and the lands "Are not, and have not heretofore been, subject to entry or sale, or settlement or preemption"; and to said lands "No preemption rights have attached or could attach."

In the court below it was argued, that by an injunction against the defendants, who have no personal interest in the lands, the bill seeks to destroy or effectually prevent the assertion of the rights of other parties not brought before the court.

This argument assumes that there are outstanding inchoate rights of preemption or homestead entries, whereas the bill alleges and the record shows that there are not, and cannot be, any such rights.

But if such rights exist, the courts will protect them, although the Register and Receiver and all the Departments of the Land Office reject them.

Lindsay v. Hawes, 2 Black, 554 (67 U. S., XVII., 265); *Cunningham v. Ashley*, 14 How., 377; *Garland v. Winn*, 20 How., 8 (61 U. S., XV., 803).

Messrs. Gahusha Parsons and William H. Kelsey, for appellees.

Mr. Justice Miller delivered the opinion of the court:

The appellant filed his bill in the Circuit Court for the District of Iowa, asking an injunction against the defendants, to restrain them from entertaining and acting upon applications made to them to prove preemptions to certain lands, which lay within the land district for which they were respectively Register and Receiver.

The principle had been so repeatedly decided in this court, that the judiciary cannot interfere either by *mandamus* or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of *Gaines v. Thompson* [*ante*, 62], decided at the last term of this court, the whole subject was fully considered, and the cases in this court examined. The doctrine just stated was announced as the result of that examination. The case of *The Secretary v. McGarrahan* [*ante*, 579], of the present term, re-affirms the principle, which must now be considered as settled. Both these cases had reference to efforts similar to the present, to control the officers of the Land Department.

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It is insisted, however, that the present case does not come within the rule so laid down, and we will proceed to examine whether this can be maintained.

The case was decided against the plaintiff on demurrer to his bill, which was dismissed for want of equitable jurisdiction.

The bill, which is very full, recites the various Acts of Congress and of the State of Iowa, by which he claims that a large list of lands, supposed to belong to the original grant to the Territory of Iowa for the purpose of improving the navigation of the Des Moines River, became his property.

We have had the history of that grant before the court recently in several cases, and it is unnecessary to repeat it here. It is sufficient to say that plaintiff's bill, giving that version of the matter which was favorable to his title, avers that he is the legal owner of the lands; that they are not public lands, and in no manner subject to sale or preemption by the government or its officers.

He insists that the facts so stated in the bill must be taken as confessed by the demurrer, and that they show that the land officers were exceeding their authority, and would give certificates of preemption and entry, which would cloud and embarrass his title, and that they should, therefore, be restrained.

The argument is plausible; but a little consideration will show that it is unsound.

The lands in controversy are situated within the land district over which these officers have authority to receive proof of preemption, and grant certificate of entry. There is within that district, of course, lands open to sale and preemption. There would be no use for the land office if there were not. The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any Act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the Acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and preemption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the Land Department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they

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give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court.

Another objection, equally fatal to the bill, is the want of necessary parties.

It appears on its face, that the Register and Receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the Register and Receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform. They might let the injunction be issued without defense, and thus a proceeding almost *ex parte* be made to strangle the incipient right of the actual settler on the public lands. If it can be done in this case, it can be done in every other in which a plaintiff is willing to proceed against the officers, without bringing the settler on the land before the court.

The decrees of the Circuit Court is affirmed.

Cited—93 U. S., 173; 101 U. S., 475.

CHARLES MERRYMAN, *Plff. in Err.*,

v.

E. W. BOURNE ET AL.

(See 8 C., 9 Wall., 593-608.)

Judgment in ejectment, when a bar—nec title—attornment by tenant—date of conquest of California—San Francisco lands—Woodworth title.

In California, a judgment in ejectment has the same conclusiveness as a judgment in any common law action.

A defeated plaintiff may bring a new action upon an after-acquired title, and the former judgment will be no bar.

A tenant may attorn to the party holding a valid title, to avoid litigation.

The conquest of California by the arms of the United States became complete July 7, 1848. Before that time, the *pueblo* or Village of San Francisco, under the laws of the country, was entitled to the territory within certain prescribed limits, known as *pueblo* lands.

After the conquest, the lands continued to be the public property of the municipality, as before the war.

The Act of Congress of July 1, 1864, was a confirmation of the Woodworth title, and took effect by relation, as of the time when the Act of the State Legislature of Mar. 11, 1858, was passed.

[No. 114.]

Argued Mar. 11, 1870. Decided Mar. 21, 1870.

IN ERROR to the Circuit Court of the United States for the District of California.

This was an action of ejectment brought in the Circuit Court of the United States for the

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Northern District of California, by the plaintiff in error, to recover certain premises in the City of San Francisco. Under stipulation of parties, the case was tried by the court without a jury.

The findings of the court were as follows:

That, Apr. 15, 1847, there was duly issued by Edwin Bryant, then alcalde of the Town of San Francisco, to Selim E. Woodworth, in due form, a grant in fee of the one hundred *vara* lot known and designated on the official map of said town as number 23, which embraces the premises described in the complaint in this action, and which grant was registered and recorded in a proper book of records deposited in the office or custody or control of the Recorder of the County of San Francisco, on or before Apr. 8, 1850.

2. That, soon after said grant was issued, the said Selim E. Woodworth entered into possession of the said lot numbered 23, and inclosed the same with a fence, and so continued in possession for some months then next ensuing.

3. That, subsequently, the said fence having either fallen down or been removed by trespassers, one Fulton, claiming under a grant issued by one Colton, a justice of the peace, for said lot number 23, entered on a portion of said lot; and thereupon the said Woodworth, in 1850, brought an action of ejectment against Fulton in the Court of First Instance at San Francisco, to recover the possession of said premises so occupied by Fulton, in which action judgment was rendered in favor of said Woodworth for the recovery of the possession of said premises, on which judgment a writ of restitution issued, by virtue of which said Woodworth was restored to the possession, after which the said Fulton appealed from said judgment to the Supreme Court of the State of California, by which court the said judgment was reversed and the said cause remanded; whereupon a final judgment was afterwards rendered in the lower court in favor of said Fulton, and thereupon, by virtue of process issued on said final judgment, the said Fulton was restored to his possessions, and he and those claiming under him continued in possession until they were afterwards ejected as hereinafter stated.

4. That, on or about Jan. 1, 1852, the said Selim E. Woodworth, by a good and sufficient deed of bargain and sale, conveyed the said one hundred *vara* lot numbered 23, including the premises in controversy, to Frederick A. Woodworth, who, in the years 1853 and 1854, instituted in the District Court of the 4th Judicial District in and for the County of San Francisco, actions of ejectment against some of the parties in possession of the said premises, claiming under said Fulton, and recovered judgments in said actions for the possession of said premises; on which judgments, writs of restitution were duly issued and served, by virtue of which the said F. A. Woodworth was restored to the possession of the premises occupied by the defendants in said writs; and the remaining persons in possession of said premises under said Fulton, and who were not included in said ejectment suits, on being threatened with suits by said F. A. Woodworth, to recover the possession of the premises

held by them, and with a view to avoid expensive litigations, acknowledged the said Woodworth's title and took leases from him; at the expiration of which leases they surrendered the possession to said Woodworth. And the possession of said Woodworth, so obtained under writs of restitution and by surrender, was fairly and honestly acquired without force, fraud or surprise.

5. That, on Dec. 12, 1849, one Colton, a justice of the peace of San Francisco, issued a grant to one Atwill for the said one hundred *vara* lot No. 22, and on Feb. 11, 1850, the said Atwill conveyed to the said Fulton whatever title he acquired by said grant in and to the premises in controversy, and the plaintiff, before and at the time of the institution of this suit, had acquired and held by regular *means* conveyances, all the title of said Fulton.

6. That, at the time of the commencement of this action, Frederick A. Woodworth and the other defendants, under a license from him, were in possession of the premises in controversy.

And as conclusions of law, from the facts aforesaid, the court decides and finds as follows, to wit:

1. That the grant from the said Colton, justice of the peace as aforesaid, to said Atwill, was null and void, and conveyed no title to the premises in controversy; and that the judgment in the aforesaid suit of *Woodworth v. Fulton* was in no respect an affirmation of the validity of the title of the said Fulton, but only a disaffirmance of the validity of the title of Woodworth, the plaintiff in that suit, as the said title was then set up and held by him.

2. That, as against the defendants in this suit, peaceably in possession of the premises in controversy, the plaintiff must recover on the strength of his own title. That the title set up by him is invalid, and the judgment aforesaid does not estop the defendants to deny the validity of said plaintiff's title.

3. That the judgment aforesaid is a decision that the defendant Woodworth's title, as then held by him, is invalid, but it does not estop him to set up any title to said premises acquired since the said judgment.

4. That by virtue of an Act of the Legislature of the State of California, entitled "An Act Concerning the City of San Francisco, and to Ratify and Confirm Certain Ordinances of the Common Council of said City," approved Mar. 11, 1858, and by virtue of the ordinances referred to in said Act, and of the 5th section of the Act of Congress entitled "An Act to Expedite the Settlement of Titles to Land in the State of California," approved July 1, 1864, all the title of the United States and of the City of San Francisco in and to the premises in controversy became and was vested in the said Frederick A. Woodworth, now deceased, and by virtue thereof the said Selim E. Woodworth, as executor of the said Frederick A. Woodworth, deceased, is entitled to the possession of the premises described in the complaint, and every part thereof.

Wherefore it is ordered that judgment be entered in favor of the defendants.

The case was then brought to this court by the plaintiff, on a writ of error.

Messrs. C. Cushing, C. Cole, George

Turner, W. H. Patterson and Jarboe & Harrison, for plaintiff in error:

It being established that the plaintiff here had all the title of Atwill and Fulton, we present the following propositions, as conclusive of this cause in our favor:

1. The Supreme Court of California decided, in the case of *Woodworth v. Fulton*, that the title of Woodworth in these premises was "invalid," and gave judgment in favor of Fulton. This decision of the highest tribunal of the State stands to day unreversed and unannulled, and under it Fulton was placed in possession of this property.

2. F. A. Woodworth (after being so defeated in the Supreme Court of the State), secured the possession again by action of ejectment in a minor court, against "some of the parties in possession," and by "threatening others," got them to acknowledge the said Woodworth's title and take leases from him; at the expiration of which leases, they surrendered the possession to Woodworth.

On this latter state of fact, said F. A. Woodworth is shown, as we claim, to have surreptitiously gained possession by tampering with the tenants of plaintiff in error, for the purpose of defeating the decision of the highest tribunal of the State, and thus became himself the tenant of Fulton, and is estopped from denying his title.

Adams, Eject., 75; *Jackson v. Scissam*, 3 Johns., 499; *Jackson v. Davis*, 5 Cow., 123; *Chambers v. Pleak*, 6 Dana, 428.

3. The prior possession by Woodworth of this property was also set up in *Woodworth v. Fulton*, 1 Cal., 295, and this was adjudicated against Woodworth also, the court holding "that his acts were too loose and equivocal to support a claim of possession."

1 Cal., 311.

We also insist that for all time the defendant, Woodworth, and all claiming under him as against Fulton, and the plaintiff (here), who is in privity with him, are barred from asserting that title.

Broom, Leg. Max., 246 (marginal); *Collins v. Butler*, 14 Cal., 223; *Kidd v. Laird*, 15 Cal., 161; *McDonald v. Bear River Co.*, 15 Cal., 230.

The same evidence which Woodworth relied upon in *Woodworth v. Fulton*, 1 Cal., 295, *i. e.*, the alcalde grant, is now relied on as a defense to this action.

Broom, Leg. Max., 229; Stark. Ev., 4 Am. ed., 200; Bull. N. P., 232 (quoted in *Eastman v. Cooper*, 15 Pick., 285); *Baker v. Rand*, 13 Barb., 152; *Birkhead v. Brown*, 5 Sandf., 134.

The facts in *Woodworth v. Fulton*, 1 Cal., 295, as to Woodworth's title and right of possession, are the same as in this case, and the decision in that case was upon the law of the alcalde grant.

Vide, *Betts v. Starr*, 5 Conn., 550; *Pleak v. Chambers*, 7 B. Mon., 566; *Outram v. Morewood*, 8 East, 346.

That the decision of *Woodworth v. Fulton*, 1 Cal., 295, was, and is, the law of that piece of property; we refer to *Wash. Bridge Co. v. Stewart*, 3 How., 424; *Oakley v. Aspinwall*, 13 N. Y., 500; *Clary v. Hoagland*, 6 Cal., 687; *Ex parte Sibbald v. U. S.*, 12 Pet., 488.

Mr. George H. Williams, for defendants in error:

Plaintiff, in order to recover, must show that he has a valid title to the premises in controversy.

Plaintiff does not pretend to have any title except through a grant made in 1849, by one Colton, a justice of the peace of San Francisco.

Judges Field and Hoffman find this title to be null and void. No law or facts can be found anywhere to support it and, indeed, plaintiff does not pretend that in itself it has any validity.

Plaintiff claims, however, that defendants are estopped by the decision of the Supreme Court of California.

1 Cal., p. 295.

Several conclusive answers may be made to this position.

1. That decision simply disaffirms defendants' title. It does not affirm the title of the plaintiff.

2. Subsequent to the said decision in 1 Cal., Woodworth brought an action of ejectment in the District Court of the 4th Judicial District of the State against those in possession under the Colton grant, and recovered judgment.

While that judgment continues unreversed and in full effect, as it now does, it will protect Woodworth in the possession which it gave him.

Doubtless the decision of the district court was not disturbed, and the surrender of the persons not sued was made, because the Supreme Court of California, in 1853, reversed its former decision, and held that an alcalde grant, under which Woodworth claims, conveyed title, and such has been the uniform course of decisions of that court since that time.

Cohas v. Raisin, 3 Cal., 443; *Hart v. Burnett*, 15 Cal., 530; *White v. Moses*, 21 Cal., 84.

Much is said, and authorities are cited in plaintiff's brief, to show that the decision in 1 California is the law of the property in question.

Is it any more the law of the property in question than the subsequent decision of the district court?

Suppose an appeal had been taken to the Supreme Court from the decision of the district court affirming plaintiff's title, and the case in 1 Cal. had been reversed, as it certainly would, what then would have been the law of the property?

Drunckel v. Wiles, 11 N. Y., 426.

3. Be the effect of the case in 1 California what it may upon the rights of the parties as they then stood, defendants can set up in their suit a subsequently acquired title.

3 Cow., 559.

The Van Ness Ordinance; the Act of the Legislature of California, passed Mar. 11, 1858, and the Act of Congress of July 1, 1864, are equivalent to a patent from the United States to Woodworth for this property.

Mr. Justice Swayne delivered the opinion of the court:

This case is brought before us by a writ of error to the Circuit Court of the United States for the District of California.

The plaintiff in error was the plaintiff in the court below. The suit was ejectment, brought to recover the premises described in the plaintiff's declaration.

They are situated in the City of San Francisco. The parties stipulated in writing that the cause should be tried by the court without a jury, and it was tried accordingly. The court found the facts specially, pursuant to the statute which governs the practice in such cases, and they are set forth in the record. Judgment was given for the defendants, and the plaintiff thereupon sued out this writ of error. So far as the facts of the case are concerned the findings of the court are conclusive between the parties. The only questions open for our consideration are questions of law, arising upon the facts as thus presented in the record.

Three grounds are relied upon for the reversal of the judgment.

Two of them are substantially the same, and will be considered together.

It is insisted that the rights of the parties, touching the premises in controversy, were settled in favor of the plaintiff in error, in the case of *Woodworth v. Fulton*, reported in 1 California, 295.

This is an error. Woodworth prosecuted the action. The premises were the same with those involved in the present suit. The Supreme Court of the State decided two points, and none other: (1) That the alcalde grant to S. E. Woodworth was void for want of the requisite authority in the officer who made it—the court holding that an alcalde was incompetent to give any title; (2) That if a recovery could be had in an action of ejectment, upon mere prior possession, no sufficient possession was shown on the part of the plaintiff. Nothing was decided or said by the court as to the title of the defendant.

In California a judgment in ejectment has the same conclusiveness as a judgment in any common law action, and in determining its effect the same principles are applied which control the result of the like inquiry in other cases. A defeated plaintiff may bring a new action upon an after-acquired title with the same effect as a stranger in whom such title might have been vested, and the former judgment will no more bar one than the other. *Barrows v. Kindred*, 4 Wall., 399 [71 U. S., XVIII., 383].

It appears by the finding of the facts that F. A. Woodworth did bring a new action against a part of those in possession. He recovered and ousted the defendants by writs of restitution. The other parties in possession thereupon surrendered and attorned to him. He thus acquired possession of the entire premises, and he, or those claiming under him, held it when this suit was instituted.

The cases in which the judgments were recovered are not before us. Who the defendants were, and what title was developed by the plaintiff, we do not know. For all the purposes of this case the judgments must be held to have been properly rendered, and to be valid. They cannot be collaterally questioned in this proceeding.

It is insisted also that Woodworth obtained possession of a part of the premises by tampering with the tenants of Fulton, under whom the plaintiffs in error claim, and thus became such tenant himself, and hence is estopped from denying the validity of the alleged Fulton title.

The language of the finding upon this subject is as follows: "And the remaining persons in possession of said premises under said Fulton, and who are not included in said ejectment suits, on being threatened with suits by said F. A. Woodworth to recover possession of the premises held by them and with a view to avoid expensive litigation, acknowledged said Woodworth's title, and took leases from him, at the expiration of which leases they surrendered the possession to the said Woodworth, and the possession of said Woodworth so obtained under said writs of restitution, and by surrender, was fairly and honestly acquired, without force, fraud or surprise.

How many such parties were in possession, what portion of the premises their possession embraced, and whether their possession under Fulton was as vendees, lessees, or otherwise, does not appear.

If they were grantees in fee the principle relied upon has no application. It is one of the incidents of subinfeudation, and was brought into the common law from the feudal system. It does not reach the relation of vendor and such a vendee. The latter holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party. *Blight's Lessee v. Rochester*, 7 Wheat., 535; *Watkins v. Holman*, 16 Pet., 26; *Crozall v. Shermerd*, 5 Wall., 268 [72 U. S., XVIII., 572]; *Osterhout v. Shoemaker*, 3 Hill, 518; *Barker v. Salzman*, 2 Met., 32.

Error is not to be presumed. It must be affirmatively shown. Doubts are to be resolved in favor of the judgment rather than against it. But if the parties were the tenants of Fulton, the fact would not avail the plaintiff in error. The principle sought to be applied is subject to several well-settled qualifications. It may be shown that the landlord's title has ceased by expiration or transfer. If the tenant be evicted, he may take a new lease from the party evicting him. It has been held, that if threatened with suit upon a paramount title, the threat, under such circumstances, is equivalent to eviction. He may, thereupon, submit in good faith, and attorn to the party holding a valid title, to avoid litigation. In such case it is incumbent upon him, and those who have profited by his submission, to show the existence and superiority of the title in question. *Mayor of Poole v. Whitt*, 15 Mees. & W., 577; *Emery v. Barnett*, 4 Com. Bench, N. S., 428; *Lunaford v. Turner*, 5 J. J. Marsh., 106; *Cuthbertson v. Irving*, 4 H. & Norman, 758; *Jordan v. Twells*, *Hardwicke's Cases*, 172.

Upon the disavowal of the landlord's title the relation of landlord and tenant ceases, and, as between them, the tenant becomes a trespasser. The Statute of Limitations begins to run, and the landlord may sue at once to recover possession. He need not wait for the end of the leasehold term. *Willison v. Watkins*, 3 Pet., 43.

In the case under consideration, Woodworth had recovered upon the adverse title against a part of those in possession, and threatened suit against the others. They yielded, to avoid the inevitable adverse consequences of a contest. This they had a right to do. The court found that the possession was obtained by Woodworth "fairly and honestly," "without force, fraud, or surprise." This is conclusive as to the in-

tegrity and validity of the transaction, and brings the case within the authorities referred to. The relation of landlord and tenant between Fulton and those parties, if it subsisted before, was thus extinguished.

Woodworth claimed title under an alcalde grant of the 15th of April, 1847. Fulton, under a grant from a justice of the peace, of the 21st of December, 1849. It is not claimed that the latter grant is of any validity.

Emanating, at the time it bears date, from such a source, it is as if it came from any other person unauthorized to give it, and did not carry with it even color of title. It is utterly void. It may, therefore, be laid out of view, as an element in the case of no moment.

The conquest of California by the arms of the United States is regarded as having become complete on the 7th of July, 1846. On that day the Government of the United States succeeded to the rights and authority of the Government of Mexico. The dominion of the latter sovereignty was then finally displaced, and succeeded by that of the former. Before that time, the *pueblo* or Village of San Francisco existed, and under the laws of the country was entitled to the territory within certain prescribed limits, known as *pueblo* lands. It had also an *ayuntamiento* or town council, and an alcalde. The alcalde was the chief executive officer of the *pueblo* and, as such, had authority to make grants of the *pueblo* lands.

The exercise of this function was subject to the authority lodged in the *ayuntamiento*, and to the still higher authority of the Departmental Governor and Assembly. In the case of *Woodworth v. Fulton*, 1 Cal., 294, it was held by the Supreme Court of the State that, from the time of the conquest, these *pueblo* lands, so far as they had not been granted to individuals, became a part of the public domain of the United States and, as such, subject to the exclusive control and disposition of Congress. This doctrine was subsequently overruled in the case of *Cohas v. Raisin*, 3 Cal., 448. It was there held that the conquest had no such effect, but that the lands continued to be the public property of the municipality, as before the war; and that the laws of Mexico relating to the subject continued in force until changed by the legislative authority of the State. It was further held that an alcalde grant, made after the conquest, was to be presumed valid, and was competent to convey title. These doctrines are now firmly established as a part of the rules of property of the State. *Hart v. Burnett*, 15 Cal., 580; *Pryne v. Treadwell*, 16 Cal., 321; *White v. Moses*, 21 Cal., 34.

But it is insisted, in behalf of the plaintiffs in error, that these adjudications cannot affect the prior unreversed judgment in the case of *Woodworth v. Fulton*, in which the rulings were otherwise. Conceding this to be so, the result of this case must still be against the plaintiff in error. The Common Council of San Francisco, by an Ordinance of the 20th of June, 1855, known as the Van Ness Ordinance, relinquished all her rights in the *pueblo* lands of the city to the parties respectively within the category of Woodworth, and to those claiming under them by competent *mesne* conveyances. This ordinance was confirmed by an Act of the Legislature of the State of the 11th of March, 1858. 15 Cal., 627, note 8.

This gave to Woodworth, and those claiming under him, a new and after-acquired title, upon which, according to the later adjudications referred to, he was entitled to recover, and to an action upon which the prior judgment in *Woodworth v. Fulton* was not and could not be a bar. The Act of Congress of July 1st, 1864, was a further confirmation of the Woodworth title, and operated in the same manner as the ordinance of the City Council and the Act of the Legislature before mentioned.

It is said that the Act of Congress was passed after the institution of this suit, and cannot, therefore, be considered. To this there are two answers. It is by no means clear that the Act was necessary to the completeness and validity of the title in question. The latter adjudications referred to, made before the passage of the Act, held, by necessary implication, that it was not. But if it were necessary, we have no difficulty in holding that it took effect by relation, as of the time when the Act of the Legislature confirming the ordinance of the council was passed. *Poole v. Fleegee*, 11 Pet., 185; *Jackson v. Dickenson*, 15 Johns., 309; *Hammond v. Warfield*, 3 Har. & J., 155; *McConnell v. Brown*, Littell's Sel. Cas., 460; *Pearson v. Darlington*, 21 Ala., 175.

We think the facts found by the court below fully sustain the judgment given, and it is affirmed.

Cited—21 Wall., 488; 98 U. S., 17; 2 Sawy., 250; 6 Sawy., 145; 4 Hughes, 570; 44 Cal., 514; 49 Cal., 380.

RICHARD W. MEADE, Admr., etc., of R.
W. MEADE, Deceased, Appt.,

v.

UNITED STATES.

(See S. C., 9 Wall., 691-725.)

Spanish claim—authority of minister—when claim not included in Treaty—decision of commissioners bars recovery in Court of Claims.

Decision of the commissioners appointed to determine Spanish claims, rejecting a claim arising after the Spanish Treaty, approved.

An assurance that a claim against Spain should be paid, could not be given by any minister of the United States, except upon the condition that it should become a treaty stipulation.

An award made by the Spanish Government long after the Treaty was signed, was not included in its provisions for settlement.

Decision of the commissioners, appointed by the United States to adjudicate Spanish Claims, dismissing a claim was final and conclusive, and bars a recovery upon the merits in the Court of Claims.

[No. 79.]

Argued Mar. 1, 1870. Decided Mar. 21, 1870.

APPEAL from the Court of Claims.

The petition in this case was filed in the court below, by the plaintiff in error, to obtain payment of certain claims originally existing against the Government of Spain. The court rendered judgment dismissing the petition, from which the petitioner took an appeal to this court. The case is fully stated by the court.

Messrs. Joseph H. Bradley and C. Cushing, for the appellant:

I. The United States had no power to release Spain from the debts or obligations of that coun-

try due to the petitioner in this case, without his assent, except upon the condition of making to him just compensation for such dues and obligations.

Vatt., bk. I., ch. 20, sec. 244; Bow. Pub. Law, 228, n. 1; Art. 5 Amend. Const.; and see, J. Q. Adams' letter IV., St. Papers, p. 704, for Relation.

The right of one nation to demand of another satisfaction for damages and injuries done to the citizens of the country making the demand, is clear.

Vatt., bk. II., ch. 6, sec. 71; *Id.*, ch. 8, sec. 342; and the authorities are copiously collected in 1 Wild, Int. Nat. Law, 198; and Phill. Int. Nat. Law, chaps. 2, 3, pp. 4, 5; see, also, Message President Monroe, May 9, 1830.

The obligation or duty of the nation on whom the demand is made is perfect, because the right and power to enforce it exists in the other. Vatt., Introduct., LVII., secs. 16, 17.

The United States, having received Mr. Meade's authority to demand redress from Spain, was bound to obtain for him full satisfaction of his claims, or themselves to indemnify him.

DeBode v. Regina, 3 Cl. & F., 449; see, also, Op. Mr. Clay, cited, 2 Nott & H., Ct. Claims, 328.

The extent of that authority is shown by the terms of the Treaty. They were authorized to release Mr. Meade's claim, which had been presented within the requirements of the Treaty, if that Treaty should be carried into effect according to its limitations.

It was not an absolute surrender by Mr. Meade of his claims on Spain, to be settled by some future negotiation; nor was Mr. Meade, by the terms of his authority bound forever from prosecuting them against Spain in case that Treaty should fail.

II. The United States, through its duly accredited Minister, having notified Spain that after Aug. 22, 1819, as the ratifications of the Convention of Feb. 22, 1819, will not have been exchanged, "All the claims and pretensions of the United States * * * will stand in the same situation as if that convention had never been made," whatever power and authority had theretofore been given by Mr. Meade to the United States by filing his claims under the provisions of that Convention, became revocable by him.

III. The act of Mr. Meade in submitting his claims to the tribunal created by Spain, on the petition of Mr. Meade at the instance of the United States, after the expiration of the time limited in the Convention for the ratification thereof, and when there was no negotiation between Spain and the United States for the resumption of that Convention, and in the language of Mr. Adams, "there was no probability that the Treaty would be ratified by Spain," was a full and complete revocation of the authority he had theretofore given to the United States.

By the 16th article of the Treaty it is provided: "That the present Treaty shall be ratified in due form by the contracting parties, and the ratification shall be exchanged within six months from this time, or sooner, if possible."

It was signed Feb. 22, 1819. Aug. 21, 1819, the day before the time limited for the ratifica-

tion of the Treaty, the Minister of the United States in Spain gave to that government the formal notice hereinbefore referred to, that unless the Treaty should be ratified the next day, the United States "will stand in the same condition as if that Convention had never been made."

Spain accepted the notice, and failed or refused to ratify it.

It follows that it was no longer binding on the citizens of the United States whose rights were involved in it; and they thereby were also remitted to their rights.

At that time there existed in Spain a tribunal which had been appointed to hear and determine his claims on the Government of Spain. To that tribunal, under these circumstances, Mr. Meade submitted his claims, and by that tribunal the amount was adjudicated May 19, 1820, with interest, which is now claimed.

IV. This claim being thus formally established, at the pressing instance of one government, adjudicated by the tribunals of the other, and admitted under the most solemn Act as a debt due by Spain to Mr. Meade, in the sum of \$378,879.88, with interest from May 19, 1820, the United States Government, "Against the will and consent of said Meade, did take and appropriate such indebtedness of the Spanish Government, and did relinquish the same to Spain and discharge and release Spain from the payment thereof."

It follows, both on grounds of public law and by the provisions of the Constitution, that the United States is bound to make him just compensation therefor, unless it is excluded by some act of misdeameaning himself.

One of the most extraordinary facts found by the Court of Claims in this connection remains to be considered. It is set out in the findings.

By the facts thus found, four things are established:

1. Spain "Refused to annul certain grants, unless the United States would agree to pay and discharge in full the indebtedness of Spain to the said Meade upon the award of the royal *junta*."

2. Thereupon the United States, by its Minister at the Court of Madrid, gave to Spain a clear and distinct assurance that the debt due to Richard W. Meade would certainly be paid to him by the United States, if the Treaty were ratified by the Spanish Government, and the cessions (to the Duke of Alagon, and the Count Panon Rostro, and Mr. Vargas) totally annulled.

3. On the faith of these assurances the Spanish Government annulled such three private cessions, and duly ratified the said Treaty.

4. The United States, with full notice and knowledge of all these facts and circumstances set forth in this finding, did, Feb. 19, 1821, accept and assent to the Treaty as ratified by Spain, and became seised and possessed of the Floridas thereby.

Finally. Appended to the Treaty, to avoid any doubt or ambiguity concerning the meaning of the 8th Article, the King of Spain, by the most formal declaration, did abrogate and annul those grants.

It would seem impossible for human ingenuity to contrive a train of facts more clearly

evidencing the power of Mr. Meade to revoke, and his actual revocation of any authority given by him to the United States to compromise his claims.

The 7th finding of the court does not contain the petition presented by Mr. Meade to the commissioners, but its contents can and must be inferred from the facts found. "He was required to present his demand to the commissioners. And the commissioners, upon such award or decree of the royal *junta* being presented to them, did refuse to allow the same; and on the contrary, did determine and decide that the only claims against Spain which they had authority to investigate and allow, were claims existing prior to the date of the Treaty of Feb. 22, 1819, and that, inasmuch as the award or decree of the royal *junta* was subsequent to the date of the Treaty, they had no authority to investigate or allow it; and the commissioners accordingly did, May 20, 1824, reject and dismiss the same."

V. If the case was within, and was in fact submitted to, the jurisdiction of the commissioners under the Treaty, and by their adjudication Mr. Meade was debarred from participating in the fund provided in that Treaty for the satisfaction of the claims on Spain released by that Treaty, it is no bar to the relief now sought in this proceeding.

VI. From the 8th finding of facts taken in connection with those already commented on, I deduce two propositions:

First. If any doubt still remain as to whether the commissioners, under the Treaty, had any jurisdiction over this claim, it is removed by this finding, which distinctly shows their assumption of this debt by the United States for and upon a consideration arising subsequent to the date of the Treaty and, therefore, they are bound to pay it.

Second. That the United States, having discharged and released Spain from the payment thereof, and having appropriated the chose in action, to wit: the debt due by Spain, and having applied the same to the public use, it is bound to make to him just compensation therefor; and just compensation is payment of the full amount of the award, with interest from the 19th May, 1820.

Messrs. E. R. Hoar, Atty. Gen., and T. H. Talbot, Asst. Atty. Gen., for the appellee:

First. Neither one nor all of the propositions of the plaintiff in error, if admitted (as all of them are not) to be true, establish the existence of an Act of Congress, a regulation of an Executive Department of the United States, or a contract of the United States, express or implied, calling for the payment by the United States of the sum here claimed. Yet one of these three things must be shown, in order to the recovery of a judgment against the Government before the Court of Claims.

Act Feb. 25, 1855, sec. 1, 10 Stat. at L., 612.

I. The Treaty contains no such contract; its positive provisions exclude such. For, in the first place, the undertaking of the United States to make satisfaction for claims extended only to an amount not exceeding \$5,000,000, and claims to that amount have been fully paid.

II. The same Article which bound the United States to payment, also provided for the ascertainment of what should be paid. Those

claims were to be paid which the stipulated Commission should, within the stipulated term, determine to be valid. Those and no others; for the Treaty was the ultimate source, the first foundation of the authority of the Commission, which was not the creature of mere statute as the counsel on the other side intimates. Its term of office was not, as he said, a statute term. It was a treaty term. Not its term only, but also its determination, derived their authority from the Treaty. This ends the whole case so far as obligations to pay are imposed by the Treaty, and so far as the opening argument of the opening counsel for the claimant affects the case.

III. Nor can a judgment of the Court of Claims find lawful basis in the facts stated as found by that court in the 5th finding, to wit:

1. An assurance by the Minister of the United States at Madrid, that the debt due to Richard W. Meade would certainly be paid to him by the United States, if the Treaty were ratified, and certain cessions made by Spain, prejudicial to the United States, annulled.

2. Ratification of the Treaty and an annulment of those cessions by Spain on the strength of that assurance.

3. A notification, by Mr. Meade, of the above assurance, ratification and annulment to the President of the United States.

4. A communication of the same by the President of the United States to the Senate pending the ratification of the Treaty.

5. The ratification of the Treaty and thereby the acquisition of Florida to the United States subsequent to that communication.

IV. But the basis of this finding lies among the public national Acts, treaties between sovereigns, the construction of which is conclusion of law, and not finding of fact, as in transactions personal and pertinent to the capacity of private parties.

V. Nor does the taking of private property for public use raise an implied contract for compensation, which can be enforced in the Court of Claims.

The constitutional obligation to compensate for such property, until expressly delegated, rests upon Congress, and is not without express authority to be assumed by any subordinate branch of the government.

Second. In the ingenious closing argument before the court below for the claimant, the validity of the claim is urged on other grounds. The second proposition which is necessary to complete his statement is, that "The United States neglected to demand in season the evidence from Spain, and neglected to insist on it when, after long delay, a demand was made."

The tenor of this proposition is made plainer by considering what he says in introducing or supporting it. He cites the following from *Lord Chancellor Truro*:

"But if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreign one, then he, the citizen, has a claim against his own country."

Further on he maintains as sound law and applicable to this case, that in respect to any claim which the United States undertakes to conduct, it stands in the relation of an attorney to his client in the prosecution of that

claim, and is responsible for laches under precisely all the stringent rules of common law applicable to the personal relations of client and counsel."

The responsibility of an attorney to his client is founded on the fact that the attorney "undertakes to conduct" the business of his client for pay and compensation, a method by which the United States never undertakes to conduct with foreign governments the claims of its citizens.

Still further the Government is not responsible for the laches of its officers or agents.

Gibbons v. U. S. (ante, 453), decided during this term.

Mr. Justice Clifford delivered the opinion of the court:

Private claims against the Government of the United States, founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government, are within the jurisdiction of the Court of Claims, as appears by the 2d section of the Act passed to amend the Act establishing that court. 12 Stat. at L., 765.

Comprehensive as that provision is, still, doubts were entertained whether the claim of the appellant was not excluded from the jurisdiction of the court by the 9th section of the amendatory Act, but all doubt upon the subject was removed by the joint resolution subsequently passed, by which Congress, in express terms, referred the claim to that court for adjudication, to be examined and decided in the same manner as other claims against the United States under existing laws. 14 Stat. at L., 611.

I. Pursuant to that authority the appellant, as the representative of the deceased claimant, presented his petition to the Court of Claims, setting forth very fully the nature of his alleged cause of action and the ground upon which he claims to recover in this case. His ancestor, the decedent, was a native born citizen of the United States. Early in the present century he went to Spain, and while resident there became extensively engaged in commerce with that country. He was there during the invasion of the French under Napoleon, and continued to reside there until the Treaty of Amity, Settlement, and Limits between Spain and the United States was ratified by both parties. Throughout that period he was constantly engaged in mercantile pursuits, and he also entered into numerous contracts with the government of that country, prior to the date of the Treaty, by means of which Spain became very largely his debtor.

Part of his claims consisted of fourteen unliquidated accounts for goods sold and delivered, and it also appears that he was illegally arrested during that period, and that he was imprisoned by the order of the government, for which wrongs and personal injuries he also held large unliquidated claims. Unable to regain his freedom from the unjust imprisonment he sought the aid of the United States, and it appears that it was not until our Government interfered that he was released from his confinement. Both before and after the date of the Treaty he invoked the aid of the Government of the United States in collecting his claims, as well those arising from contracts as those arising

ing from unjust imprisonment and personal injuries.

Prior to the date of the Treaty, the claimant filed in the office of the Secretary of State a notice of his claims against that government, amounting, as he alleged, to \$400,000, and the finding of the court below shows that the notice so filed was one of the notices referred to and included in the Treaty between the two countries. Reclamations were also made by many other citizens of the United States upon Spain for wrongs and injuries suffered by them through the acts or official orders of that government, notices of which were either filed in the State Department or had been presented to the Minister of the United States resident in that country. Questions of great magnitude also touching treaty obligations previously contracted, the settlement of disputed territorial limits, and the cession of new territorial possessions were under the diplomatic discussion between the plenipotentiaries of the two governments.

Pending these reclamations, and at a moment when the state of the negotiations presented strong hopes that they might terminate successfully, the claimant informed the Secretary of State that it had been intimated to him that if he would advance a further sum of money to that government he might procure a grant of lands in Florida sufficient to cover the whole amount of his claims. Evidently his purpose was to ascertain whether such a grant, if made, would be sanctioned and respected by the United States in case the then pending negotiations should be successful and Florida should be ceded to our jurisdiction.

II. Equal and exact justice to all the claimants was what our Government was endeavoring to secure by the negotiations, and of course the suggestion received no encouragement whatever, as it contemplated a separate provision for one, to the exclusion of the rest. On the contrary, the reply of the Secretary was to the effect that if the Treaty of Cession was concluded it would contain a provision that all grants made after a given date, to be fixed by the contracting parties, should be null and of no effect. Influenced by that reply he abandoned any further attempt to collect his claims by procuring a grant of land, and submitted the same to the State Department "for that protection which his Government may think proper to grant."

On the 22d of February, 1819, the Treaty of Amity, Settlement and Limits, was signed by the respective plenipotentiaries of the two countries, and the Senate of the United States ratified the same on the 24th of the same month. 8 Stat. at L., 264; 3 Exec. Jour., 177.

All the territories which belonged to Spain, situated to the eastward of the Mississippi, known by the name of East and West Florida, were agreed to be ceded to the United States in full property and sovereignty, the United States contracting that all the grants of land made therein by Spain, or by her lawful authorities, before the 24th of January, 1818, the date when the first proposal for the cession was made, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the domin-

ion of the former sovereign, but the contracting parties also stipulated, in the same article of the Treaty, that all grants made subsequent to that date "are hereby declared and agreed to be null and void."

Animated with a desire of conciliation and with the object of putting an end to all differences existing between them, the contracting parties reciprocally renounced all claims for damages which they themselves or their respective citizens and subjects "have suffered until the time of signing this Treaty." Such claims for damages so renounced by the respective parties, on the one side or the other, were classified in the 9th article of the Treaty under different heads, but it will not be necessary to refer to any of the classifications with much particularity except to the fifth class renounced by the United States, which releases all claims of our citizens "until the signature of this Treaty," statements of which soliciting the interposition of the Government of the United States have been presented to the Department of State or to the Minister of the United States subsequent to the antecedent convention between the two countries.

Claims to which the described renunciation extends were declared by the 11th article of the Treaty to be entirely canceled, and the United States contracted, not only to exonerate Spain from all demands in future on account of such claims, but also "to make satisfaction to their citizens for the same to an amount not exceeding \$5,000,000." Subsequent demand by the United States for any such claim was entirely prohibited, and the United States also contracted to appoint three commissioners to ascertain and adjudicate the full amount of all such claims, and the stipulation was that the commissioners should receive, examine and decide upon the amount and validity of all the claims of citizens of the United States so renounced and canceled. They were also authorized to hear and examine on oath every question relative to the said claims, and to receive all suitable authentic testimony concerning the same, and the Sovereign of Spain contracted to furnish all such documents and elucidations as were in the possession of that government for the adjustment of the claims according to the principles of justice, the law of nations, and the stipulations of the prior Treaty between the contracting parties.

III. Viewed in the light of these several suggestions, nothing can be more certain than the conclusion that the claims in question, at the time the Treaty was signed, were included in its provisions, and "that the authority and the trust of examining, ascertaining and deciding upon their amount and validity were solely and exclusively committed to the commissioners" to be appointed under the Treaty. Beyond question they were at that date unliquidated claims of a citizen of the United States, statements of which, soliciting the interposition of our Government, had not only been presented to the Department of State, but also to the Minister of the United States, showing to a demonstration that the claims of the ancestor of the appellant were within the very words of the Treaty.

Prompt action by the United States in ratifying the Treaty did not, however, have the ef-

fect to secure corresponding promptitude on the part of the other contracting party. Delay ensued, which for a time was wholly unexplained; but it soon came to be understood that it arose from the fact, that pending the negotiations three grants of large tracts of land, situated in the ceded territories, had been made, which our Government regarded as null and void under the closing provision of the 8th article of the Treaty. Determined not to protect those grants, the Secretary of State instructed our Minister to explain and declare, upon the exchange of ratifications, that the exchange was made "with a full and clear understanding between the plenipotentiaries of both the high contracting parties that these grants were among the grants thus declared null and void."

On the receipt of that dispatch Spain refused to ratify the Treaty, and, through her Minister sent here for that purpose, objected to that requirement as inconsistent with the Treaty, and he insisted that such a declaration, if made, would "tend directly to annul one of its most clear, precise and conclusive articles." Pending this discussion, the period fixed by the Treaty for the exchange of the ratifications expired; but the United States notified the Spanish Government the day previous, that if the six months expired without such ratification they should hold themselves free to press and enforce their claims and pretensions in any and every mode consistent with honor that their interests may require.

Confessedly, some of the expressions of that dispatch indicated that the United States might, under some circumstances, be induced to refuse to carry the Treaty into effect; but they never made any such decision, and never did any act or uttered a sentiment which authorized the claimants interested in its provisions to assume that they had come to any such conclusion. Nothing of the kind was ever intimated by the Minister sent here from Spain, and the correspondence which ensued shows conclusively that neither party contemplated any such result. He came for explanations; but he was told, before any reply was given to that part of his communication, that the President wished to be informed whether he was the bearer of the ratifications of the Treaty previously signed and committed to the charge of our Minister for that purpose. Obligated to answer that inquiry in the negative, he found it necessary to give explanations in behalf of his own government before requiring any from the United States. Reference is made to that correspondence to show that the Treaty as signed was never abandoned by either party, and nothing was ever given or promised by the United States except what is therein stipulated to secure its ratification.

New articles to the Treaty were not required by the new Minister, and he was emphatically told by the Secretary of State that the United States could not, consistently with what was due to themselves, stipulate any new engagements as the price of obtaining the ratification of the old; that the declaration which our Minister was instructed to deliver at the exchange of the ratifications of the Treaty with regard to the 8th article, was not intended to annul or in the slightest degree to alter or impair the stipulations of that article; that the only object in view was to guard his government, and all per-

sons interested in any of the annulled grants, against the possible expectation or pretense that those grants would be made valid by the Treaty.

Although the Secretary of State informed the Minister sent here for explanations that the question of ratification on the part of the United States must be again submitted to the Senate, because the six months had expired, still he insisted that it should be ratified by the other contracting party without delay and without any alterations, showing conclusively that the consummation of the arrangement was both contemplated and desired. 4 Am. St. Papers, 683.

IV. Power to annul the grants in question, or to declare them null and void, as required by our Government, it was insisted by the Spanish negotiators, did not reside in the King alone, that the consent of the Cortes must first be had before the required declaration could be made; and it does not appear that any attempt was made on the part of our Government to controvert that proposition. Further delay necessarily ensued, but the consent of the Cortes was given on the 5th of October, 1820, and on the 24th of the same month Spain ratified the Treaty without alteration or amendment.

Occurring, as these matters did, in the recess of the Senate, further action was necessarily deferred until the meeting of Congress. By special message the President, on the 18th of February, 1821, informed the Senate that the Minister of Spain had given notice that he was ready to exchange the ratifications of the Treaty, and it appears that the Senate, on the 19th of the same month, again consented to and advised the President to ratify it, without making any amendment to the same, or suggesting any qualification whatever to any of its provisions. 3 Executive Jour., 244.

Application had been made by the deceased claimant to the Government of Spain, before his claims were transmitted to the State Department, requesting that the King would appoint a commission to liquidate his claims; but, on the 17th of January, 1819, when the prospect brightened that a Treaty would be concluded, he submitted his claims to the Department of State "for that protection which his Government may think proper to grant."

No such commission was admitted until after the Minister who signed the Treaty had been recalled, and the United States had been informed by his successor that his Government regarded the declaration which our Minister was instructed to exact, when the ratifications of the Treaty should be exchanged, as tending "directly to annul one of its most clear, precise and conclusive articles." Reluctant to make the required declaration, Spain recalled her Minister and "suspended the ratification of the Treaty;" and on the 7th of May, 1819, she appointed the commission previously requested by the claimant, and it appears that the commission in eleven days afterwards informed the claimant that they were prepared to receive his proofs and hear his explanations. *Meade v. U. S.*, 2 N. & H., 256.

They, the commissioners, proceeded promptly to the discharge of their duties, and on the 31st of August following they notified the claimant to produce the documentary evidences to support his claims, and it appears that he, in the course of a few weeks, transmitted the originals

to the commission. Perfect success attended his efforts, as the commission, with the express and formal approval of the King, on the 19th of May, 1820, made an award in his favor for the sum of \$373,879.88, in our currency, which included his fourteen unliquidated contract claims, with interest to the time of such liquidation; and also a sum in gross on account of his claims for personal injuries.

Justice had been denied him for years, but it was now promptly accorded in the award, and the finding of the court below shows that the King at the same time approved a certificate of the award, in accordance with the laws and customs of the country, and delivered the same to the claimant as conclusive evidence of the verity of the award. By the fourth finding of the court below it also appears that the United States was notified of that result, both by the Government of Spain and by the claimant, and that the Secretary of State expressed his approval of it to both parties. Five days before the Treaty was, the second time, submitted to the Senate for their advice, the claimant addressed a memorial to the President, making known for the first time what his pretensions were in the new aspect of his claim.

V. Briefly stated, they were to the effect that the Senate, if the Treaty should be submitted for ratification, should either annex a new article recognizing his claim as expressed in the award made after the Treaty was signed, or, if that could not be conceded, that the 5th renunciation should be explicitly excepted from the ratification and expunged from the Treaty. Unless he could have a distinct recognition of his claim, he asked, as an act of justice, that the alternative request might be granted, that he might "be left free to prosecute the claim where it is unquestionably due, unembarrassed with the imposing renunciation of my country." Stronger language to express his convictions that his claim, as it is existed when the Treaty was signed, was included in the 5th renunciation of the same, could not well be chosen than he employed in that memorial, where he says that it is his "decided election to abide the issue of an appeal to the moral sense and good faith of that nation rather than the chances of that contingent and long-deferred indemnity provided for the other claims into whose company mine has been introduced by the Treaty."

Addressed, as the memorial was to the President, he referred it to the Secretary of State for his opinion, and nothing can be more conclusive as to the views of the Executive than the report of the head of the State Department. By the statement of the memorial itself, said Mr. Adams, it was questionable to the Cortes and to the Minister of Finance whether or not the claim was included in the renunciation of the 9th article. If it was, said the Secretary, the claimant will be entitled to the immunities stipulated by the Treaty and in the form provided by the same instrument; if it was not, his resort is, as it originally was, exclusively to the Spanish Government, and the Cortes, in recognizing his claim, have given directions for his payment. Both the memorial and the report of the Secretary of State were communicated to the Senate the next day after the Treaty was transmitted for the consideration of that body.

Authority to appoint commissioners was con-

ferred upon the President, as stipulated in the 11th article of the Treaty, by the 4th section of the Act of the 3d of March, 1821, and it is well known that they were duly appointed and commissioned as therein required. 3 Stat. at L., 639.

They were duly organized, as required, and exercised the functions of their office for the period of three years. During that time the claimant, as the finding of the subordinate court shows, presented his claim to the commissioners as expressed in the award made by the Spanish commission, and it appears that the commissioners of the United States refused to allow the claim in that form. He was fully heard, but they ruled and decided that the only claims which they had authority to investigate and allow were claims existing prior to the date of the Treaty, and that inasmuch as the award presented was subsequent to the date of the Treaty, they had no authority to investigate or allow it; and it appears that they accordingly rejected and dismissed the petition upon the ground that the evidence produced was not sufficient to establish the claim.

Plain as the decree of the commissioners is, it is not possible to misunderstand their views. They held that all unliquidated claims of our citizens upon that government, statements of which, soliciting the interposition of our Government, had been presented to the Department of State, or to the Minister of the United States in Spain, since the former convention and prior to the signature of the Treaty, were within their jurisdiction, but that liquidated claims or claims of a subsequent date were not within their jurisdiction. Such, also, were the views of the Secretary of State in his very able dispatch of the 29th of April, 1823, addressed to the *chargé d'affaires* from Spain. Sen. Doc., 2d Sess. 18th Cong., 248.

He shows to a demonstration that the time of the signature, and not that of the ratification of either of the parties, nor that of the exchange of ratifications, is expressly agreed upon as the time until which the claims and the statements of them to the Department of State, or to the Minister of the United States in Spain, had been received, which claims were, on the part of the United States, renounced by the 5th renunciation.

His reasoning is, that it could not have been the intention of the parties that they should renounce claims, or admit statements of them, not known to the party assuming the obligation at the time of contracting it; and the court here entirely concurs in that construction of the article. Whatever claims, therefore, might arise, or whatever statements of them might be made after the signature of the Treaty, were not within that provision, because they could not, with propriety, be provided for in any such stipulation.

Beyond all doubt it was an unliquidated claims for which provision was made, and neither party contracted that the other should determine their amount of validity, but the stipulation on the part of the United States was, that three commissioners should be appointed by the President, by and with the advice and consent of the Senate, and that the commissioners should determine the amount and validity of all such claims of our citizens.

Examined in the light of these suggestions we

concur in the views of Mr. Adams, as expressed in that dispatch, that "if anything in human intention can be made clear by human language, it is, that the claims provided for by the above stipulation were in the condition, as they had been exhibited, at the time of the Treaty." 1 Sen. Doc., 2d Sess. 18 Cong., 250.

VI. Transactions between the claimant and the Government of Spain, subsequent to the signature of the Treaty, could not be evidence to the commissioners of the condition of the claim at the time of that signature, and for that reason the court is of the opinion that the decision of the commissioners rejecting the claim, as expressed in that award, was correct. They did not reject the unliquidated claims of the appellant, as filed in the State Department, nor as presented to our Minister in Madrid before the Treaty was signed. 1 Rep. Com., 1st Sess. 20th Cong., No. 58.

Unambiguous as the decision of the commissioners is, there is no reason to suppose that the claimant was misled even for a moment. He knew that he had a right to present his claims to the commissioners as they existed at the time the Treaty was signed, but he elected to stand upon the claim as it was expressed in the award, and he must abide the result, as in the opinion of this court the decision of the commissioners that the award was not within the stipulations of the Treaty is correct.

Suppose all the preceding suggestions are correct, still the claimant insists that the judgment must be reversed on account of what appears in the fifth finding of the court. Unexplained, the court below there find as follows: (1) That the Cortes refused to annul the three grants in question until the United States should agree to pay and discharge in full the indebtedness of Spain to the deceased claimant, as recognized in the award of the Spanish commission. (2) That the United States, by their Minister at the Court of Madrid, gave to Spain "a clear and distinct assurance that the debt due to the claimant would certainly be paid to him by the United States if the Treaty was ratified, and the said grants were totally annulled." (3) That the Spanish Government, upon the faith of those assurances, annulled the grants and ratified the Treaty. (4) That the claimant duly notified the Government of the United States of these facts, and of the assurances so given by our Minister, and that the notice was duly received by the President, and was by him communicated to the Senate, at the same time that the advice of that body was asked the second time, as to the ratification of the Treaty. (5) That the United States, with full notice and knowledge of all the facts and circumstances set forth in that finding, did accept and assent to the Treaty as ratified by Spain, and became seized and possessed of the ceded territories.

Without stopping to show that the findings are contradicted by the testimony of our Minister, or that they are improbable in themselves, or that they are unsupported by any satisfactory evidence, we proceed at once to remark that the claimant is entitled to the full benefit of the rule that the facts found in the court below are to be regarded as in the nature of a special verdict. Grant all that, still the findings are subject to many criticisms.

By what means did the court become judicial? See **WALL**.

cially informed that the Cortes refused to annul the grants in question until the United States should agree to pay and discharge in full the award held by the claimant? Oral proof to that effect could hardly be obtained which would be of a satisfactory character, and if proof of that kind was not introduced, then the inquiry arises: upon what evidence does the finding rest?

Legislative bodies usually act by decree, resolution, order or vote, but nothing of the kind is referred to as existing in this case. Depositions of two witnesses were introduced to show that our Minister gave the assurances specified in the finding, but he states in his deposition that he does not remember that he ever gave any such assurances, and there is no reason to conclude that he ever intended to enter into any contract upon that subject. Who knows that the Government of Spain in deciding to annul those grants acted upon the faith of the assurances given by our Minister that the claims of the ancestor of the appellant would be paid in full, as expressed in the award made long after the Treaty was signed; and if no one is able to give testimony to that effect, by what means was the conclusion formed? Tested by these or any similar considerations, it is easy to see that the several conclusions embraced in the 5th finding are conclusions of law rather than conclusions of fact, as they depend mainly, if not entirely, upon the construction of public Acts, diplomatic dispatches, and Treaty stipulations.

Regarded in that light, the finding of the court below may be re-examined here on appeal, but it is not necessary to rest the decision in this case upon that ground, as by the very terms of the finding it appears that the assurances which it is supposed misled the Cortes were given by our Minister, and there is no evidence whatever that in giving the assurances he acted in pursuance of any instructions from the President or by virtue of any authority from the United States. Negotiations are usually conducted under instructions from the President, and the provision of the Constitution is that "he (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."

Such an assurance as that supposed could not be given by any Minister of the United States, except upon the condition that it should become a Treaty stipulation, and as such be subject to the approval of the President and be ratified by the Senate, as required by the Constitution.

Even if the finding had any foundation in fact, it is clear that the act of our Minister in giving the assurances was wholly without authority, and that the act was null and void, which must have been known to the Spanish Government and to the claimant.

VII. Examination will next be made of certain other complaints made by the appellant, as exhibited in the 8th finding of the court below. The substance of that finding is as follows: (1) That the claimant, on the 7th of April, 1823, and before the commissioners under the Treaty rejected his claim as founded upon the award, requested the United States to procure from the Spanish Government his original vouchers and evidences of indebtedness; that the United States made the demand as

requested, but that the Spanish Government positively refused to comply with the request, upon the ground that the award was a judicial decree and was final and conclusive. (2) That the Spanish Government did subsequently assure the United States that the vouchers and documents would be given up, but that the same never were produced, and have ever since been, and still are, withheld. (3) That by reason of such refusal and neglect on the part of Spain, the commissioners never considered or allowed his claim; that they allowed the claims of other persons, existing prior to the Treaty, to an amount greater in the aggregate than the \$5,000,000 provided by the Treaty, and that the commission, after making those awards, expired.

Regarded in the most favorable light, the facts stated in the finding do not show any ground of action against the United States: (1) Because it appears that the claimant never presented to the commissioners his unliquidated claims as they were filed in the State Department, or as they existed at the time the Treaty was signed. (2) Because the finding does not show that he ever intended to present his claims in that form to the commissioners, nor that he was prevented from so doing by the neglect and refusal of that government to produce his original vouchers and documents. (3) That even if the finding did show that he intended to present his claims in that form, and that he was injured by the alleged neglect and refusal, still the admission would not benefit the appellant, as the finding, with that admission superadded, would not show any cause of action against the United States within the Acts of Congress conferring jurisdiction upon the Court of Claims, as it would not show a claim founded upon any law of Congress or upon any regulation of an Executive Department, nor any claim founded upon any contract, express or implied, with the Government of the United States.

VIII. Some consideration must also be given to certain general propositions submitted by the appellant as tending to bring his case within the scope of an implied contract.

1. He contends that the United States had no power to release Spain from her obligations due to the ancestor of the appellant, without his assent, except upon the condition of making him just compensation for his claims.

Special examination of that topic, or of its conditions and qualifications, is not necessary, as the case before the court comes within the rule, as conceded by the appellant, as his ancestor did submit his claims to the Department of State for that protection which his Government might think proper to grant; and the finding of the court below is that the claimant, both before and after the date of the Treaty, did invoke the aid of the United States in collecting his claims, both those arising on contracts and those arising from personal injuries. 2 Rep. Com., 1 Sess. 22d Cong., No. 316; 3 Sen. Doc., 1 Sess. 19th Cong., p. 66; *De Bode v. The Queen*, 3 House L. Cas., 449.

2. Attempt is also made to maintain the proposition that the power which the claimant gave to the United States to make reclamations in his behalf became revocable by him after the six months fixed by the Treaty for the ex-

change of the ratifications had expired, but the proposition is wholly inadmissible, as the effect would be, that whenever any such misunderstanding should arise between the contracting parties, the negotiations might be controlled by a single claimant having some pecuniary interest in the treaty.

3. Next suggestion is that the act of the claimant in submitting his claims to the Spanish Commission operated as a full and complete revocation of the power he previously granted to the United States to adjust his claims, but the proposition is even less defensible than the preceding one, as it would enable one of the contracting parties, by making terms with a citizen of the other party, to avoid the obligation of fulfilling a treaty stipulation.

4. Remark upon the 6th finding of the court does not seem to be necessary, as what has been said in response to the 5th finding, furnishes a full answer to every deduction made from it by the claimant. This award was made long after the Treaty was signed, and the claim in that form never was included in the 5th renunciation. In his memorial he requested that a new article might be added to the Treaty, making provision for the payment of his claim as expressed in the award, or that the 5th renunciation might be expunged; but the request was not granted, nor could it have been in the alternative form without defeating, in all probability, the whole arrangement.

Entitled, as the claimant clearly was, to prove his unliquidated claims before the commissioners, it is much to be regretted that he did not seasonably come to the conclusion to adopt that course and avail himself of the plain right secured to him by the Treaty. His error in that behalf increased the equation to other claimants, and now his only remedy is by an appeal to the equity of Congress.

Under the circumstances, one or two observations upon the conclusions of law certified by the court below will be sufficient. We do not concur in the first nor the second finding, except that part of it where the court say that the decision of the commissioners, appointed by the United States, dismissing the claim was final and conclusive, and bars a recovery upon the merits in that court. We concur also in the third conclusion of law, and direct that the judgment be affirmed.

Cited—17 Wall., 444.

J. LOBRANO, *Plff. in Err.*,

v.

J. NELLIGAN.

(See S. C., 9 Wall., 295-298.)

Power of Legislature over infants' estates—state statute in regard to.

The Legislature possesses the power to determine by law the manner in which the estates of infants shall be preserved, and to say what kind of security shall be given by those who are intrusted with their management.

It has the power of altering the law on the subject whenever, in its judgment, the interest of the minors or the public good requires that it should be done.

There is no right of complaint, if the Legislature, in varying the nature and extent of the security, takes care that the property is preserved.

A state statute changing such security does not violate any contract, as there is no contract to violate in such case.

[No. 118.]

Argued Mar. 10, 1870. Decided Mar. 28, 1870.

IN ERROR to the Supreme Court of the State of Louisiana.

This case was brought on July 8, 1861, in one of the courts of the State of Louisiana, by the defendant in error, to recover the purchase money for certain lots. The court having entered judgment in favor of the defendant, an appeal was taken to the Supreme Court of the State, where the said judgment was reversed, and judgment given for the plaintiff for \$915.27, with interest and costs. Thereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. Thomas J. Durant, for plaintiff in error:

The defendant in error brought suit in the Fifth District Court of New Orleans, claiming from J. Lobrano, plaintiff in error, \$915.27, the amount of a cash installment of the price of certain real estate in New Orleans, which had been adjudicated at public auction to Lobrano, but which the latter refused to take and comply with his bid.

To this petition Lobrano answered, that he was not bound to take the property and pay the price, since the property was burdened with a legal mortgage in favor of minor children, of a greater amount than the value of the property, and that the Act of the Legislature by which it was pretended that such mortgage had been raised and cancelled was unconstitutional, null and void.

And the Fifth District Court of New Orleans gave judgment in favor of the defendant there, the plaintiff in error here.

From that judgment, Nelligan, defendant in error here, appealed to the Supreme Court of Louisiana.

The judgment of the Supreme Court of Louisiana in favor of the validity of the Act of the Legislature of that State of 16th March, 1859, is erroneous, on the ground that this Act is repugnant to the Constitution of the United States.

"No state shall pass any law impairing the obligations of contracts." U. S. Const., Art. 1, sec. 10, sec. 1.

In Louisiana, the father gives no security for the fidelity of his administration of the minors' property. Civ. Code La., art. 330.

The property of the tutor is tacitly mortgaged in favor of the minor from the day of the appointment of the tutor, as security for his administration, and for the responsibility which results from it. Civ. Code La., arts. 3, 279, 354.

The tutor and minor stand in relation to one another as parties to a contract of the species where the obligation is contracted by the obligor (tutor), without any express agreement on the part of the obligee (minor); such as are imposed by the sole authority of the law.

See Civ. Code, La., art. 2,271; see Toullier, *tit. 8, tit. 4*, vol. 11, p. 2; see Marcade 234.

The mortgage is a legal right on the property bound for the discharge of the obligation.

See 9 WALL.

La. Civ. Code art. 8250; art. 8254; art. 3279; art. 3288.

The Act of the Legislature of Louisiana impaired the obligation by relieving the property of James Robb from the mortgage, and leaving the minors without security.

8 Story, Const., 250, sec. 1379; *Rowlett v. Shepherd*, 4 La., 94; *Sabatier v. His Creditors*, 6 Mart. (N. S.), 588.

Mr. J. P. Horner, for defendant in error:

The court did not, necessarily, consider the Constitution of the United States.

The article of the Constitution of Louisiana is not similar to that of the Constitution of the United States; that of Louisiana provides: "No *ex post facto* law, nor law impairing the obligation of contracts, shall be passed, nor vested rights devested, unless for purposes of public utility and for adequate compensation previously made." That of the United States provides: "No State shall pass any law impairing the obligation of contracts." Under these constitutional provisions, a law may be antagonistic to the Constitution of the State, and not to that of the United States. In the case of *Charles River Bridge v. Warren Bridge*, 11 Pet., 540, the court said: "It is clear that this court has no right to pronounce an Act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it devests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws. See, also, *U. S. v. Jones*, 8 Pet., 418; *Watson v. Mercer*, 8 Pet., 110.

The writ of error should be dismissed.

The Victory, 6 Wall., 384 (78 U. S., XVIII., 849); *Ham. Mfg. Co. v. Mass.*, 6 Wall., 636 (78 U. S., XVIII., 906; *Rector v. Ashley*, 6 Wall., 142 (78 U. S., XVIII., 733).

If a law that changes or destroys a privilege be not a law impairing the obligation of contracts (Civ. Code, 3153) neither can that which alters, amends or destroys a tacit mortgage, be a law impairing the obligation of contracts. A tacit mortgage arises from a statute, and so does a privilege. Neither can arise from the will of contracting parties.

See *Stocking v. Hunt*, 3 Den., 274; *Tarpley v. Hamer*, 9 Sm. & M., 313; *Jackson v. Lamphire*, 3 Pet., 280; 7 La., 301; *McCracken v. Hayward*, 2 How., 608; *Oriental Bank v. Freese*, 18 Me., 112; 29 Miss., 186.

Mr. Justice Davis delivered the opinion of the court:

The only question for discussion in this case relates to the power of the Legislature of Louisiana to authorize James Robb to sell his real estate, free from the tacit mortgage in favor of his minor children. By the Civil Code of that State, the father is the administrator of the estate of his minor children, and does not, as in communities where the common law prevails, give personal security for the fidelity of his administration, but his immovable property is tacitly mortgaged in favor of the minor from the day of his appointment, as security for his administration and for the responsibility resulting from it.

In this condition of the general law on this subject, the Legislature empowered James

Robb, of New Orleans, to sell his real estate under certain conditions, and directed so much of the proceeds of the sale as should be coming to his children to be invested for their benefit, subject to the approval of the Probate Court, in certain species of security which could not be assigned nor transferred until the termination of the administration. Power was given to the court to discharge the mortgage to the children on compliance with the conditions imposed in the Act, which was done before the sale in controversy.

It is contended that the statute authorizing Robb to sell is invalid, because it impaired the obligation of a contract; but we think this a mistaken view of the subject. It is certain there was no contract to violate, which the parties themselves had any hand in making, and the inquiry arises whether the law has made one for them which has been impaired by this statute. It will not be questioned that the Legislature possesses the power to determine by law the manner in which the estates of infants shall be preserved, and to say what kind of security shall be given by those who are intrusted with their management, and, if so, as a necessary consequence, it has the power of altering the law on the subject, whenever in its judgment the interest of the minors or the public good requires that it should be done.

In most of the States of the Union the guardian of the property of a minor gives bond with personal securities, for his faithful conduct; but in Louisiana, in case the father occupies that relation, a different security has been provided, for his entire real estate is bound for the proper discharge of his trust. The security is called a tacit mortgage, which is nothing more than a regulation by law to assure the property of the minor in the custody of the parent against loss. The Legislature thought proper to adopt this measure of protection as a general policy on the subject to which it relates, and as there is no constitutional restraint on its action in this regard, it can change or modify this policy whenever it thinks proper to do so. And it has so far modified it, that the natural tutor of his minor child can at any time remove the general lien on his real estate, by executing a mortgage on a specific part of it, which he is at liberty to change to other property. This course of proceeding, authorized as early as 1830, must have been generally adopted, and although the security for the minor is actually lessened by it, as a part is taken in pledge where the whole was previously bound, it does not appear that the constitutionality of the statute has ever been questioned. The wisdom of the measure is apparent, for the public good requires that the power to alienate real estate should be restricted as little as possible, and this consideration doubtless induced the Legislature to depart from its original policy, which made the transfer of real estate, when owned by a parent whose minor children had property, very difficult.

The principle which allows a change of security at all, necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint, if the Legislature, in varying the nature and extent of the security, takes care that the property is preserved.

A contrary doctrine, if carried to its legitimate

conclusion, would seriously interfere with the ability of the Legislature to perform one of its most important duties. Charged as it is with the duty of preserving the estate of the minor, it could not change the character of the security, which it had at one period accepted as sufficient for the purpose, although it should turn out to be wholly inadequate to accomplish the object. It is not to be presumed the Legislature will lessen the security, except for good cause, nor jeopard by its course of action the estate of the minor, but, should such be the case, the corrective cannot be applied by this court.

By the statute in question, which was intended to benefit the minor children of James Robb, and was an indirect mode of investing their means, under legislative direction, a change of security has been effected and nothing more, and we cannot see how these minors, in the proper sense of the term, have been divested of any right in consequence of this change. Be this as it may, the Legislature never contracted with them, or with anyone in their behalf, not to use its power in this regard, and there being no contract to violate, there is no question in this case which this court can review.

The judgment of the Supreme Court of Louisiana is affirmed.

JOHN R. BIGELOW, *Plff. in Err.*,

v.

DOUGLAS F. FORREST.

(See S. C., 9 Wall., 339-353.)

Act of Congress in regard to Acts during rebellion, effect of—effect of Confiscation Act—took only life interest—who may sue under—
heir may sue.

The Act of Congress of Mar. 3, 1863, in regard to prosecutions for acts committed during the rebellion, does not apply to actions of ejectment.

It applies only to personal actions for wrongs done under authority or color of authority of the President of the United States, or of some Act of Congress.

There was no error in the state court in disallowing the removal of this action into the Circuit Court of the United States.

Under the Confiscation Act of July 17th, 1862, all which could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized.

Such decree only establishes a confiscation during the life of the one for whose offense the land is condemned and sold.

The persons, described in the 5th section of such Act, who are barred from bringing a suit for the possession or use of such property, are those and those only, whose property the President has caused to be seized.

The heir of one of such persons may, after his death, recover the lands so forfeited and sold.

[No. 120.]

Argued Mar 15, 1870. Decided Mar. 28, 1870.

IN ERROR to the Supreme Court of Appeals of the Commonwealth of Virginia.

This was an action of ejectment, brought by the defendant in error, in the Circuit Court of the County of Fairfax, Virginia, against the plaintiff in error.

The history of the case and a statement of the facts fully appear in the opinion of the court.

Messrs. W. Willoughby and Luke P. Poland, for plaintiff in error:

I. The court erred in denying the motion to remove the cause to the United States Circuit Court.

An Act of Congress, passed Mar. 3, 1868, and amendments thereto, provided that on such petition, properly made, such removal shall be ordered, and the state court shall not have jurisdiction to proceed further.

This is an action of trespass, claiming a wrong to have been committed.

But it was an act committed under color, at least, of an order given by authority of the President of the United States.

II. The decree of the District Court of the United States, condemning and confiscating all the right, title and interest of the original owner, is binding upon all but the appellate courts.

It does not appear in the record that there was any irregularity in the proceeding before the district court. Every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears.

Voorhees v. Jackson, 10 Pet., 449.

But even if it did appear that there were irregularities in the mode of proceeding, they could not be inquired into by a state court. It is only the jurisdiction of the United States District Court that can be assailed.

Jurisdiction of these cases is given to the district court. That court acquires jurisdiction by a seizure of the property. After such seizure all judgments, sentences and decrees affecting the property so seized, are conclusive upon all the world from the time of such seizure, and no proceeding can be avoided for any subsequent irregularity.

4 Cranch, 378, 396; 7 Cranch, 428; 5 Cranch, 184; 3 Binn., 220; 1 Paine (C. C.), 626; *The Bolivia and Cargo*, 1 Gall., 81, 83; 3 Para. Merc. L., 535; 3 Pet., 193; 1 Wall., 634 (68 U. S., XVII., 697); 2 Wall., 843 (69 U. S., XVII., 873); 9 Pet., 8; 1 Pet., 840; 6 Pet., 729; 2 How., 338.

It is true that there was no personal service of process on the original owner, and no service of process except by publication; but jurisdiction did not depend upon that fact. This being a proceeding *in rem*, jurisdiction attached by the seizure of the property. From the time of such seizure no proceedings, however irregular or erroneous, can be corrected in this way.

Slocum v. Mayberry, 2 Wheat., 1; *Gelston v. Hoyt*, 3 Wheat., 246.

It is absurd to say that personal service should be made upon a person within the lines of the enemy. It does not appear in this case whether there was a trial by jury. If that mode of trial is proper, the presumption must be that there was such a trial.

The Sarah, 8 Wheat., 891; *Armstrong's case*, 6 Wall., 766 (78 U. S., XVIII., 862).

III. The defendant in error, plaintiff in the suit in the court below, is admitted to have been one of the persons described in section 5 of the Confiscation Act, and the facts show him to have been one also of the persons described in section 6 of such Act. In both of these sections, the Act declares that "It shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, See 9 WALL.

U. S., Book 19.

or any of it, to allege and prove that he is one of the persons described in this section."

No amount of argument could make this point clearer than this statement in the law itself. It is positive, unequivocal and completely decisive of this whole case.

Nor was it necessary that this fact should have been pleaded specially or in abatement.

Virginia Code of 1860, ch. 135, sec. 18.

The Act under consideration is in all its parts constitutional.

Its object is to raise money for the purpose of applying the same for the support of the Army of the United States.

The land was in territory held by those who have been held to be public enemies. The defendant in error and the original owner were both in actual arms against the government.

The lives, liberty and property of public enemies lie at the mercy of the conqueror.

1 Kent, Com., 96; Vat. L. Nat., b. 3, chaps. 8, 9, 13; *Ware v. Hilton*, 3 Dall., 199; see, also, *Cooper v. Telfair*, 4 Dall., 14; *Smith v. M^r*, 6 Cranch, 286.

The decree of the district court confiscating all the right, title and interest of the original owner, was fully authorized by the law.

This is not a proceeding in the nature of a bill of attainder.

The constitutional limitation upon bills of attainder does not apply to proceedings in courts, in individual cases, where there are regular trials and formal proceedings in which the individual has full opportunity to defend.

The last clause of the Joint Resolution, explanatory of the Confiscation Act, was passed out of abundant and I think superfluous caution, to keep the Act within the limits of the Constitution.

Certainly, it was not designed to fall short of the power given by the Constitution.

Any other construction of the real intention of Congress than that we give it, would defeat the very object of the bill, which was to raise money for the support of the army. In any event, the tenure of a mere life estate would be so uncertain, that but very little money could be raised upon it.

Such a construction should not be given to an Act of Congress, if it is possible to give any other reasonable view of its intention.

See opinion of Judge Underwood in *U. S. v. Latham*, found in McPherson, Hist. Rebellion, 206.

The word "forfeiture" is always spoken of as referring to all the interest a man has in property. It is one of the modes of absolute conveyance of real estate, and the word is never used in any other legal sense.

2 Bl., 267.

Messrs. Lawrence B. Taylor and Conway Robinson, for defendant in error:

The 12th section of the Act of Congress of 1789 did not prohibit the state court from proceeding further in the cause.

Parker v. Overman, 18 How., 141 (59 U. S., XV., 319); *Livingston v. Gibbons*, 4 Johns. Ch., 98; *West v. Aurora*, 6 Wall., 141 (73 U. S., XVIII., 820).

As to the Act of March, 1863, it may be observed, in the language of the Supreme Court of Massachusetts, that "It was passed Ma-

grante bello and without a due consideration of the independence of the state courts."

Wetherbes v. Johnson, 14 Mass., 419.

Provisions of the Act other than those there discussed, have in more recent cases been held unconstitutional.

Ohio v. Bliss, 3 Grant, 427; *Jones v. Seward*, Id., 431; *Jones v. Seward*, 41 Barb., 277.

This case does not come within the same.

S. & L. R. R. Co. v. Boston & Lowell R. Co., 21 Law Rep., 210.

A suit cannot be removed to and proceeded in, in the Circuit Court of the United States, if it could not have been brought therein by original process.

Beardsley v. Torrey, 4 Wash. (C. C.), 288; *Den v. N. J.*, 4 Wash. C. C., 844; *Smith v. Rines*, 2 Sumn., 346; *Coghill v. Lawrence*, 2 Blatchf., 307; *Van Zandt v. Maxwell*, 2 Blatchf., 421; *Abranches v. Schell*, 4 Blatchf., 261; *Warner v. Fowler*, 4 Blatchf., 311; *Wood v. Matthews*, 23 Vt., 787; *Freeman v. Robinson*, 7 Ind., 328.

It is very clear that this is not within the meaning of the Act of March 3, 1863, a suit for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, by virtue or under color of any authority derived from or exercised "by or under the President of the United States." *Rives, J.*, though differing from the majority of the court in other respects, concurred on this point in *Martin v. Snowden*, 18 Gratt., 121.

On the merits the judgment must be deemed correct, and be affirmed, unless it appear to be erroneous by facts agreed and made part of the record, in the manner required by the decisions of this court.

Graham v. Bayne, 18 How., 60 (59 U. S., XV., 265); *Guild v. Frontin*, 18 How., 135 (59 U. S., XV., 290); *Suydam v. Williamson*, 20 How., 428 (61 U. S., XV., 978); *Kelsey v. Forsyth*, 21 How., 85 (62 U. S., XVI., 32); *Campbell v. Boyreau*, 21 How., 226 (62 U. S., XVI., 98); and it does not so appear.

On the contrary, supposing the court can look at the agreement between the parties, it distinctly appears that from French Forrest, who was seized in fee of the land in question, the right in fee did, on his death, descend to the plaintiff in ejectment, without any diminution by reason of the Marshal's sale, the right under which could not continue beyond the life of French Forrest; for not only is it provided by the Constitution (art. 3, sec. 3, clause 2), that "No attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted," but it is part of the history of the legislation of July, 1862, that the President prepared the draft of a message objecting to provisions that might result "In the divesting of title forever;" that before his message was presented to Congress, a Joint Resolution was passed to remove his objections; that this Resolution expressly provides, "Nor shall any punishment or proceedings under said Act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

Although the Act said that the party "Shall forfeit all his lands," yet they said what lands he had, "Ought to appear by record, and is not

matter of averment; which is not sufficient; for words without a record are not allowable to entitle the King;" but his title, in cases of treason, ought always to appear by record; and where it does not appear by record, what certain land the parties attainted had, the common law will never adjudge the freehold in deed or in law, of any land to be in the King, until office found.

Nichols v. Nichols, Plowd., 486.

This has been repeatedly recognized.

Winchester's case, 3 Co., 2 a; case of *Alton Woods*, 1 Coke, 26.

The cases show that conviction is not enough where there is no attainder.

Rea v. Willes, 8 B. & Ald., 510; *Rea v. Bridger*, 1 Mees. & W., 145; Tyrw. & Gr., 487.

That there must be some further act.

Doe v. Evans, 5 B. & C., 584.

That, even in case of attainder, an estate of freehold is not divested without office found; that an action of ejectment may be maintained upon the demise of a person actually attainted.

Doe v. Prichard, 5 B. & Ad., 781; S. C., 2 Nev. & M., 489.

But if the Act of Congress admits of such a construction as is contended for, it was passed without authority. According to that common law which is our birthright, forfeiture of real estate for crime, though that crime be treason, does not precede, but is a mere consequence of attainder.

4 Bl. Com., 881; *Hales v. Pettit*, Plowd., 260; *Leicester v. Heydon*, 4 Bl. Com., 890.

The matter appears still plainer when the Amendments to the Constitution, especially articles 4, 5, 6, 8, are looked to—articles which provide that a person is not to be deprived of his property, "without due process of law;" nor held to answer for the act, alleged to be crime, unless on a presentment or indictment of the nature and cause of the accusation; unless on a presentment or indictment of a grand jury; that he has a right to be informed through such presentment or indictment of the nature and cause of the accusation; and "The right to a speedy and public trial by an impartial jury."

Ex parte Milligan, 4 Wall., 119 (71 U. S., XVIII., 265); *Cummings v. Mo.*, 4 Wall., 320, (71 U. S., XVIII., 362); *Ex parte Garland*, 4 Wall., 377 (71 U. S., XVIII., 369); *Martin v. Snowden*, 18 Gratt., 133, 134; *Norris v. Doniphan*, 12 Am. L. R., 171 (4 Met. Ky., 385).

Such presentment or indictment, such distinct allegation of the nature and cause of the accusation as the Constitution contemplates, might have been fully answered by the plea of pardon or amnesty.

Const. U. S., art. 2, sec. 2, clause 1; *Armstrong's Foundry*, 6 Wall., 766 (73 U. S., XVIII., 882); *U. S. v. Hart*, 6 Wall., 770 (73 U. S., XVIII., 884).

The District Court of the United States had no jurisdiction to make such decree as it made Nov. 9, 1863. Judge Washington distinguishes such cases from one not of admiralty jurisdiction.

"If the object be to punish the offender in his person or property generally," he does not question but that the trial "must be by jury."

Clark v. U. S., 2 Wash. (C. C.), 523; *The Samuel*, 1 Wheat., 14; *The Octavia*, 1 Wheat.,

20; *The Sarah*, 8 Wheat., 891; 1 Stat. at L., 76, sec. 9; 1 Bright. Dig., 231, sec. 11.

Accordingly, there was a right to such trial in cases under the Act of Aug 6, 1861.

Union Ins. Co. v. U. S., 6 Wall., 763 (78 U. S., XVIII., 879); *Armstrong's Foundry*, 6 Wall., 769 (78 U. S., XVIII., 884); *St. Louis Street Foundry*, 6 Wall., 770 (78 U. S., XVIII., 884).

Mr. Justice Strong delivered the opinion of the court:

This was an action of ejectment originally brought by Douglas F. Forrest, in the Circuit Court for the County of Fairfax, Virginia, against John R. Bigelow, the defendant below, now plaintiff in error. The defendant having pleaded two issues on the 8th day of November, A. D. 1867, filed his petition for the removal of the cause into the Circuit Court of the United States, under the provisions of the 5th section of the Act of Congress of March 8d, 1863 (13 Stat. at L., 766), entitled "An Act Relating to *Habeas Corpus* and Regulating Judicial Proceedings in Special Cases." The prayer of the petition was denied, and by agreement of the parties a case was stated in the nature of a special verdict, upon which the court gave judgment for the plaintiff. A petition was then presented to the District Court of Appeals praying for a writ of *supersedeas* to the judgment, and assigning as error that the Circuit Court denied the motion to remove the cause into the Circuit Court of the United States upon the petition which had been filed for such removal, and also that the judgment was not warranted by the facts found in the agreement made in lieu of a special verdict, and that it was against the law and the evidence. The District Court of Appeals, however, being of opinion that no error had been committed in the cause by the Circuit Court of Fairfax County refused the *supersedeas*. A petition was then presented by the defendant to the Supreme Court of Appeals of the State, complaining of the action of the District Court of Appeals, and praying for a writ of *supersedeas* to the judgment, assigning the same errors which he had assigned in his petition to the district court. The application to the Supreme Court was unsuccessful. The *supersedeas* was denied, and thereupon this writ of error has been sued out.

The first question presented by the record for our consideration is whether there was error in the refusal of the State Circuit Court to allow a removal of the cause into the Circuit Court of the United States; for if there was not, there is no ground for complaint that the Supreme Court of Appeals had denied a *supersedeas* to the judgment because the removal prayed for had not been allowed.

The Act of Congress of March 8d, 1863, under which the right to remove the cause was claimed, and under which the right existed, if it existed at all, enacted in its 5th section, that if any suit or prosecution, civil or criminal, had been or should be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done, or committed, or any act omitted to be done, at any time during the then existing rebellion, by virtue or under color of any author-

ity derived from or exercised by or under the President of the United States, or any Act of Congress, the defendant might effect the removal of the cause into the Circuit Court of the United States holden in the district where the suit might be pending. The Act prescribed the course to be pursued in order to stay the proceedings in the state court and transfer the cause into the federal tribunal. It must be conceded that the plaintiff in error complied with the requisitions of the statute and its supplements respecting the form of procedure for a removal of his cause. It remains, therefore, only to inquire whether the action was one which, under the Act of Congress, could be removed. It was an action of ejectment, commenced on the first of April, 1867, in which the plaintiff averred seisin in himself on the first day of January, 1867, and an entry by the defendant upon the land on the same day, and a withholding of the possession. It might, perhaps, be sufficient to say that the act complained of, for which the suit was brought, was not, as described by the statute, "an arrest or imprisonment made," or "other trespass or wrong done or committed," or "an act omitted to be done during the rebellion." It is to suits for acts done or omitted to be done during the rebellion exclusively that the statute is applicable, and prior to January 1st, 1867, the rebellion had ceased to exist.

But we do not rest our judgment upon so narrow ground. In our opinion, the statute was not intended to apply to actions of ejectment. It is manifest to us that Congress had in view only personal actions for wrongs done under authority or color of authority of the President of the United States, or of some Act of Congress. The 4th section made any order of the President, or under his authority, a defense in all courts to any action, civil or criminal, pending or to be commenced, for any search, seizure, arrest or imprisonment made, done or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress. The description of the causes of action mentioned in the 5th section is slightly different, not quite so detailed and specific, but it is evident that they were intended to be the same in both sections, as well as in the 7th, which prescribed a statutory limitation to suits and prosecutions. The specification, which all of these sections contain, of arrests and imprisonments, or, as in the 4th section, of searches, seizures, arrests and imprisonments, followed by more general words, justifies the inference that the other trespasses and wrongs mentioned are trespasses and wrongs *ejusdem generis*, or of the same nature as those which had been previously specified. This construction is fortified by the consideration that the mischief against which the statute was intended to guard was manifestly the excitement and prejudice so likely, in times of intense popular feeling, to attend suits in local courts for personal wrongs; excitement and prejudice which might render a fair trial difficult, and which might, indeed, greatly embarrass the government. The same mischiefs, in the same degree, could hardly have been expected to attend the trial of possessory actions for real estate. The action of ejectment is not a personal action, and it appears to us not to be embraced in any of the classes mentioned in the 4th, 5th and 7th sections of the Act.



It follows that there was no error in disallowing the removal of this case into the Circuit Court of the United States.

We proceed next to inquire whether there was error in the judgment of the court upon the merits of the case. The plaintiff below claimed the land as the sole heir of his father, French Forrest, who had been the owner down to September 1st, 1863, and who died intestate on the 24th day of November, 1866. The defendant claimed as a purchaser under a decree of confiscation made by the District Court of the United States for the Eastern District of Virginia, on the 9th day of November, 1863. French Forrest, the father of the plaintiff, was an officer in the navy of the Confederate States from July 1st, 1862, until April, 1865. In September, 1863, under the Act of Congress of July 17th, 1862, known as the Confiscation Act (12 Stat. at L., 559), the land in controversy was seized as his property, libeled in the District Court of the United States, and, on the 9th of November next following, a decree of condemnation was entered, and the land was ordered to be sold by the Marshal. Whether there was a *renditioni exponas* issued, as was ordered by the court, does not appear from the case stated (to which alone we can look for the facts), except that the Marshal's deed recites its issue. We may assume that there was. The property was sold at the Marshal's sale and a deed was made to the purchasers. Subsequently, and before the institution of this suit, the entire interest acquired by the purchase became vested in Bigelow, the defendant. But what was that interest?

The 5th section of the Confiscation Act of July 17th, 1862, enacted that it should be the duty of the President of the United States to cause the seizure of all the estate and property, moneys, stocks, credit and effects of certain persons described in six classes, and to apply and use the same and the proceeds thereof for the support of the army. To one or more of these classes French Forrest belonged. That it was not intended the mere act of seizure should vest the property seized in the United States is plain from the provisions of the 7th section, which enacted that to secure the condemnation and sale of any such property, after the same shall have been seized, proceedings *in rem* should be instituted in a district court, and that if it should be found to have belonged to a person engaged in rebellion, or who had given aid or comfort thereto, it should be condemned as enemy's property, and become the property of the United States, and that it might be disposed of as the court might decree. Concurrently with the passage of this Act, Congress also adopted a Joint Resolution (12 Stat. at L., 627) explanatory of it, whereby it was resolved that no punishment or proceedings under the Act should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. It is a well known fact in our political history that this resolution was adopted in consequence of doubts which the President entertained respecting the power of Congress to prescribe a forfeiture of longer duration than the life of the offender. Be this as it may, the Act and the Resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the prop-

erty of the United States, or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized. It follows, then, that the estate acquired by the purchaser at the Marshal's sale expired on the 24th day of November, 1866, when French Forrest died.

It is argued, however, on behalf of the plaintiff in error, that the decree of confiscation in the District Court of the United States is conclusive that the entire right, title, interest and estate of French Forrest was condemned and ordered to be sold, and that as his interest was a fee simple; that entire fee was confiscated and sold. Doubtless, a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the Act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so it would have transcended its jurisdiction. And it attempted no such thing. The decree made has not that meaning. It is true, the cause in the district court was entitled, "United States against all the right, title, interest and estate of French Forrest in and to all that certain piece, parcel, or lot of land" (describing it); but all this is descriptive, not of quantity of estate, but of the subject of seizure, and that was land. The proceeding was required by the Act of Congress to be *in rem*, and the decree condemned, not the estate of French Forrest, but, using its own words, "the real property mentioned and described in the libel." The Marshal was ordered to sell the said property, the boundaries of which were given in the title to the decree. Had the purchasers looked at that decree (and knowledge of it must be attributed to them), they would have seen that it was a decree of confiscation of the land, and they were bound to know its legal effect. It is, therefore, a mistake to argue that the plaintiff below was permitted to impeach collaterally the decree under which the Marshal's sale was made, or that the judgment of the court in this case impeaches it. The argument assumes, what cannot be admitted, that the decree of the district court established a confiscation reaching beyond the life of French Forrest, for whose offense the land was condemned and sold.

It has been further argued on behalf of the plaintiff in error, that the plaintiff below was barred against maintaining his suit by the latter clause of the 5th section of the Act of 1862, which enacted that it shall be a sufficient bar to any suit brought by such person for the possession or use of such property or any of it, to allege and prove that he is one of the persons described in the section. The agreed statement of facts, in lieu of a special verdict, finds that the plaintiff is one of the persons described in said section 5th; but it immediately explains this by adding, "that is to say, he acted as an officer of the army and navy of the so called Confederate States from and after the passage of said Act until April, 1865." Was he, therefore, barred from maintaining the ejectment? The land was not seized or condemned for any act of his. He had no interest in it when it was declared forfeited. He could not have been heard in opposition to the decree of for-

feiture. That proceeding was wholly *inter alias partes*. If, therefore, he is not at liberty to assert his claim, he is denied the right to his property without trial, without any procedure in due course of law, and the practical effect of the bar is to assure to the purchaser at the Marshal's sale the enjoyment of the property after his right has expired, and to give him by estoppel a greater estate than he purchased. No construction of the Act of Congress that works such results can be accepted. It is plainly against the true meaning of the Act. We have already remarked that the Act and the contemporaneous resolution must be construed together. The latter declares that the Act shall not be construed to work a forfeiture of the real estate of the offender beyond his natural life. It can do this neither directly nor indirectly. The punishment inflicted upon him is not to descend to his children. His heritable blood is not corrupted. It is, of course, necessary to give such an interpretation to the words of the statute that they shall not contravene the declared intent of Congress. And this may be done and effect given to every part, by holding that the persons described in the 5th section, who are barred from bringing a suit for the possession or use of such property, are those, and those only, whose property the President has caused to be seized. Such we think is the meaning of the clause barring suits.

This is all that need be said of the case. It is enough to show that, in our opinion, none of the errors assigned have any real existence. We do not care to speculate upon the anomalies presented by the forfeiture of lands of which the offender was seised in fee, during his life and no longer, without any corruption of his heritable blood; or to inquire how, in such a case, descent can be cast upon his heir, notwithstanding he had no seisin at his death. Such speculations may be curious, but they are not practical, and they can give no aid in ascertaining the meaning of the statute.

Judgment affirmed.

Cited—10 Wall., 25, 224; 11 Wall., 321; 13 Wall., 160, 177; 20 Wall., 115; 91 U. S., 57; 93 U. S., 211; 95 U. S., 233; 96 U. S., 229; 106 U. S., 8; 109 U. S., 266; 2 Dill., 556; 90 Ill., 483, 499; 1 Hughes, 567; 12 Am. Rep., 430, 422 (7 Kan., 131-136); 15 Am. Rep., 11 (111 Mass., 72); 19 Am. Rep., 220 (60 N. Y., 578).

THE FIRST NATIONAL BANK OF LOUISVILLE, *Pf. in Err.*,

v.

THE COMMONWEALTH OF KENTUCKY.

(See S. C., 9 Wall., 353-364.)

Government securities not taxable—shares in banks taxable—Kentucky law—banks may pay tax on shares.

When the capital of a bank is invested in the securities of the government, it cannot be taxed.

The shareholders of a bank may be taxed by the States on shares so held by them, although all the capital of the bank be invested in federal securities.

The revenue law of Kentucky, which imposes a tax on bank stock, is a tax on the shares of the stockholders.

NOTE.—*Power of States to tax. Taxation of shares in national banks and of other corporations.* See note to *Prov. Bk. v. Billings*, 29 U. S. (4 Pet.), 514, and note to *Dobbins v. Erie Co.*, 41 U. S. (16 Pet.), 435.

See 9 WALL.

It is not to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders.

A question that was not raised in the court below cannot be raised here.

[No. 103.]

Argued Mar. 4, 1870. Decided Mar. 28, 1870.

IN ERROR to the Court of Appeals of the State of Kentucky.

A petition was filed in the Franklin Circuit Court, State of Kentucky, by the plaintiff in error, to recover judgment for the amount of a certain tax. Upon a demurrer to the said petition, the said court entered a decree dismissing the petition. The plaintiff then took an appeal to the Court of Appeals of that State, by which court the said decree was reversed, and thereupon the defendant sued on this writ of error.

A full statement of the case appears in the opinion of the court.

Messrs. Pirtle and Caruth and John A. Wills, for plaintiff in error:

A tax on the capital stock of plaintiff in error cannot be collected.

First. Because of its investment in government bonds. It is alleged in the 8d paragraph of the answer and admitted by the State, that the entire capital stock in the plaintiff in error is now and has been ever since its organization, invested in government bonds and securities.

A tax upon the capital stock is a tax upon the bonds and securities of which it is exclusively composed. No tax can be imposed by the law or authority of any State, upon the bonds in which the capital of plaintiff in error is invested, nor upon any person, society or corporation in the relation of owner of said bonds; yet this would be done by taxing the capital stock of plaintiff in error.

These doctrines are well settled by adjudged cases in this and other courts.

Weston v. Charleston, 2 Pet., 449; *Bk. Commerce v. Com.*, 2 Black, 620 (67 U. S., XVII., 451); *People v. Com.*, 2 Wall., 900 (69 U. S., XVII., 793); *Whitney v. Madison*, 28 Ind., 381.

Second. Because of its character as an agency and instrument of the powers of the Federal Government. This is no open question. The powers, agents and means employed by Congress to carry into effect the powers vested by the Constitution in the Federal Government, must be free from state taxation and control. Such protection is necessary to uphold the Nation's credit and to preserve the Nation's life. It is settled by adjudged cases in this court, that the plaintiff in error, as a Bank in its corporate capacity, cannot be made the subject of taxation by state law or state authority upon its franchise operations or capital stock, but that it is wholly exempt from such taxation by reason of its relation to the National Government as an agency or instrument in the exercise of its constitutional powers.

McCulloch v. Md., 4 Wheat., 316; *Osborn v. U. S. Bank*, 9 Wheat., 788; *Dobbins v. Com.*, 16 Pet., 435; *People v. Com.*, 28 N. Y., 204.

The tax imposed in this case upon plaintiff in error, is in substance and in fact a tax upon the operations of the Bank itself, and as such is emphatically condemned by the authorities we have just cited.

Can the law be enforced as a tax on the shares?

In delivering the opinion of the court below, the *Chief Justice* declares that the Act of Assembly relied on as imposing the tax herein, levies the tax on the shares and not on the capital stock. This is a mere declaration.

Suppose these laws do lay a tax simply on the shares of plaintiff in error, can it be collected? We insist that it cannot; because the manner of collecting the tax levied contravenes the National Currency Act, and makes it in effect a tax on the bank itself.

Such is the position of the Supreme Court of Pennsylvania, as taken in a case directly in point.

Markos v. Hartranft, etc., not yet reported.

A concession to the State of Kentucky, of the right to enforce the payment of the tax sued for herein, carries with it, necessarily, the right of the State to exact penalties from the Bank and its officers to secure its enforcement. This right, if conceded, may, and actually does, involve the destruction of these national agencies.

These laws are unconstitutional.

I. They levy a tax upon the capital stock of plaintiff in error, and not upon its shares. This is forbidden, because, 1. The entire capital stock is invested in bonds of the United States, and a tax on that is on the bonds composing it. 2. By reason of its relation to the government as one of its fiscal agents.

II. If, as held by the Court of Appeals, a tax on the shares, it cannot be collected: 1. Because the mode of collection is in contravention of the Currency Act, and renders it in effect a tax on the Bank itself. 2. Because the rate assessed is greater than that assessed on moneyed capital in the hands of individual citizens of Kentucky.

Messrs. Albert Pike and Robert W. Johnson, for defendant in error:

The tax sought to be avoided here is neither a tax on the bonds and securities of the government, nor a tax upon an instrument or agent of the government, unless it is the Bank itself that is taxed.

As the shares are not the property of the Bank, but of the shareholders, it is not the Bank which is taxed, unless that results as a consequence from the fact that the Bank is required to pay the tax for the shareholders. When an agent is required to pay the tax assessed against his principal on his principal's property, it is not the agent who is taxed. And if the agent in one case, and the Bank in the other, insists that he or it cannot rightfully be compelled to pay the tax, is not that a question as to the relations between the principal and his agent, and the Bank and its stockholders, and how far one may be made responsible for the other, which depends on the municipal law of the State, and as to which the state courts are the tribunals of last resort?

Mr. Justice Miller delivered the opinion of the court:

This is an action brought by the State of Kentucky in her own courts, against the First National Bank of Louisville, to recover the amount of a tax of fifty cents per share on the shares of its stock. The case resulted in a judgment in favor of the Commonwealth in the Court of Appeals, to which this writ of error is prosecuted.

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The suit is brought according to the practice of the courts of that State, by a petition setting forth the amount of the tax and claiming a judgment for the same. The answer by the same mode of practice, sets up four distinct defenses to the action. These are:

1. That defendant is not organized under the law of the State, but under the Bank Act of the United States, and is not, therefore, subject to state taxation.

2. That it has been selected and is acting as a depository and financial agent of the Government of the United States and, therefore, is not liable to any tax whatever, either on its Bank, its capital or its shares.

3. That its entire capital is invested in securities of the Government of the United States, and that its shares of stock represent but an interest in said securities and, therefore, are not subject to state taxation.

4. That the shares of the stock are the property of the individual shareholders, and that the Bank cannot be made responsible for a tax levied on those shares, and cannot be compelled to collect and pay such tax to the State.

In the several recent decisions concerning the taxation of the shares of the National Banks, as regulated by sections 40 and 41 of the Act of Congress of June 8d, 1864 (18 Stat. at L. 111), it has been established as the law governing this court that the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the Corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the States, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the Corporation be taxed as the owner of such securities.

On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the States on stock or shares so held by them, although all the capital of the bank be invested in federal securities, provided the taxation does not violate the rule prescribed by the Act of 1864.

It is not intended here to enter again into the argument by which this distinction is maintained, but to give a clear statement of the propositions that we have decided, that we may apply them to the case before us.

If, then, the tax for which the State of Kentucky recovered judgment in this case is a tax upon the shares of the stock of the Bank, and is not a tax upon the capital of the Bank owned by the Corporation, the first, second and third grounds of defense must fail.

There are, then, but two questions to be considered in the case before us:

1. Does the law of Kentucky, under which this tax is claimed, impose a tax upon the shares of the Bank, or upon the capital of the Bank, which is all invested in government bonds?

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2. If it is found to be a tax on the shares, can the Bank be compelled to pay the tax thus levied on the shares by the State?

The revenue law of Kentucky imposes a tax "on bank stock, or stock in any moneyed corporation of loan and discount, of fifty cents on each share thereof, equal to \$100 of stock therein, owned by individuals, corporations or societies."

We entertain no doubt that this provision was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the individual or corporation owning such shares, in the same manner as other taxes are collected from individuals. It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of \$100. These shares may, in the market, be worth a great deal more or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but the tax is the same in each case. This shows that it is the share which is intended to be taxed, and not the cash or other actual capital of the bank.

It is said that there may be, or that there really are, banks in Kentucky whose stock is not divided into shares of \$100 each, but into shares of \$50 or other amounts, and that this shows that the Legislature did not intend a tax of fifty cents on the share, but a tax on the capital. But the argument is of little weight. What the Legislature intended to say was, that we impose a tax on the shares held by individuals or other corporations in banks in this State. The tax shall be at the rate of fifty cents per share of stock equal to \$100. If the shares are only equal to \$50 it will be twenty-five cents on each of such shares. If they are equal to \$500 it will be \$2.50 per share. The rate is regulated so as to be equal to fifty cents on each share of \$100.

But it is strongly urged that it is to be deemed a tax on the capital of the Bank, because the law requires the officers of the Bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State, of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholders. If the State cannot require of the Bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some Act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject.

See *U WALL*.

But it is argued that the banks, being instrumentalities of the Federal Government, by which some of its important operations are conducted, cannot be subjected to such state legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from that state taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, 4 Wheat., 316, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agents of the Federal Government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal Government are only exempted from state legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the Government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal Government authorizes the tax.

If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could, undoubtedly, collect the claim by legal proceeding, in which the bank could be attached or garnished, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no

greater interference with the functions of the Bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government.

A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit state taxation to the shares of the Bank, as distinguished from its capital, and to provide against a discrimination in taxing such Bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy.

It is said here in argument that the tax is void because it is greater than the tax laid by the State of Kentucky on other moneyed capital in that State. This proposition is not raised among the very distinct and separate grounds of defense set up by the Bank in the pleading. Nor is there any reason to suppose that it was ever called to the attention of the Court of Appeals, whose judgment we are reviewing. We have so often of late decided, that when a case is brought before us by writ of error to a state court, we can only consider such alleged errors as are involved in the record, and actually received the consideration of the state court, that it is only necessary to state the proposition now. As the question thus sought to be raised here was not raised in the Court of Appeals of Kentucky, we cannot consider it.

The judgment of that court is affirmed.

Dissenting, *Mr. Chief Justice Chase.*

Cited—9 Wall., 477, 590, 591; 18 Wall., 36, 230; 94 U. S., 538; 95 U. S., 687; 101 U. S., 156; 1 Dill., 321, 322; 3 Dill., 334; 5 Bank. Reg., 249; 3 Cliff., 352; 75 N. Y., 36; 76 N. Y., 76; 10 Am. Rep., 441, 446 (5 N. Y., 96); 19 Am. Rep., 560 (42 Conn., 426); 23 Am. Rep., 445 (11 R. I., 321); 28 Am. Rep., 495 (50 Vt., 112); 34 Am. Rep., 21, 33 (62 Ala., 234, 464).

THE MAYOR AND ALDERMEN OF THE CITY OF DAVENPORT, *Plff. in Err.*,

v.

UNITED STATES, *ex rel. RUFUS L. LORD.*

(See S. C. "*The Mayor v. Lord*," 9 Wall., 409-414.)

State law of practice, not effectual in U. S. Courts—writ against city, how directed—city estopped by judgment against it—injunction by state court.

A state law prescribing rules of practice has no efficacy, *proprio vigore*, in the Courts of the United States. It can only be made effectual by adoption in the proper manner.

A writ directed to the Mayor and Aldermen of a City is properly directed in a suit against the City. Upon a motion for *mandamus* to compel a City to pay a judgment against it, the City cannot set up that the bonds for which the judgment was rendered were illegally issued.

A state court cannot, by an injunction, prevent the execution of the process issued from a court of the United States to give effect to its judgment.

[No. 138.]

Argued Mar. 18, 1870. Decided Mar. 28, 1870.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

This was a petition filed in the Circuit Court of the United States for the District of Iowa, by the defendant in error, for a *mandamus*, directed to the Mayor and Aldermen of the City of Davenport, commanding them to levy a tax to pay a certain judgment. The court below having awarded a peremptory *mandamus* as prayed for, the case was brought here by the defendant on a writ of error.

The case is fully stated in the opinion of the court.

Messrs. J. J. Weed and Clarke, for plaintiff in error:

This writ was directed to the "Mayor and Aldermen of the City of Davenport," and the answer alleges that the respondent is not bound by law to execute the same, for the reason that it is misdirected, there being no such officer, person, corporation, association or body known in law or fact. The direction of the writ is material. In *Chance v. Temple*, 1 Iowa, 198, the court says that "This is so material a part of the writ, and if defective gives to the defendant a defense so clear and simple, that too much pains cannot be taken to insure its accuracy."

Tapp. *Mand.*, 810-820, and alphabetical series of directions, n. 9, 810-818. The writ should have been directed to the Corporation, instead of some of its officers. In 1837, the Town of Davenport was incorporated "By the name and style of the City of Davenport," and by that name given perpetual succession. By the 2d section of the charter it is provided, that "The inhabitants of said City, by the name and style aforesaid, shall have power to sue and be sued, to implead or be impleaded, defend and be defended, in all courts of law and equity, and in all actions whatsoever." Laws of Iowa, 1861.

NOTE.—*Mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds.*

It is to be inferred that when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is an act which repels such an inference. Having the power to levy a tax for the payment of the judgments, it was the duty of the city to exercise the power. The payment was not a matter resting in its pleasure, but a duty it owed to the creditor. Having neglected this duty, the case was one in which a *mandamus* should have been issued to enforce its performance. U. S. v. New Orleans, 98 U. S., 381; Com. v. Com'ts of Allegany Co., 37 Pa. St., 277; Lowell v. Boston, 111 Mass., 460; Hasbrouck v. Milwaukee, 24 Wis., 123; *Ex parte Parsons*, 76 U. S.,

Such defects may be taken advantage of at any time before the peremptory *mandamus* is awarded. On demurrer to the return, the relator will fail if his writ be substantially defective.

Com. Bk. v. Can. Com., 10 Wend., 26; *People v. Supervisors, etc.*, 14 Barb., 52; *Can. Trustees v. People*, 12 Ill., 248; *People v. Ransom*, 2 N. Y., 490.

The general principles of law:

1. The writ of *mandamus* is a proper remedy to compel an inferior tribunal, corporation or public officer to perform a duty enjoined by law; and where the right of the relator to have the act performed is clear.

Rev. of 1860, sec. 3761, p. 668; *Com. v. Hampden*, 2 Pick., 414; *Swan v. Work*, 24 Miss., 439; *State v. Napier Co. Judge*, 7 Ia., 425; *Ross v. Lane*, 8 Sm. & M., 695; *Glasscock v. Com. of Gen. Land Off.*, 3 Tex., 51; *Can. Trustees v. People*, 12 Ill., 248, and innumerable other authorities which might be cited.

2. Corporations—and particularly municipal corporations—have only such rights and powers as are expressly granted to them, or are necessary to carry into effect the rights and powers so granted.

Clark v. Des Moines, 19 Ia., 199; *S. C.*, 12 Am. Law Reg., 146; *Perrine v. Ches. & Del. Can. Co.*, 9 How., 172; *Augusta v. Earle*, 13 Pet., 584; *Beatty v. Knowler*, 4 Pet., 169; *Broughton v. Salford Water Works*, 8 B. & Ald., 1; *Rungan v. Coster*, 14 Pet., 129; *Dartmouth Coll. v. Woodward*, 4 Wheat., 636; *Bk. of U. S. v. Dandridge*, 12 Wheat., 64.

3. The duties and powers of officers of a municipal corporation are prescribed by statute, and every person dealing with them, as such, may know and be charged with knowledge of the duties and the extent of these powers.

Clark v. Des Moines, 19 Ia., 199; 12 Am. L. R., 146.

We contend that the acts required to be performed by the alternative writ are not enjoined by the Statutes of Iowa.

5th Art. of Orig. Act of Incorp. of the City of Davenport, approved Feb. 5, 1851; Laws of 1851; Dillon, Dig. of City Ord., 38; Act Jan. 23, 1857, sec. 4; Act 1851, Art. 5; Act 1855, sec. 4; Act 1851, Art. 5; Act 1855, sec. 8.

The grant being doubtful, the power cannot be exercised.

Hughes, 232; *Knox Co. v. Aspinwall*, 65 U. S., 376, XVI., 735; *Von Hoffman v. City of Quincy*, 71 U. S., XVIII., 408; *Benbow v. Iowa City*, 74 U. S., ante, 79; *Supervisors v. Rogers*, 74 U. S., 175, ante, 160; *Supervisors v. Durant*, 78 U. S., post, 732; *Cass County v. Johnson*, 95 U. S., 390.

Mandamus may be resorted to, to compel a municipal corporation to levy or collect a tax for the payment of a public debt. *Heine v. Levee Comrs.*, 1 Wood., 246; *S. C.*, 36 U. S. (19 Wall.), 635.

Where it is a duty to impose a tax, and that duty is not performed, it may be enforced by *mandamus*. *Rees v. City of Watertown*, 36 U. S. (19 Wall.), 107, and authorities cited above.

A repeal of statute authorizing issue of bonds and a local tax to pay therefor, would not affect right to *mandamus* to compel corporation to levy tax. *Supervisors v. U. S.*, 71 U. S., XVIII., 419.

Where the language of the statute is that supervisors "may, if deemed advisable," levy tax, statute has been construed as mandatory. *City of Galena v. Amy*, 72 U. S., XVIII., 560; *Clark v. Davenport*, 14 Iowa, 494; *People v. Supervisors*, 51 N. Y., 401; *Commonwealth v. Pittsburgh*, 34 Pa. St., 496.

See 9 WALL.

Clark v. Davenport, 14 Ia., 494; *Perrine v. Ches. & Del. Can. Co.*, 9 How., 172; *Moran v. Miami Co.*, 2 Black, 722 (67 U. S., XVII., 842); *Douglass v. Placerville*, 18 Cal., 643; *Beatty v. Knowler*, 4 Pet., 152; *People v. Can. Co.*, 8 Scam., 153; *U. S. v. Wigglesworth*, 2 Story, 369; *Dugan v. Bridge Co.*, 27 Pa., 303.

The writ commands the respondents to levy and collect a specific tax sufficient to pay the balance of interest on said railway bond debt, amounting to \$22,390.75, in addition to the five mills tax. It is not claimed, as we understand, that either the special Acts of Incorporation of the City of Davenport, or chapter 42 of the Code of 1851, invests the City Council with authority to levy and collect this tax; but the relator relies upon sec. 1896 of the Code of 1851 (now sec. 3275 of the Code of 1860).

Does this section apply to corporations acting under special charters, and if so, does it enlarge the taxing powers of their officers? We need not enter into the discussion of this question here. It has already been determined by the highest judicial tribunal of the State of Iowa; it is purely a question of local statutory construction; and according to the well settled practice of this court, the decisions of that court in the construction of local statutes will be recognized and followed by the Supreme Court of the United States.

Leffingwell v. Warren, 2 Black, 599 (67 U. S., XVII., 261); *McCutchen v. Marshall*, 8 Pet., 120; *Elmendorf v. Taylor*, 10 Wheat., 232; *U. S. v. Morrison*, 4 Pet., 124; *Nasmith v. Sheldon*, 7 How., 812; *Sumner v. Hicks*, 2 Black, 532 (67 U. S., XVII., 355); *Gelpcke v. DuBuque*, 1 Wall., 175 (66 U. S., XVII., 520).

Mr. Jas. Grant, for defendant in error:

The City of Davenport is the Corporation and corporate name. By Act of Feb. 5, 1851, the City Council consists of a Mayor and Aldermen; by same Act, the City Council has authority to levy and collect taxes. The Mayor and Aldermen compose the City Council. They are the proper persons to whom the writ should be directed.

The city charter, by the Act of Jan. 22, 1855, required the City to levy a specific tax to pay the interest on its railway bonds, whenever there was a deficiency in the ordinary revenue. The defendant says in bar of the performance, that it was enjoined by a proceeding in the

Where creditor has no plain, adequate or efficient remedy, the court of common law will, by *mandamus*, compel officers of municipality, having the power, to levy a tax to pay lien. As a rule, creditor must first sue at law, and by judgment of the court establish the validity of the claim and the amount due, and an execution must be issued and returned unsatisfied. When these steps have been taken, the creditor is entitled to *mandamus* to compel the levy of a tax to be appropriated to his debt. *Coy v. Lyons*, 17 Iowa, 1; *Heine v. Levee Comrs.*, 36 U. S. (19 Wall.), 655; *Riggs v. Johnson Co.*, 73 U. S., XVIII., 768; *Walkley v. City of Muscatine*, 73 U. S., XVIII., 930; *State v. Clay*, 46 Mo., 231; *Frank v. San Francisco*, 21 Cal., 686; *People v. Clark*, 50 Ill., 213; *Olney v. Clark*, 50 Ill., 453; *Boynton v. Newton*, 34 Iowa, 510; *Schaffer v. Cadwallier*, 36 Pa. St., 126; *Watertown v. Cady*, 20 Wis., 501; *Dillon on Mun. Corp.*, secs. 685, 686; *Jones on R. R. Securities*, secs. 300, 302; *Dillon on Mun. Bonds*, 58.

There is an exception to the rule that claim must be first reduced to judgment. Where the debt is upon bonds, issued to aid R. R. Co., and statute creating debt makes it the duty of certain officers

state court, to which the plaintiff was a party. The demurrer to that excuse was well sustained by the court below.

The last question made by the plaintiff in error, is upon the power of the court to compel it to levy a sufficient tax to pay the plaintiff's judgment under the execution law. That question was settled by this court in the case of *Amy v. Burlington*, 495, and again at this term, *Duta v. Muscatine*, ante, 490, against the plaintiff in error.

Mr. Justice Swayne delivered the opinion of the court:

This case is brought before us by a writ of error to the Circuit Court of the United States for the District of Iowa. It is one of a class of cases, many of which, under different aspects, and presenting a variety of questions, have been heretofore decided by this court. It appears by the record that, on the 6th of November, 1867, the relator procured to be issued against the plaintiffs in error an alternative writ of *mandamus*, which was substantially as follows:

It recites that the relator recovered a judgment in that court against the City of Davenport, on the 15th of May, 1867, for the sum of \$63,509.44, and costs; that the City is a municipal corporation, and that its affairs are managed by a Mayor and Aldermen, who perform all the duties of the Corporation in relation to levying and collecting taxes, and paying its debts; that execution has been issued upon the judgment and returned, no property found, and that there is no property belonging to the City liable to execution; that the causes of action upon which the judgment is founded are the principal of certain bonds issued by the City in payment of her subscription to the stock of the Mississippi and Missouri Railroad Company in the years 1853 and 1854, and the interest on these bonds, and the interest on certain bonds of the City issued in the year 1857, under a vote of the people to borrow money for various City improvements; that the Mayor and Aldermen were empowered by an Act of the Legislature, of the 22d of January, 1858, whenever necessary, to levy a specific tax to pay the railroad bond debt and interest; that no interest has been paid on this debt since 1861, and that the principal is now due and unpaid; that the Mayor and Aldermen, besides the specific tax to pay the railroad bonds before mentioned, are au-

thorized by the city charter of January 22d, 1855, to levy a general tax of five mills on the dollar, and, by the general City Incorporation Act of 1851, one mill on the dollar as a sinking fund to meet its bonded debt; that the valuation of property for the year 1867 is \$5,000,000, which is not more than one half the cash value of the property; that the property of the City is subject to taxation at its real cash value; that the assessment is made by the city assessor; that the Mayor and Aldermen are authorized to correct the assessment, when erroneous, and that they have heretofore neglected to perform this duty; that it has been the duty of the Mayor and Aldermen, since the year 1861, to levy a specific tax amounting to \$7,500 a year, to pay the interest on the railroad bonds—a tax of one mill on the dollar amounting to \$4,000 on the assessed value, and \$8,000 on the real value of the property of the City, as a sinking fund, to be applied to the principal of the bonds, and a tax of ten mills on the dollar for general purposes, which, after defraying the ordinary city expenses (five mills on the dollar being sufficient for that purpose), would amount to \$20,000 per year, taking the assessment as the basis of taxation, and \$60,000 per year, if the basis were the real value of the property, whereas the whole annual interest of the debt of the City, since 1863, has not exceeded \$25,000; that the Mayor and Aldermen, since the interest became delinquent, have not levied a general tax exceeding five mills on the dollar; that the relator has made a demand on the Mayor and Aldermen to levy a tax sufficient to pay said judgment; that they have neglected to do so, and that the relator is without other adequate remedy at law.

The Mayor and Aldermen are, therefore, commanded to levy and collect on the assessment roll for the year 1867 a special tax to pay the interest on the railway bonds, and to levy and collect a special tax of one mill on the dollar on the assessment of 1867, to be applied upon the principal of the bonds on which the judgment was recovered.

It is averred that these two levies, less delinquencies, would amount to between \$10,000 and \$11,000, which, when applied in payment of the judgment, would leave a balance of nearly \$50,000 unpaid.

To pay this balance the Mayor and Aldermen are commanded to cause the real and personal

to levy tax to pay the bonds, the amount is ascertained and fixed by statute and the duty clear, and in case of failure, *mandamus* may be issued without a judgment. *State v. Davenport*, 12 Iowa, 335; *Shinbone v. Randolph*, 56 Ala., 133; *Newman v. Justinice*, 5 Sneed, 695; *Elliot County v. Kitchen*, 14 Bush., 299; *State v. Comrs.*, 6 Ohio, 280; *Justices of Clark Co. v. Turnpike Co.*, 11 B. Mon., 154; *Brown v. Crego*, 22 Iowa, 498; *Stevensen v. Township of Summit*, 35 Iowa, 462; *Pegram v. County Comrs.*, 64 N. C., 557; *Flagg v. Palmyra*, 23 Mo., 440; *Madrox v. Graham*, 3 Met., 56; *Columbia Co. v. King*, 13 Fla., 461; *State v. Milwaukee*, 20 Wis., 87; *People v. Brown*, 55 N. Y., 180.

In U. S. courts judgment is the foundation of jurisdiction to grant *mandamus* for such purpose. *County of Greene v. Daniel*, 102 U. S., 187.

Validity of the bonds has been questioned on the application for *mandamus* before judgment, and the writ granted where court were of opinion bonds were valid and denied when it was of opposite opinion. *Comrs. of Columbia Co. v. King*, 13 Fla., 461; *Lexington v. Milliken*, 7 Gray, 280; *Com. v. Comrs.*, 16 S. & B., 317; *State v. Yeatman*, 22 Ohio, St., 546.

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Where *mandamus* is applied for after judgment, the validity of the bonds cannot be questioned on the application. The judgment decides that question. *U. S. v. New Orleans*, 98 U. S., 381; *Mayor v. Lord*, supra.

Mandamus cannot be issued to compel the levy of a tax beyond the statutory limit, whether that limit is fixed by a general statute or by special or by both combined. The court cannot create—it only enforces a legal duty. *Supervisors v. U. S.*, 85 U. S. (18 Wall.), 71; *Amy v. Allegheny City*, 65 U. S., 364, XVI., 614; *U. S. v. County of Macon*, 60 U. S., 582; *U. S. v. County of Clark*, 95 U. S., 769; *U. S. v. Mayor*, 2 Wood, 230; *State v. Macon Co. Court*, 60 Mo., 20; *Vance v. Little Rock*, 30 Ark., 485; *Beard v. Supervisors of Lee Co.*, 51 Miss., 542; *Porter v. Thompson*, 22 Iowa, 38; *State v. Shortbridge*, 56 Mo., 128; *State v. Mayor*, 23 La. Ann., 358; *Campbell v. Taylor*, 8 Bush, 206; *Weston v. City of Syracuse*, 17 N. Y., 110; *Clark v. Davenport*, 14 Iowa, 494; *Burroughs on Taxation*, 376-378.

Nor can the application of moneys raised for other purposes be thus compelled. *Rose v. Batzdillo*, 39 Cal., 270.

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property of the City to be assessed for the year 1868 at its real cash value, and upon such valuation to levy over and above the five mills on the dollar for ordinary city purposes, a specific tax sufficient to pay the balance of the interest on the railway bond debt, amounting to \$22,390.75, and a specific tax of one mill on the dollar, to be applied in payment of the principal of the bonds embraced in the judgment; to levy and collect the said tax on the valuation of 1867, and apply it on the judgment; to levy and collect the said tax on the real cash valuation of the property for the year 1868, and apply it in payment of the judgment; and if any balance should remain, of principal or interest, to continue to levy and collect the taxes yearly, and to apply them, when collected, in payment of the judgment, until the principal and interest, and costs of the judgment, are fully paid, or that the Mayor and Aldermen should appear before the court at the time specified and show cause why they refused to do so.

A motion was made to quash the writ, which was overruled. The same motion was subsequently made and again overruled. The Mayor and Aldermen thereupon made a return.

It sets out the following defenses:

1. That the writ was issued in the name of the United States, instead of the President.

2. That it was erroneously directed to the Mayor and Aldermen.

3. It denies that the affairs of the City are controlled by the Mayor and Aldermen, but avers that they are managed by the City Council.

4. It denies that the Mayor and Council were authorized by the laws mentioned, or that it was their duty to levy and collect the taxes mentioned.

5. It denies that the issue of the bonds for improvements was authorized by a vote, as alleged.

It avers that on or about the 19th of June, 1861, the Mayor and Aldermen were, and ever since have been, enjoined by the decree of the District Court of Scott County from levying any tax to be applied in payment of the principal or interest of the railroad bonds in question.

6. It denies that the assessed valuation ever amounted to \$5,000,000—that in the year 1867 it amounted to only \$4,592,423.

7. It denies that the valuation never exceeded half the cash value, and avers that the City Council has always performed its duty in respect to correcting erroneous assessments.

Some details are given as to the expenditures of the City, which it is not deemed necessary particularly to advert to. The relator asked leave to amend the writ as to the name in which it was issued. Leave was given and it was amended accordingly. To the averment that the writ was misdirected, he replied that it was directed properly, the Mayor and Aldermen composing the City Council. To each of these several parts of the residue of the return he demurred specially. At the argument of the demurrer he abandoned his claim for the levying of a tax of one mill for a sinking fund, and the parts of the writ relating to the subject were stricken out. The court sustained the demurrer. The defendants elected to abide by it and made no further return. Thereupon the court awarded a peremptory *mandamus*, as prayed for.

See 9 WALL.

The learned counsel for the plaintiffs in error have referred to a statute of Iowa as regulating the practice in this class of cases. It is proper to remark that the provisions of that statute not having been adopted by a rule of the circuit court for that district, could have no effect in this proceeding. A state law prescribing rules of practice has no efficacy *proprio vigore* in the courts of the United States. It can only be made effectual by adoption in the proper manner.

The point that the writ was misdirected is not well taken. The direction was substantially correct, and the court properly disregarded the objection.

To the proposition that the bonds issued by the City for improvement purposes were not sanctioned by the requisite popular vote there are two answers: (1) The respondents are concluded by the judgment at law. They cannot go behind it to raise any question touching the sufficiency of either of the causes of action upon which it was rendered. (2) It is not denied that the relator was an innocent purchaser. In that event, if the bonds could have been properly issued under any circumstances he had a right to presume they were so issued, and as against him the City is estopped to deny their validity. *Aurora City v. West* [ante, 42]; *Beloit v. Morgan* [ante, 205]; *Meyer v. Muscatine*, 1 Wall., 393 [68 U. S., XVII., 567]; *Mercer County v. Hackett*, *idem*, 93 [68 U. S., XVII., 549]; *Van Hostrup v. Madison City*, *idem*, 297 [68 U. S., XVII., 539]; *Superintends v. Schenck*, 5 Wall., 784 [72 U. S., XVIII., 559].

The injunction cannot avail the respondents. The relator was not a party to the proceeding. If he had been, it is not competent for a state tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the National Courts, and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question. *Riggs v. Johnson County*, 6 Wall., 166 [73 U. S., XVIII., 768]; *U. S. v. The Council of Keokuk*, *Id.*, 516 [73 U. S., XVIII., 934].

The denials of the averments in the writ touching the cash value of the property assessed are immaterial. In any event it was the right of the relator to have the respondents required to supervise the valuation, and to correct the errors, if any, which might be found to exist.

The allegations of the return as to the tax laws relied upon by the relator, and the powers and duties of the respondents under them, could have been more appropriately presented upon the motions to quash the writ, or by a demurrer. They were not insisted upon in the argument at the bar. We shall, therefore, content ourselves by remarking that we are satisfied with the conclusions upon the subject reached by the court below. *U. S., ex rel. Butz, v. Muscatine* [ante, 490].

We think the demurrer to the return was properly sustained, and the order for a peremptory writ of *mandamus* properly made.

The judgment of the Circuit Court is affirmed.

Cited—9 Wall., 417, 419; 10 Wall., 645; 103 U. S., 484; 1 Hughes, 295; 41 N. J. L., 253; 5 Dill., 323; 2 Wood, 475, 476; 1 McCrary, 389, 370.

J. G. W. FINCKE, *Appl.*,

v.

THE STEAMBOAT FAIRBANKS, her
Tackle, etc., THE NEW YORK AND WASH-
INGTON STEAMBOAT COMPANY, Claimants.(See S. C., "*The Fairbanks*," 9 Wall., 420-425.)*Rules of navigation—recovery for collision.*

A steamship when approaching a sailing vessel must keep out of the way, and the sailing vessel is required to keep its course.

An error committed by the vessel required to keep her course, after the approaching vessel is so near that the collision is inevitable, will not impair her right to recover for the injuries resulting from the collision, if she was otherwise without fault.

[No. 118.]

Argued Mar. 14, 1870. Decided Mar. 28, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, by the appellant, to recover damages resulting from a collision. The court decreed in favor of the libelants. This decree having been reversed by the circuit court, on appeal, the libelant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. James C. Carter, for appellant:

The sailing vessel is not merely privileged, but required to act a passive part, and her general duty is, therefore, expressed in the rule that she must keep her course.

The Oregon v. Rocca, 18 How., 570 (59 U. S., XV., 515); *Steamship Co. v. Rumball*, 21 How., 872 (62 U. S., XVI., 144).

The maritime law requires the steam vessel, not merely to prevent the collision, but to prevent as far as possible all hazard or danger of a collision. In other words, not to bring on a dangerous proximity, but to give the sailing vessel a wide berth.

Same authorities as above cited. *St. John v. Paine*, 10 How., 588; *Genesee Chief v. Fitzhugh*, 12 How., 461.

Messrs. Robert D. Benedict and E. C. Benedict, for appellees:

The libelant must satisfy the court that the brig was free from fault, and he must establish, by preponderating evidence, that the loss was occasioned by the culpable negligence of the steamer.

The John Fraser, 21 How., 194 (62 U. S., XVI., 110); *The Morning Light*, 2 Wall., 557 (67 U. S., XVII., 863); *The Grace Girdler* (*ante*, 116).

Where it appears plainly that the sailing vessel in such a case changed her course, the burden of proof is upon her to justify herself for the decree is against her.

"The rule that a steamer must take care and avoid a sailing vessel, if she keeps her course,

is equally imperative that the latter must not change her course. If she does, she is in fault, and cannot invoke the rule against the steamer."

Nelson, *J.*, in *Scotia*, 5 Blatchf., 228; see, also, *The Meander*, Holt's Rule of the Road, 244; *The Anglo Norman*, 1 Newb., 492-494.

Mr. Justice Clifford delivered the opinion of the court:

Rules and regulations for preventing collisions on navigable waters between ships and vessels engaged in our mercantile marine, as well as between ships and vessels in the Navy of the United States, have been prescribed by Congress.

Steam vessels, when under way, are required to carry a bright light at foremasthead, so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, to wit: from right ahead to two points abaft the beam on either side, and of such a diameter as to be visible, on a dark night with a clear atmosphere, at a distance of at least five miles. They are also required to carry a green light on the starboard side and a red light on the port side, so constructed as to throw a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam, the former on the starboard side and the latter on the port side, and of such a character respectively as to be visible, on a dark night with a clear atmosphere, at a distance of at least two miles. Both of the colored lights are required to be so fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow. 13 Stat. at L., 58; 14 Stat. at L., 228, sec. 11.

Sailing ships, under way, are required by the first named Act, to carry the same lights as steamships, under way, with the exception of the white masthead light, which they shall never carry.

Reference will only be made to two or three of the sailing rules enacted by Congress, as none of the others have any application in this case.

By the 15th article it is provided that if two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship. Steamships, when approaching another ship so as to involve risk of collision, are also required to slacken their speed, and, if necessary, to stop and reverse; and the 18th article provides that where one of two ships is required to keep out of the way, the other shall keep her course, subject to the qualifications that due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from those rules necessary to avoid immediate danger. 13 Stat. at L., 61.

Sailing vessels employed in the mercantile service were not required to carry lights before the passage of the first named Act of Congress, but the sailing rules as previously defined by the decisions of this court in the particulars under consideration, were, in substance and effect,

NOTE.—Collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.), 557.

the same as those enacted by Congress, as appears by several reported cases. *Steamship Co. v. Rumball*, 21 How., 883 [62 U. S., XVI., 148]; *St. John v. Puine*, 10 How., 588; *The Genesee Chief*, 12 How., 461.

Beyond question those cases show that a steamship when approaching a sailing vessel must keep out of the way, and that sailing vessels are required to keep their course in order that the steamship may not be led into error or be baffled in her endeavors to keep out of the way. Bound to keep out of the way, the steamship may go to the right or left, and in order that she may determine the matter wisely, so as to prevent any disaster, the correlative duty is required of the sailing vessel that she shall keep her course.

Many of the material facts in this case are either without dispute or are so fully proved as not properly to be regarded as the subject of controversy. Both parties agree that the collision occurred at eleven o'clock in the evening of the 5th of June, 1864, off the coast of New Jersey, some fifteen miles east of the Highlands. Just before it occurred the brig was heading north by east, and was bound for the Port of New York on a voyage from Turk's Island, and the witnesses agree that the wind was south-east and that the brig, when close-hauled, would lay within six points of the wind, so that she had the wind five points free. Though not stormy it was rather dark, as there was some haze on the water, but the brig was sailing four or five knots an hour, and there were no other vessels in sight. On the other hand, the steamer was bound on a voyage from the Port of New York to Washington, and was heading south by west, and her speed was eight knots an hour.

Some conflict exists in the testimony as to the point whether the brig had the required lights and whether she kept her course as alleged in the libel, or whether she changed it as alleged in the answer, but it will be sufficient to state the facts as they appear to the court without reproducing the testimony of the witnesses or attempting to reconcile their contradictory statements.

The vessels were less than half a mile apart when the brig was descried by the steamer, and it is satisfactorily proved that the brig had the required lights and that her lookouts were properly stationed on the forward part of the vessel. At that time it was the master's watch on board the steamer, but the better opinion from the evidence is that he was in the pilot house and not on deck, as stated in his deposition. He admits, however, that he saw the approaching vessel, and that he knew that it was a sailing vessel, and his statement is that he changed the course of the steamer from south by west to south-south east, which cannot be correct, because if he had done so there could not have been any collision, as the speed of the steamer was double that of the brig. But the second mate was on deck at the same time, and he states that the master was in the pilot house, and that he went to the pilot house where the master was and told him that there was a vessel ahead, and that the master directed the man at the wheel to change the course of the steamer half a point to the eastward; that he then went forward and walked around; that it ap-

pearing to him that the brig had also changed her course in the same way, he went back to the pilot house and so informed the master, and that the master then told the wheelsman to let the steamer come up half a point more to the eastward. When the master gave the second order he came out of the pilot house, as the second mate testifies, and looked at the approaching vessel. Beyond question he must at once have discovered that the order just given was insufficient to prevent a collision, and he immediately returned to the pilot house and directed the helmsman to change the course to southeast, which is the order he should have given in the first instance. But it is evident that his memory is unreliable, as it is clear that the collision could not have occurred if he had given that order, or the one he says he gave, when the brig was first seen by the steamer.

Precautions must be seasonable to be of any avail, but it was too late when he gave the last order, as the second mate testifies that the jib-boom of the brig, by the time the order was obeyed, was not more than thirty yards from the steamer. Even if tested alone by the testimony of the witnesses on board the steamer, the court is fully satisfied that the first two orders were not of a character to avoid a collision, and that the third order was not given in season to accomplish the desired result. Confirmed as this theory is by the testimony of the mate and pilot of the brig, the court has no hesitation in adopting it as correct.

Suppose the fact to be so, still it is contended by the claimants that the decree of the circuit court must be affirmed because they insist that the brig changed her course, and that if she had kept it, as she was bound to do, the collision would not have occurred. Grant that the conclusion would follow if the theory of fact involved in the proposition was correct, still the views of the claimants cannot be sustained, as the fact alleged is not satisfactorily proved.

From the time the steamer was first seen, to the time of the collision, the deck of the brig was in charge of her mate, and he testifies positively that the brig did not change her course, as is supposed by the claimants; and the pilot of the brig, who went below before the collision, testifies that her course when he left the deck was north by east, and that when he came on deck, just before the collision, no alteration had been made in the course. No witness examined in the case on either side is able to support that theory by any positive statement, but the attempt of the claimants is to establish the theory by circumstances, of which the principal one is the appearance of the steamer where she was struck by the brig on her star-board bow. They contend that it was a square blow, and that the character of the injury to the steamer shows that the approach of the brig was at right angles and not head on, as they were substantially approaching when each was first descried by the other.

Although it must be admitted that the argument is ingenious and exceedingly well put, still the decisive answer to it is that the circumstances adduced do not satisfy the court that any such change of course was made by the brig as is supposed, certainly not until the proximity of the two vessels was so close that a collision was inevitable, and then it is quite

clear that the steamer made a sudden change, and it may be that the brig also changed her course, as is supposed by the claimants. Fault, under such circumstances, will not be imputed to the vessel required to keep her course if she was otherwise blameless. *Steamship Co. v. Rumball*, 21 How., 884 [62 U. S., XVI., 148]. An error committed by the vessel required to keep her course, after the approaching vessel is so near that the collision is inevitable, will not impair her right to recover for the injuries resulting from the collision if she was otherwise without fault, for the reason that those who put the vessel in that peril are chargeable with the error, and must answer for the consequences which it occasioned. *Bentley v. Coyne*, 4 Wall., 512 [71 U. S., XVIII., 459]. Examined in the light of these suggestions, our conclusion from the evidence is that the steamer was wholly in fault.

Decree reversed and the cause remanded, with direction to affirm the decree of the District Court.

Cited—1 Bro., 807.

THE STEAMBOAT JAMES GUY, HER
TACKLE, ETC., WILLIAM J. HEALY, Claim-
ant, *Appt.*,

v.
YOUNG TALL.

(See S. C., "*The Guy*," 9 Wall., 758, 759.)

*Repairs on vessel a lien—acceptance for, when
not payment.*

Reasonable repairs on a vessel in a foreign port, ordered by the owner, are a lien on the vessel which may be enforced in admiralty.

Acceptances for the amount of repairs, given by such owner who was insolvent, and which were not taken in payment, are not payment.

[No. 87.]

Argued Jan. 26, 1870. Decided Mar. 28, 1870.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The libel in this case was filed by the defendant in error, in the District Court of the United States for the Eastern District of New York, to recover the cost of certain repairs made to the steamboat, James Guy. A decree having been entered in favor of the libellant, the claimants of the boat took an appeal to the circuit court, by which the said decree was affirmed; whereupon the claimant sued out this writ of error.

The case is further stated by the court.

Messrs. Beebe & Chas. Donohue and Wm. M. Evarts, for plaintiffs in error:

The contract to pledge the vessel must be on a mutual, express or implied contract. The credit cannot be a silent one of the libellant's own making.

Liens of the character here set up are not favored in this court nor by any system of laws. They are *strictissimi juris*, and are not to be sustained but on the most ample proof.

Pratt v. Reed, 19 How., 859 [60 U. S., XV., 660].

It must be that supplies were necessary and could be obtained only by a credit on the vessel.

1 Pars. Mar. Law., 491; see, also, 4 Wash. (S. C.), 458.

Messrs. William W. Goodrich and Orville Horwitz, for defendant in error:

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The supplies were necessary. The work was ordered by the owner, and he was the best judge of its necessity. *The Alexander*, 1 W. Rob., 362; *The Sophie*, 1 W. Rob., 369.

It is affirmatively established by the positive testimony of the libellant, that credit was given to the vessel. This bill was charged to the vessel upon libellant's book, and the bill was so rendered to the owner and was by him received without objection or dispute.

"Where repairs have been made or necessities have been furnished to a foreign ship, or to a ship in a part of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for its security. And he may well maintain a suit in rem in the admiralty, to enforce his rights."

The Gen. Smith, 4 Wheat., 448; *The Jerusalem*, 2 Gall., 849; *Smith v. The Eastern Railroad*, 1 Curt.; *Thomas v. Osbornes* (Judge Taney), 19 How., 88 [60 U. S., XV., 541].

There is no need that express words should be used, stating that the credit is given to the vessel at the time of the contract.

The Eliza Jane, 1 Sprague, 158; *The Aurora*, 1 Wheat., 96; *Peyroux v. Howard*, 7 Pet., 334; *Davis v. A New Brig*, Gilp., 478; *Davis v. Child*, Davels, 78; *Stevens v. The Sandwich*, 1 Pet. Adm., 298; *Andrews v. Wall*, 3 How., 578; *Zane v. The President*, 4 Wash. (C. C.), 458; *North v. The Eagle*, Bee, 78; *Sarchet v. The Davis*, Crabbe, 185; *The Belfast* (*ante*, 266).

Mr. Chief Justice Chase delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the Southern District of New York sitting in admiralty.

The libel claimed a lien on The James Guy for repairs made upon her by the libellant, and alleged to be necessary to fit her for the prosecution of her employment. That employment was, in connection with several other boats, the transportation of the government mails and of passengers, and of freight between Norfolk, Virginia and Newbern, North Carolina.

Baltimore was not the home port of The Guy. Indeed it is admitted in the answer that she did not belong to Maryland.

The evidence shows that the repairs were ordered by one Olney, who called himself proprietor and agent of the line, and seems to have been the owner of The Guy, and that they were reasonably fit and necessary.

There is proof that the libellants received from Olney acceptances for the amount of the repairs, but none that they were taken in absolute payment. On the contrary, it appears that the acceptor was insolvent and unworthy of credit, and that in fact the credit was given to the boat.

These facts being established, it is apparent that this case must be governed by the principles settled at this term in the case of *The Grapeshot* (*ante*, 651).

The decree of the Circuit Court was in accordance with those principles, and must be affirmed.

Arg'd—1 Ben., 112.
Cited—10 Wall., 214, 217; 3 Biss., 101, 102; 5 Biss., 182; 7 Blatchf., 373; 11 Blatchf., 241; 14 Blatchf., 35, 42; 1 Bro., 539; 9 Ben., 83; 2 Hughes, 126; 5 Hughes, 466; 3 Sawy., 206; 2 Law., 460.

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THE CITY OF KENOSHA, *Pff. in Err.*,

v.

ALONZO CAMPBELL.

Second appeal—judgment affirmed.

When in pursuance of a decision of this court, a new judgment is rendered by the court below, which is sought to be reversed, on the ground that on the former hearing an important and controlling fact was misapprehended by this court, held, that there was no misapprehension.

[No. 144.]

Argued Mar. 22, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

The history and facts of the case sufficiently appear in the opinion of the court. See, also, the report of the previous decision by this court, in this case, as *Campbell v. Kenosha*, 5 Wall., 194 (72 U. S., XVIII., 610).

Mr. John W. Cary, for plaintiff in error:

This cause when formerly before this court, was evidently decided upon the hypothesis that the Act of Mar. 22, 1853, authorizing the loaning of the credit of the City to the railroad for \$150,000 was in full force as an authority to make this subscription; and that the subscription and scrip should be upheld for that reason.

By reference to the syllabus of the case, as reported in 5 Wall., 194 (*supra*), we find the substance of the decision stated as follows: "Where the Legislature of the State passes two Acts, one (which by the Constitution it had the power to pass) authorizing a city to subscribe a limited amount (\$150,000) of stock to a railroad, another (which by the Constitution it had no power to pass) authorizing it to subscribe an unlimited amount, and the city professing to act under the one which authorized the unlimited amount, subscribed the limited amount of \$150,000, a subsequent recognition by the Legislature of the subscription as legal, validates the subscription."

The court, all through the opinion, treats the case as one where there was a valid authority to make the subscription, and that the city authorities in making it had by mistake acted under an invalid authority, and that such a mistake was curable. See *Op.*, 5 Wall., 199 (72 U. S., XVIII., 611).

In this supposition the court was entirely mistaken, for the reason that at the time when such subscription was made, there was no such valid authority as was supposed.

The Act of Mar. 22, 1853, was exhausted in 1853, by the issue to the full amount authorized to be issued under it; the whole of which is now outstanding as a debt against the said City.

Hence, at the time when this scrip was issued in 1856, the said Act of Mar. 22, 1853, was no authority for the issue of the same. The decision of this court, therefore, in this case, based upon the hypothesis that said Act was then in full force and a valid authority for making the subscription, is wholly inapplicable to the case as it is now presented.

That decision held the subscription and the issue of this scrip valid by reason of that law, supposing it to be in full force; but it now appears that that law had been exhausted more than three years previously, and therefore it was no authority whatever for this scrip or subscription.

See 9 WALL.

We are, therefore, not asking the court to reverse its former decision, but have presented a new case on the facts, which renders the former decision inapplicable to this case as it is now presented.

There was no authority in the City to subscribe to the capital stock and issue its orders or scrip in aid of the Kenosha and Beloit Railroad Company, and the scrip issued for that purpose is, therefore, void.

The plaintiff, in order to recover, was bound to show affirmatively that such authority existed; there was no presumption in his favor on this point. *Thompson v. Lee Co.*, 3 Wall., 330 (70 U. S., XVIII., 178).

The pretended authority upon which the City acted, was section 8 of the amendment to the city charter, approved Mar. 23, 1853, and the ordinance and other proceedings passed by said City in pursuance of said Act.

We deny that said Act and the proceedings under it were any authority for the issue of said scrip or orders, for the reason that said section 8 of said Act was in direct contravention of section 8, art. —, of the Constitution of the State of Wisconsin.

As an original proposition, it would be the duty of this court to hold said section 8 unconstitutional and void. But the question is not open. It has already been passed upon by the Supreme Court of the State of Wisconsin, which is a proper tribunal to determine its validity under the Constitution of Wisconsin, and its decision on this question is conclusive upon this court. *Post v. Kenosha*, 12 Wis., 616.

The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is binding upon the courts of the United States as the text.

Leffingwell v. Warren, 2 Black, 603 (67 U. S., XVII., 262); *Shelby v. Guy*, 11 Wheat., 361; *McClung v. Silliman*, 8 Pet., 270; *Green v. Neal*, 6 Pet., 291; *Ross v. Duval*, 13 Pet., 45; *Massingill v. Downs*, 7 How., 767; *Nesmith v. Sheldon*, 7 How., 812; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 How., 504.

Mr. Wm. P. Lynde, for the defendant in error.

Mr. Chief Justice Chase delivered the opinion of the court:

The record in this case was before us at the December Term, 1866. The judgment of the court below had been in favor of the City of Kenosha, and the writ of error was prosecuted by the now defendant in error. The judgment was reversed; and on a new trial, there was a judgment against the City. And the City is now plaintiff in error, and seeks the reversal of the last judgment.

Counsel have labored with much zeal and ability to satisfy the court that, upon the former hearing "One important and controlling fact was misapprehended, or did not sufficiently appear in the case at that time." But we are not convinced that there was any such misapprehension, or that any important fact escaped the observation of the court.

The judgment of the Circuit Court, therefore, must be affirmed.

Under the circumstances of the case, how-

ever, we cannot say that it was prosecuted merely for delay. The motion for affirmance with ten per cent. damages, must, therefore, be denied.

OTIS H. WEED AND ORIN SHERMAN,
Copartners, as O. H. WEED & COMPANY,
Piffs. in Err.,

v.

JOHN H. CRANE.

Where there is nothing to review in the record, judgment affirmed.

Where in the record there is no exception to any ruling of the court upon the trial nor to the report, nor to any ruling of the court in relation to it, there is nothing which can be reviewed, and the judgment will be affirmed.

[No. 128.]

Submitted Mar. 15, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This was a suit at law brought to recover damages for infringement of letters patent, issued to the defendant in error.

The parties by stipulation agreed that the jury might find a verdict without assessing the actual damages, and that after verdict for plaintiff, the damages might be fixed and determined by an assessor appointed for that purpose by the court; the object being to avoid going into evidence before the jury, which might prove unnecessary if the defendant's plea was sustained.

The case was then duly submitted to the jury, and a verdict found for the plaintiff below, and no exceptions were taken by either party during the trial; upon the rendition of a verdict for the plaintiff below, the clerk of the court was duly appointed to assess the damages pursuant to the agreement of the parties, and he made his report, or assessment of damages, in writing to the court, which report contained a statement at large of a portion of the evidence taken by the assessor, and of his conclusions therefrom, and of his decisions upon the admissibility or inadmissibility of certain testimony at certain stages of the hearing. Upon the coming in of the assessor's report as to the damages, the parties were duly heard by the court as to the allowance or adoption of the sum fixed by the assessor as the damages sustained by the plaintiff; and after such hearing and allowance of the damages so found by the assessor, the court ordered judgment in said suit for the plaintiff below, and no exception was ever taken by the defendant below to any opinion or ruling of the court below at this time or at any time; and there is nothing in the printed record to indicate any objection made by the defendant below at any stage of the proceedings, excepting at the hearings before the assessor.

To reverse the judgment of the court below, the defendants sued out this writ of error.

Mr. Jas. B. Robb, for plaintiffs in error.

Mr. F. A. Brooks, for defendant in error:

It does not appear that any rulings in matters of law were made in the court below, nor that any exceptions were taken to any such

rulings, nor have any errors been assigned to the judgment of the court below; and such judgment should, therefore, be affirmed. *James v. Bk. (ante, 275); Genesee v. Bonner (ante, 227).*

Mr. Chief Justice Chase delivered the opinion of the court:

On looking into the record of this cause we find no exception to any ruling of the court upon the trial, nor any exception to the report of the assessors, nor to any ruling of the court in relation to it. There is nothing, therefore, in the record which can be reviewed here upon error, and the judgment of the Circuit Court must be affirmed.

RICHARD ROE, Casual Ejector, AND
GEORGE P. BURNETT, Tenant in Possession, *Piffs. in Err.,*

v.

JOHN DOE, *ex dem.* JOHN M. M. CALDWELL.
(See S. C., 9 Wall., 200-204.)

Vendee's possession under contract of sale—effect of—vendee, not tenant—when possession becomes tortious—notice to quit.

If a contract for a sale of lands be silent as to possession by the vendee, he is not entitled to it.

If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee, and the relation of landlord and tenant does not subsist between the parties.

In such case the vendee cannot dispute the title of the vendor; the assignee of the vendee is as much bound by the estoppel as the vendee himself.

Upon default in payment of any installment of the purchase money, the possession becomes tortious, and the vendor may at once bring ejectment.

It is not necessary to give notice to quit before bringing ejectment, according to the local law of Georgia.

[No. 186.]

Argued Mar. 18, 1870. Decided Apr. 4, 1870.

IN ERROR to the District Court of the United States for the Northern District of Georgia.

This was an action of ejectment brought in the District Court of the United States for the Northern District of Georgia, by the defendant in error, for the recovery of a certain tract of land.

The verdict and judgment in the court below having been for the plaintiff, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. M. Thompson and D. A. Walker, for plaintiff in error:

Burnett entered into possession lawfully, and ejectment could not be sustained against him without a notice to quit, or a notice that the contract was rescinded, or a demand of payment and notice of rescinding.

Livingston v. Bryan, 1 Johns., 322; *Jackson v. Salmon*, 4 Wend., 327; *Costigan v. Wood*, 5 Cranch (C. C.), 507; *Newby v. Jackson*, 1 B. & C., 448.

A person who enters and holds land under a contract to buy it, is to be regarded as at least a tenant at will; and a tenant at will is not a

wrong-doer, and ejectment will not lie against him, unless his tenancy be determined before the commencement of the suit.

2 Rich. (S. C.), 542; 4 T. R., 690; 1 Barn. & C., 126; *Lewis v. Beard*, 18 East, 210; *Bruce v. Rawlins*, 10 East, 261.

These common law principles apply in this case. 3 Wheat., 212.

The Statutes of Georgia require a demand in such a case as this. Act 1827, 2 Cobb. Ga., 901, 902. Irwin, Rev. Code (Ga.), sec. 2265.

Messrs. James E. Brown and John D. Pope, for defendant in error:

The charge of the court in reference to demand and notice to quit before action brought, was strictly accurate. The substance of the charge was, that Caldwell was not bound to make a demand before bringing this action; and that Burnett was not entitled to notice to quit before action brought. This was correct according to the laws of Georgia. It is the well established rule of law and the constant practice in this State, in cases between vendor and vendee, where bond for titles is given, and the purchase money is not paid when due according to contract, to bring ejectment for the premises without demand or notice.

Jackson v. Miller, 7 Cow., 747; *McHan v. Stansell*, 89 Ga.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the District Court of the United States for the Northern District of Georgia. The suit was an action of ejectment, prosecuted by the defendant in error to recover possession of the premises described in his declaration. The view which we take of the case renders it unnecessary to consider several of the exceptions which are found in the record. The facts as they appear, and which are undisputed, are as follows:

Caldwell was in possession, claiming title. On the 26th of January, 1864, he sold to Vliet, who paid him \$4,000, and executed to him two promissory notes, each for \$7,000, payable, respectively, on the 1st of April and the 1st of July following, with interest from date. Caldwell at the same time executed to Vliet a title bond in the penal sum of \$36,000. It recited the payment of the \$4,000 and the execution of the notes, and was conditioned that if Vliet should pay the notes at maturity, and Caldwell should thereupon make to him "a good warranty title in fee simple" for the premises, the bond should be void. The bond was silent as to the right of Vliet to occupy the premises, but Caldwell put him in possession. Vliet transferred the bond and delivered possession to Burnett. Nothing having been paid on the notes, and more than three years having expired since the maturity of the one last payable, Caldwell instituted this suit to oust Burnett and recover back possession of the property.

The legal principles which must govern the determination of the case are all well settled. If the contract in such cases be silent as to possession by the vendee, he is not entitled to it. *Suffern v. Townsend*, 9 Johns., 85; *Erwin v. Olmsted*, 7 Cow., 229. If the contract stipu-

lates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee. The relation of landlord and tenant does not subsist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license. Co. Litt. 52*b*; *Mumford v. Whitney*, 15 Wend., 880; *Dolittle v. Eddy*, 7 Barb., 78; *Watkins v. Holman*, 16 Pet., 54; *Bright's Lessee v. Rochester*, 7 Wheat., 585. In such cases the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor. *Whiteside v. Jackson*, 1 Wend., 418; *Jackson v. Moncrief*, 5 Wend., 26; *Jackson v. Stewart*, 6 Johns., 34; *Hamilton v. Taylor*, Litt. Sel. Cases, 444. The assignee of the vendee is as much bound by the estoppel as the vendee himself. *Jackson v. Walker*, 7 Cow., 637. Upon default in payment of any installment of the purchase money, the possession becomes tortious, and the vendor may at once bring ejectment. 1 Wend., 418; 5 *Id.*, 26; 7 Cowen, 637, cited *supra*. Ejectment may sometimes be maintained when covenant for the purchase money could not. *Wright v. Moore*, 21 Wend., 280.

In England it is necessary to give notice to quit before bringing ejectment. *Right v. Beard*, 18 East, 210; *Doe v. Jackson*, 1 B. & C., 448. In this country, generally, the rule is otherwise. 7 Cow., 637; 7 Barb., 74, *supra*. In the case before us, the question must be decided according to the local law of Georgia. The authorities upon the subject, cited in the brief for the defendant in error, and especially the manuscript case of *McHan v. Stansell*, decided by the Supreme Court of that State, at the June Term, 1869, and not yet reported, establish the proposition that such notice in this case was not necessary.

The plaintiff's lessor was clearly entitled to recover upon these grounds. This renders it immaterial whether Rogers had or had not a valid title by virtue of the Statute of Limitations, whether Caldwell had or had not a valid title under the same statute, or a perfect paper title, and whether the deed executed by the trustees of the Rome Female College was valid or not. Resolving all these questions in the negative, the right of the plaintiff's lessor to recover was not affected. The instructions relating to these subjects may, therefore, be laid out of view. In any just view of the subject they could have worked no injury to the plaintiff in error.

The testimony offered as to the amount paid by Burnett to Vliet for the property was irrelevant, and was properly excluded.

In *Marlin v. Willink*, 7 Sergeant & Rawle, 297, where the leading facts were substantially identical with those upon which the questions before us have arisen, Judge Duncan said: "This is the plainest case in the world." Ejectment was held to have been properly brought by the vendor, and a judgment in his favor was sustained. Whatever relief the plaintiff in error may be entitled to must be sought in equity. He can have none at law.

The judgment of the court below is affirmed.

Cited—23 Wall., 127; 1 McCrary, 633; 18 Am. Rep., 631 (24 Gratt., 512).

MICHAEL LYNCH ET AL., *Plffs. in Err.*,

v.

CARMEN S. DEBERNAL ET AL.

(See S. C., 9 Wall., 815-826.)

Board of Commissioners' judgment not assailable collaterally—San Francisco lands.

The Board of Commissioners' adjudication upon a Mexican claim for lands, however erroneous, cannot be collaterally assailed on the ground that it was made upon insufficient evidence.

The provision of the 15th section of the Act of Mar. 3, 1851, declaring that such final decree shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons, does not change the operation of this general rule.

The final decree confirming lands to the City of San Francisco, excepted parcels of land which had been granted by lawful authority to private parties.

[No. 106.]

Argued Mar. 6, 1870. Decided Apr. 4, 1870.

IN ERROR to the Supreme Court of the State of California.

An action was brought in the District Court of the Fourth Judicial District of the State of California, to recover certain lands. Judgment was rendered in that court for the plaintiffs. Whereupon the defendant took an appeal to the Supreme Court of the State, in which court the judgment was affirmed. Thereupon the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. J. Hubley Ashton and George H. Williams, for plaintiffs in error:

The petition of the city having been filed in July 1852, and that of the plaintiffs in Mar., 1853, in legal contemplation the title of the property passed from the government to the city before the DeBernals instituted their proceedings, and there was nothing left for their claim to attach to.

They have no patent, and if they had one it would take effect by relation Mar. 1, 1853; but before that date, by the retrospective operation of the confirmation and grant to the city, the legal title had been transferred to her.

Landes v. Brant, 10 How., 872; *Waterman v. Smith*, 13 Cal., 420; *Beard v. Federy*, 3 Wall., 491 (70 U. S., XVIII., 92); *Grisar v. McDowell*, 6 Wall., 380 (73 U. S., XVIII., 868); *Stoddard v. Chambers*, 2 How., 284; *Bissell v. Penrose*, 8 How., 380.

The older confirmation defeats the younger. *Chouteau v. Eckhart*, 2 How., 345; *Les Bois v. Bramell*, 4 How., 449; *Berthold v. McDonald*, 22 How., 841 (63 U. S., XVI., 321); *Landes v. Brant* (*supra*).

When we consider the equities, the defendants' title must prevail, for it was earlier in origin as a Mexican title, and earlier in inception as an American title, than the title asserted by the plaintiffs.

Ross v. Barland, 1 Pet., 665; *Doe v. Eslava*, 9 How., 421.

The defendants are third persons within the meaning of the 15th section of the Act of Mar. 3, 1855, and as such are not concluded by the decree of confirmation produced by the plaintiffs, and by the survey and location of the claim, or by either.

Beard v. Federy, 3 Wall., 478 (70 U. S., XVIII., 68).

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At the time of that contestation, they were not possessed of the title which they now exhibit, and their right to intervene and assail the surveys was denied in the district court and in this court, upon the sole ground that they wanted the very interest and title which are now brought to the attention of the court:

Is there anything in the exception contained in the decree of the circuit court of May 18, 1865, which excludes the land now in controversy from the confirmation there made to the City of San Francisco?

The exception in the decree at most, only comprehends lands to which perfect titles were acquired by persons from the Government of Mexico, and to which such titles were subsisting when California was acquired by the United States, and does not extend to inchoate or equitable titles, such as the title of the DeBernals, which did not attach to any particular land of which the grantees were in possession at the time of the acquisition of California.

Messrs. Edmond L. Gould and F. Billings, for defendants in error:

The confirmation of the *pueblo* claim was but a confirmation in embryo.

Persons holding under the Van Ness ordinance take nothing by the *pueblo* title, but get their rights originally from the United States Government, by legislative grant contained in the Acts of 1864 and 1866. These Acts are to the holders under the city equivalent to a patent.

Grignon v. Astor, 2 How., 319; *Guillard v. Stoddard*, 16 How., 494.

The *pueblo* title having been an equity, the legal title to the land was in the United States. And that legal title there remained, so far as concerned the city and its successors, until the passage of Act of Congress of July 1, 1864.

But on that day the legal title to the demanded premises was not in the United States. That portion of these *pueblo* lands had been already conveyed to the defendants in error.

April 2, 1857, when the government appeal was dismissed, their confirmation became absolutely final.

That takes effect by relation from the date of filing their petition before the Board, Mar. 1, 1853.

And thus it appears that their title is the elder by more than eleven years.

The plaintiffs in error are estopped from further attacking our claim. *U. S. v. Fossett*, 21 How., 446 (62 U. S., XVI., 186).

We invoke the plea *res judicata*.

Mr. Justice Field delivered the opinion of the court:

This is an action of ejectment, to recover the possession of certain real property situated within the corporate limits of the City of San Francisco, as defined by its charter of 1851. The plaintiffs assert title to the premises under a grant of the Mexican Government, confirmed by the tribunals of the United States.

It appears from the record of proceedings had before the Board of Commissioners, created under the Act of March 3d, 1851, to ascertain and settle private land claims in California (9 Stat. at L., 631), and before the District Court of the United States, on appeal from the Board, which is set forth in the findings, that in 1834, Figueroa, then Mexican Governor of the Department

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of California, issued a grant of a tract of land, embracing the demanded premises, to one José Cornelio De Bernal: that De Bernal having died, his widow and son, the plaintiffs in this action, in 1853, presented their claim under the grant to the Board of Commissioners, for confirmation; that in 1854, the claim was adjudged valid and confirmed by the Board, and in 1856, on appeal, by the District Court of the United States. From the decree of the District Court, the United States declined to prosecute an appeal to this court, and the decree thus became final.

In 1851, the tract confirmed was surveyed under the direction of the Surveyor-General of the United States, and the survey was subjected to the revision and correction of the District Court, under the Act of Congress of June 14th, 1860. 12 Stat. at L., 33. When made to conform to the directions of the court, the survey and the plat of it were approved, and its decree of approval was, on appeal, affirmed by this court. *Dehon v. De Bernal*, 3 Wall., 774 [70 U. S., XVIII., 146].

The Act of June 14th, 1860, gives to a survey and plat of land claimed under a confirmed Mexican grant, when approved by the district court, the effect and validity of a patent of the United States. It so declares in express terms. 12 Stat. at L., 34, sec. 5. It is, therefore, upon the decree of confirmation, and the approved survey and plat, that the De Bernals rely to recover in the present action.

To meet the case thus presented the defendants contend: 1st. That the Board of Land Commissioners had no jurisdiction to consider the claim of the plaintiff's under the grant of Figueroa, and as a consequence, that the action of the district court, in hearing the appeal from the Board, and in revising and approving the survey of the claim, was without authority and void; and 2d. That if the Board had such jurisdiction, the defendants possess an older and superior title to the premises under the Ordinance of the City of San Francisco, adopted in June, 1865, and the subsequent legislation of the State and of the United States respecting the same.

The objection to the jurisdiction of the Board arises from the fact that the premises granted consist of a lot within the limits of the *pueblo* or Town of San Francisco as it existed at the cession of California to the United States. At that date San Francisco, as such *pueblo*, possessed an equitable claim to lands within the limits of four square leagues, to be assigned and measured off from the northern portion of the peninsula upon which the town is situated. The City of San Francisco succeeded to such interest, and her authorities presented the claim to the Board of Land Commissioners for confirmation; and the defendants insist that the claim of the Bernals under the grant of Figueroa should have been presented in the name of those authorities, and could in no other way have been brought under the jurisdiction of the Board.

This position is founded upon the language of the 14th section of the Act of Congress, but is not, in our opinion, supported by its meaning. A previous section of the Act requires every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government, to present his claim to the commissioners for examination. The 14th

section qualifies this general language, and declares that the provisions of the Act shall not extend to lots held under grants from any corporation or town, to which lands have been granted for the establishment of a town by the Spanish or Mexican Government; nor into any city or town, or village lot, which city, town or village existed on the 7th of July, 1846; and provides that the grants for such lots shall be presented by the corporate authorities of the town, or if the land upon which the town, city or village is situated, was originally granted to an individual, shall be presented in the name of such individual.

The second clause of this section does not apply to all lots situated within the limits of a city, town, or village, which existed on the 7th of July, 1846, but only to the lots owned or claimed by such city, town or village.

The object of the section was to give to lot-holders deriving title from a common source—from the authorities of a *pueblo* or town, or from an individual who was originally the grantee of the land upon which the *pueblo* or town is situated—the benefit of the examination by the board of the general title under which they hold, and relieve the commissioners from the necessity of considering a multitude of separate claims for small tracts depending upon the validity of the same original title. It intended that the corporate authorities should present under one general claim not only the interest of the city, town or village which they represent, but also the separate interest of individuals holding under conveyances from them. The confirmation of the common title to these authorities would of course inure to the benefit of parties holding under them.

The section has no application to lots held adversely to the corporation or town by independent titles. The confirmation of a claim, whether made to corporations or individuals, could not inure to the benefit of parties holding adversely to them.

The claim of the Bernals, not being derived from the *pueblo* of San Francisco, or by any action of its authorities, but directly by a grant from the political chief of the department, was adverse to the claim of the city. It was, therefore, properly presented to the Board of Commissioners for examination, and jurisdiction over it was rightfully taken by that tribunal.

The Board having jurisdiction of the claim, its validity and title to recognition and confirmation were subjects for that tribunal's determination; and its adjudication, however erroneous, cannot be collaterally assailed on the ground that it was made upon insufficient evidence. The rule is as applicable to inferior and special tribunals as it is to those of superior or general authority, that where they have once acquired jurisdiction their subsequent proceedings cannot be collaterally questioned for mere error or irregularity. The provision of the 15th section of the Act of March 3d, 1851, declaring that the final decrees of the commissioners, or of the district court, and patents following them, in these California land cases, shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons, does not change the operation of this general rule. Final decrees in other judicial proceedings affecting the title to property,

are not conclusive except between the parties; they bind only them and their privies; they do not conclude the rights of third persons not before the court, or in any manner affect their rights. Third parties, with respect to the adjudications of the Board of Commissioners, and of the district court, on appeal from the Board, stand upon the same footing as they do with respect to other adjudications in the ordinary proceedings of courts of law.

The decree of the district court upon the claim necessarily involved an adjudication that the grant under which it was made was valid; and the decree approving the survey settled the location and boundaries of the land. As neither of these determinations can be collaterally assailed for any matter which might have been corrected on appeal, had it been brought to the attention of the appellate court, the plaintiffs must recover unless the defendants have a superior title to the premises.

Such title they claim to possess, as we have already mentioned, under the ordinance of the City of San Francisco, passed in June, 1855, and the subsequent legislation of the State and of the United States.

Whilst the claim of the City of San Francisco to her municipal lands was pending before the District Court of the United States, on appeal from the Board of Commissioners, the Ordinance of June 20th, 1855, commonly known, from the name of its reputed author, as the Van Ness ordinance, was passed. By its 2d section the city relinquished and granted all the title and claim which she held to the lands within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the Common Council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal proceedings.

In March, 1858, the Legislature of the State ratified and confirmed the ordinance, and in July, 1864, Congress passed an Act by which all the right and title of the United States to the lands were granted to the City of San Francisco, for purposes specified in the ordinance. The party through whom the defendants claim was in actual possession of the premises in controversy at the time designated in the ordinance, and also on the passage of the confirmatory Act of the Legislature, and therefore acquired whatever right or title the city then possessed.

The claim of the city was confirmed in May, 1865, by the decree of the Circuit Court of the United States, to which court the hearing of the claim had been transferred; and subsequently, with some modifications, by the Act of Congress of March 8th, 1866. Act to Expedite the Settlement of Titles to Lands in State of California, 14 Stat. at L., 4; 13 *Id.*, 338, sec. 4; *Grisar v. McDowell*, 6 Wall., 877 [73 U. S., XVIII., 887].

The position of the defendants is that by the possession of the party through whom they claim, and the operation of the Van Ness ordinance, they acquired an older and superior title to that ceded to Bernal by the grant of Figueroa. This position assumes that the city pos-

sessed a title to the premises in controversy at the time the ordinance was passed, whereas, though the city was then asserting, in the courts of the United States, her claim to four square leagues, the boundaries of the tract were not defined, nor was it known what exceptions and reservations might be made from the claim when it should be considered and finally determined. Whoever received deeds from the city, or asserted title to parcels of land under the Van Ness ordinance, whilst the claim of the city to the land was thus pending, necessarily held whatever they took subject to the final determination of the claim. Their title stood or fell with the claim.

Now, when the final decree upon the claim was made there were excepted from the tract confirmed such parcels of land as had been, by grants from lawful authority, vested in private proprietorship, and had been finally confirmed to parties claiming under said grants by the tribunals of the United States, or should thereafter be finally confirmed to parties claiming thereunder by said tribunals in proceedings then pending therein for that purpose. This exception is not limited to parcels of land claimed under perfect grants, as contended by counsel, but includes all parcels claimed by private parties under grants from the authorities of the former government, the claims to which had been subjected, or might, in proceedings then pending, be subjected to the examination of the tribunals of the United States, and had been, or might be, confirmed by them. The object of the exception was to prevent any possible controversy between parties claiming under the city, and parties holding under grants adjudged valid by the tribunals of the United States, and to protect the latter from being harassed by further litigation respecting their titles. By the language, "such parcels of land as have been by lawful authority vested in private proprietorship," no more is meant than parcels of land which have been granted by lawful authority to private parties.

The exception excludes, therefore, from confirmation to the city the land granted to Bernal, and the Van Ness ordinance did not operate to pass any right or interest in the demanded premises to the party through whom the defendants claim.

As, by the doctrine of relation, the decree confirming the titles of the city took effect as of the day when her petition was presented to the Board in July, 1852, it is contended that the exception is to be construed as referring only to grants, which had been confirmed previous to that date, or which might subsequently be confirmed in proceedings then pending. But the position is not tenable. Such a construction is not required from any application of the doctrine of relation. That doctrine is applied only to subvert the ends of justice, and to protect parties deriving their interests from the claimant pending the proceedings for the confirmation of his title. It gives effect to the confirmation of the title as of the day when the proceedings to secure such confirmation were instituted; and for that purpose only can the decree be treated as made at that time. No different interpretation is to be given to the language of the decree than would be given if the

doctrine of relation had no application. *Jackson v. Burd*, 4 Johns., 230; *Heath v. Ross*, 12 Johns., 140.

Judgment affirmed.

Cited—13 Wall., 101; 97 U. S., 283; 99 U. S., 166.

WILLIAM GUNTON AND JOHN F. CALLAN, Surviving Trustees of the BANK OF WASHINGTON, Appts.,

v.

JOSEPH NOCK.

(See 8 C., "*Bank of Washington v. Nock*," 9 Wall., 373-386.)

Lien on claim—on judgment, when not valid—unfulfilled contract.

An agreement with a corporation that it should advance money to enable one to prosecute his claim against the government, and that the advances should be first paid out of any sums he might realize for his claim, does not create a lien upon the judgment recovered by him in the Court of Claims.

An agreement that the corporation was to have a lien upon the drafts drawn, for the proceeds of locks and keys manufactured and delivered, does not create a lien on such judgment, where all the drafts have been paid and no claim existed except for breach of the contract.

Complainants can have no lien by virtue of a contract which they never fulfilled.

[No. 84.]

Argued Feb. 25, 1870. Decided Apr. 4, 1870.

IN ERROR to the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below, by the plaintiffs in error, for an injunction upon defendant from receiving certain moneys from the United States, on which the plaintiffs claimed a special lien and for the payment therefrom of a claim alleged to be due to them from defendant. The court below having dismissed the bill, the plaintiffs sued out this writ of error. To establish their alleged lien, the plaintiffs in the court below put in evidence the following instruments, viz.:

WASHINGTON, 6th January, 1865.

I hereby renew and revive my indebtedness and obligations of the Bank of Washington (at Washington, D. C.), arising out of certain advances made to me for drafts on the Postmaster-General of the United States in 1840, and all accruing interest thereupon as well as for any other advances which have been made to me or which may be made to me, or any account whatever by the said Bank of Washington.

(Signed) JOSEPH NOCK. (L. 8.)

Witness:

(Signed) W. T. CALLAN,
Filed May 23, 1867.

(Stamp.)

Exhibit B, No. 3.

"In the matter of the claim of Joseph Nock upon the United States Government, for damages for a breach of the mail lock contract.

It is hereby understood and agreed between the Bank of Washington and Joseph Nock, that in consideration of the Bank advancing such sums of money as they may think proper, for the necessary costs and expenses attending the prosecution of the above mentioned claim,
See 9 WALL.

the debt due by said Nock to the Bank, together with the sums advanced pursuant to this agreement, shall be first paid with interest out of any receipts realized by him from the Government, and that no deduction or discount shall be made on said debts due the Bank, if the amount realized by said Nock shall exceed by thirty-three and one third per cent. the amount of said debt.

Washington, December 2, A. D. 1852.

(Signed)

JOSEPH NOCK.

Filed May 23, 1867.

R. J. Meigs, Clk.

Some other documentary evidence was received upon the trial, the nature and effect of which, with a full statement of the facts of the case, appear in the opinion of the court.

Mr. W. D. Davidge, for plaintiff in error:

No evidence was offered to show the matter in avoidance of the agreement of Dec. 2, 1852, or that of Jan. 6, 1865.

It is submitted that the lien of the Bank upon the fund is too plain for controversy. The lien is expressly declared and established by the agreements of Dec. 2, 1852, and Jan. 6, 1865. It is true that the appellee sought to avoid them by allegations of fraud and misrepresentation; but it is equally true that these allegations put in issue by the replication, were not sustained by a particle of evidence.

2 Dan. Pl. & Pr., 2d Eng. and 1st Am. ed., 988, and cases cited.

That the Bank could legally acquire the lien claimed cannot be controverted. The Act of July 29, 1846, sec. 1 (9 Stat. at L., 41), evidently has no reference to an assignment of such an interest as is here claimed, but only to claims allowed by Resolutions or Act of Congress. The later Act of Feb. 26, 1853, sec. 1, 10 Stat. at L., 170, applies only to assignments made after its date, and could not affect the lien declared by the agreement of Dec. 2, 1852.

The lien established, the jurisdiction of chancery attached to compel payment.

Wylie v. Cox, 15 How., 415.

Mr. Isaac N. Morris, for defendant in error:

Only by misrepresentation was a court of equity induced to take cognizance of the case in the first instance. It never, in reality, rightfully had jurisdiction; but if it had, it lost it the moment the injunction was dissolved, when the claim came under a common law remedy.

The drafts were relied on for the repayment of the money, as is shown by complainants' confession and exhibits, which also show that they were to have a specific lien only on the drafts and their proceeds. This was the contract, as they set it up in their bill. It is not pretended that they were to have a lien on anything else. It is not pretended the defendant had anything but his patent, and what he expected to realize out of his contract with the government, upon which a lien or security could be given.

In the subsequent part of the bill it is alleged the defendant executed, Dec. 2, 1852, the pretended contract renewing his indebtedness, "To make to him further advances to prosecute his said claim for payment." The Postmaster-General had paid all drafts drawn upon him, on which only the lien existed as far as money was due, and there was no claim being prosecuted in that direction. What claim then? The bill does not state, and the term is so vague and indefinite

that the court cannot determine the point. One thing only is clear: that the defendant signed the contract to obtain advances to prosecute his said claim for payment and that no advances whatever were made for any such purpose; that he only signed said pretended contract to obtain said advances. There is no pretense set up in the bill, that the defendant agreed to give the said complainant, on what he might recover on said claim, any lien on the judgment recovered in the Court of Claims or its proceeds, and if he created any obligation on himself, it was only a common law obligation and not one in which this court can enter a decree in equity.

The complainants further aver that defendant, "after a long prosecution of his said claim (what claim?), and sundry advances made therefor by your orators, etc., was finally awarded by the Court of Claims, \$27,000, in satisfaction of said contract to furnish said locks." Then follows a statement that the amount is in the Treasury, that defendant is about to draw it, that the complainants have a lien on it, and that the defendant in respect to said fund is only a trustee.

It is alleged in the foregoing language quoted from the bill, that the award of the Court of Claims was in satisfaction of said contract to furnish said locks. The exact reverse is true. It was awarded in damages against the government, because it refused to abide by said contract and repudiated it.

If there was no contract between the parties giving the complainants a specific lien on the sum awarded by the Court of Claims, it follows that defendant was not a trustee in regard to it, and that this court can make no decree against him as such; that in such a case as this, this court has no jurisdiction, and it must be dismissed; for if it is discovered, at any stage of the proceedings of the cause, that it is one coming under law jurisdiction, it must fail in equity.

It is not averred that any money, not even the \$27,000, was awarded on the said drafts or their proceeds, on which only a lien existed. The complainants cannot recover more than they ask. There are two questions involved, the lien and the indebtedness. Both are necessary, conjointly, to maintain the proceeding in equity. In this case neither exists. The drafts which were to be drawn, and on which a specific lien was created, were to be drawn on an agreement to manufacture the locks. The damage resulting from the failure to observe the contract, was quite another thing. If there is any other agreement, by virtue of which a lien was created on any funds coming to said defendant, complainants fail to set it up. They fail to state when and how they obtained a right to receive a part of the \$27,000 awarded defendant in the Court of Claims. The injunction on it was long since dissolved.

Respondent admits that complainants made to him certain advances, to enable him to comply with his contract to manufacture and deliver said locks to the government, and distinctly alleges that said complainants requiring additional security for said advances, he, the respondent, executed to William Gunton, as trustee for the Bank of Washington, a deed of assignment of his said patent, which said assignment was accepted by said complainants and said Bank as such security.

Twenty years' possession of real estate is considered a pretty good title. Here there is twenty-seven years possession of a patent, with a legal assignment of it properly recorded for valuable consideration, and it is now too late for the holder to compel the respondents to take it back and pay the advances, and the Bank has never in twenty-seven years offered to surrender it, nor could the respondent compel its surrender as stated. Upon this ground alone, the court will doubtless adjudge the accounts between the parties settled.

The respondent, among other things, sets up as his defense:

That this court has no jurisdiction of this cause.

That the demands of complainants, if any exist, are barred by the Statute of Limitations, which he has set up in his answer.

That he is not in any wise indebted to the complainants, or to the Bank of Washington.

That there is no lien, no injunction and no money on which an injunction can operate. If any lien ever existed upon any fund *in esse* or *in posse*, it was removed by the assignment of the patent.

Mr. Justice Clifford delivered the opinion of the court:

Advances were made by the complainants, as they allege, to enable the respondent to fulfill a certain contract which he had previously made with the Postmaster-General to furnish to that department a certain number of mail locks and keys for the postal service of the United States.

Prior to the date of the contract, to wit: on the 16th of July, 1839, the respondent had obtained letters patent for the lock to be furnished, as a new and useful improvement, with the exclusive right to make, use and vend the same, for the term of fourteen years, and on the first day of August following he received orders from the head of that department for two hundred locks and six hundred keys, to be constructed in accordance with his patent.

Before the respondent had filled that order, to wit: on the 18th of November of the same year, he received another communication from the Postmaster-General, informing him that he was authorized to make mail locks and keys for the Postoffice Department, of certain specified descriptions, and at certain specified prices, and that orders would be given for the quantities required from time to time, as they were wanted, payment to be made on the delivery of the articles, as ordered for the use of the government.

Wanting more means than he had at command, to enable him to perform his contract, the respondent applied to the Bank for a loan, and the complainants allege that he agreed, in consideration that they would advance money for him on his drafts on the Postmaster-General, to give the Bank a specific lien on the drafts and their proceeds, whenever the same should be realized, to secure and reimburse the corporation for the full amount of the advances so made or to be made, with interest until the principal should be repaid. Cash advances to the respondent were accordingly made by the bank, under and by virtue of that agreement, and the complainants allege that the advances

so made enabled the respondent to fulfill his contract, and to supply the locks and keys for the postal service, as ordered by the department.

Drafts were drawn on the Postmaster-General for the contract price of the locks delivered; but the complainants allege that, for some reason unknown to them, they never received more than \$200 of the proceeds, and that there still remains due and owing to them for the advances made by them, including interest, the sum of \$8,078.82; that on the 2d of December, 1852, the respondent entered into a written agreement with the corporation, that if they would make him further advances to enable him to prosecute his claim against the government, the debt due by him to the bank, for the former advances, as well as the further advances to be made, should be first paid out of any sums he might realize for his claim for the breach of the contract, and that the whole amount of the debt due to the Bank should be paid without any discount if the amount he realized of his claim exceeded by thirty-three and one third per cent. the amount of his debt to the bank.

They also allege that the respondent, on the 8th of January, 1865, by a written instrument of that date, under his hand and seal, acknowledged all the advances so made to him, and renewed and revived his said indebtedness and obligations to the bank for the said advances.

Moneys were subsequently advanced by the Bank for the respondent to the amount of \$100, and they allege that the Court of Claims awarded in his favor the sum of \$27,000, in full satisfaction for the damages claimed by the respondent for the acts of the department in annulling his contract to furnish such locks and keys for the postal service, and that he neglects and refuses to pay his indebtedness to the Bank, or to recognize their specific lien on that fund, but that he is seeking to appropriate the same to his own exclusive use, which, as they allege, is contrary to equity and in fraud of their legal rights. Wherefore they pray that the advances they made to the respondent may be decreed to be a specific lien on the amount recovered in that judgment, and they also pray for an account, and for an injunction to restrain the respondent from receiving this amount from the Treasury of the United States.

Process having been issued and served, the respondent appeared and admitted that he was the original and first inventor of the lock in question; that he received letters patent for the same as a new and useful improvement, and that he made a contract with the Postmaster-General to furnish the same to that department for the postal service of the United States; that he received an order under that contract for one thousand and forty locks and seven hundred and fifty keys; that he subsequently filled the order, and that the proceeds thereof, except the sum of \$150, together with the proceeds of other parcels of the same patented lock and key, to the amount of \$1,593.85, were paid to the Bank; that all locks and keys manufactured and delivered under the contract were paid for by the department except twelve hundred, which the Postmaster-General refused to accept, and which the respondent delivered to the Bank,

in whose possession they have ever since remained, unavailable to the respondent.

Fearful that the proceeds of the drafts would not be sufficient to satisfy the claim for the advances, the officers of the Bank demanded further security, and the respondent alleges that thereupon he assigned to the Corporation his whole interest in the letters patent for the lock in question, and that the Bank continued to hold the same until the letters patent expired. He admits that he executed the drafts, and that they were drawn to enable the Bank to receive the proceeds of the locks and keys as manufactured and delivered to the department, but he expressly denies that there was any understanding or agreement that the drafts were to be a lien on the contract, as alleged in the argument of the appellants.

Separate defenses are also presented to the subsequent agreements set up by the appellants, and in respect to that of the 2d of December, 1852, he alleges that the advances were made to pay for the services of an agent to procure an extension of the patent, and to prosecute his claim against the government for the annulment of his contract; that they were not made a lien on the contract, as supposed by the appellants, and that the application for the extension of the patent was refused, and that the suit in the Court of Claims to recover damages for a breach of the contract resulted in an adverse judgment.

Apart from that defense he also alleges that the Bank employed the same agent and agreed to give him one third of whatever sum they might receive towards their claim, in case the agent was successful in procuring the extension of the patent, or the allowance of the claim.

In his answer the respondent also admits the execution of the agreement of the 6th of January, 1865, but he alleges that he never received under it more than \$100, and that when he needed funds to enable him to prosecute his claim to a successful result, the appellants refused to make him any advances, and informed him that they had no confidence in his claim, and that they would not advance him a dollar for that purpose.

By the order of the court the cause was referred to an auditor, and he reported that the several advances made to the respondent amounted to \$8,700.33, and the court, at a special term, on the 5th of August, 1867, entered a decree in favor of the complainants for that amount. But the respondent appealed to the full court in general term, where the decree was reversed and a decree entered dismissing the bill of complaint. Whereupon the complainants appealed to this court, and still insist that their claim is a lien upon the judgment recovered by the respondent against the United States in the Court of Claims.

Liens existed at common law, and they usually arise by statute or by contract, or by the usages of trade or commerce. *Add., Cont., 1174; 3 Pars., Cont., 238.* Such a contract, if alleged, must be proved, and when proved the rights of the parties depend upon the terms of the contract. *Randel v. Brown, 2 How., 406; Allen v. Ogden, 1 Wash., 174.*

The complainants contend that their claim is a lien upon the judgment recovered by the respondent, but he denies that proposition and

insists that he never entered into any such contract. Before examining that question, however, in its general aspect, it becomes necessary to inquire and determine whether by the terms of the original arrangement it was agreed and understood between the parties that the advances made by the Bank to the respondent were to be a lien upon the contract made by the respondent to manufacture the locks and keys and deliver the same to the Postmaster-General, or whether those advances were only to be a lien on the drafts to be drawn by the respondent for the proceeds of the locks and keys so manufactured and delivered, after the proceeds became due and payable.

Evidently the views of the complainants cannot be sustained by virtue of the original arrangement, unless they had a lien upon the contract between the government and the respondent, as the drafts drawn for the proceeds have all been paid and adjusted to the satisfaction of all concerned. Suffice it to say on this point that the complainants do not allege in the bill of complaint that they had any lien upon the contract; and if they had done so the allegation would not be of any avail, as the answer expressly denies the existence of any such lien, and there is nothing in the proofs to sustain any such theory.

What they do allege is, that they had a specific lien upon the drafts drawn for the proceeds of the locks and keys manufactured and delivered, but it is not alleged that there were any such drafts outstanding and unpaid by the government, which were included in the judgment recovered by the respondent. On the contrary, it is alleged in the answer, and not denied by the complainants, that all the drafts drawn for locks and keys manufactured and delivered to the department were paid in full by the government.

Twelve hundred locks were manufactured, which were refused by the Postmaster-General, but the averment of the answer is, that they were delivered to the Bank, and it does not appear that any draft or drafts for the contract price of those articles were ever drawn, presented or refused. Such advances were made by the Bank at different times, and one of the appellants testifies that the understanding was that they were to draw the money as soon as the locks were delivered, and that the orders were given to enable them to draw the money due for locks and keys furnished to the department; and the respondent testifies that the whole amount due for the locks furnished was paid by the government either to him or to the Bank.

Much of the respondent's indebtedness to the bank was contracted prior to the 6th of June, 1840, and on that day he assigned his whole interest in the letters patent to the Bank, or to one of the appellants for the benefit of the Bank, as security for such advances, with authority, in case he should fail to pay the same when the advances became due, to sell and dispose of the patent at public or private sale, first giving sixty days' public notice of such sale, as provided in the instrument of assignment.

Dissatisfied with the arrangement, the department refused to give further orders for the locks and keys, and on the 6th of December, 1841, the department annulled the contract, and entered into a new contract with another

party to supply the locks and keys for the postal service of the United States.

All the drafts drawn by the respondent for the proceeds of locks and keys furnished to the department had been paid, and he had no claim upon the United States except for the breach of the contract.

Suppose all these suggestions are correct, still the complainants refer to the agreement of the 2d of December, 1853, and insist that they are entitled to a decree by virtue of that instrument. Undoubtedly, the effect of that instrument was to renew and revive the original promise of the respondent to pay to the Bank any balance which he owed the Corporation for those prior advances, but it did not have the effect to renew or revive any prior lien on the contract between the respondent and the government, because no such prior lien ever had any existence. It removed the bar of the Statute of Limitations, but its effect in all other respects was only prospective.

Briefly stated, the terms of the instrument are, that the Bank shall advance such sums of money as they may think proper for the necessary costs and expenses in prosecuting the claim of the respondent against the government, and that he, the respondent, agrees, in consideration thereof, that their debt against him, together with the sums so advanced, shall first be paid out of any receipts realized from the government. Certain advances were accordingly made for that purpose, an agent was employed, a suit was instituted in the Court of Claims, but nothing was recovered, and the result was an adverse judgment against the claimant. Both the Bank and the claimant abandoned the prosecution of the claim, and nothing further was done in that behalf for the period of twelve years. Nothing in fact was ever done by the Bank or the respondent under that agreement after the suit was determined in favor of the United States.

Conditioned, as the instrument was, that the debts of the Bank were to be paid out of the receipts which they might collect from the government, our conclusion is, that the supposed lien never attached to the claim of the respondent, as nothing was ever collected. Beyond doubt he owes the debt, as he received the advances, but the question is whether the Bank acquired any lien by virtue of that instrument, and our conclusion is that no lien was created by it, because nothing was collected from the government.

Years elapsed before the respondent made any further attempt to obtain damages for the refusal of the Postmaster-General to fulfill the contract. Some new powers had been conferred upon the Court of Claims, and the respondent employed a new agent, who succeeded in procuring the passage of a resolution by Congress, referring the matter again to the Court of Claims for their adjudication. Encouraged by this resolution he instituted a new suit in the Court of Claims, and on the 6th of January, 1863, he gave the Bank another written agreement renewing and reviving his indebtedness and obligations arising out of certain advances made to him for drafts on the Postmaster-General, and for all accruing interest, as well as for any other advances which have been or may be made by the said Bank.

Reference is made by the plaintiffs to this instrument as showing a lien on the judgment in question in behalf of the complainants, but it is quite clear that the language of the instrument will not admit of any such construction. Unquestionably, it is a new promise, but it contains no language whatever to support the theory that the parties intended that it should have the effect to create a lien in favor of the bank upon the claim of the respondent against the United States.

Special reference is made in the instrument to the advances made for the drafts drawn on the Postmaster-General, not as creating or recognizing any lien on the original contract, but as descriptive of the indebtedness and obligations which it was the purpose of the respondents to renew and revive.

Two indorsements were made on the instrument, to wit: one for \$80 and the other for \$40, and it is true that those indorsements contain the recital that those sums were advanced in aid of the claim of the respondent, and that the appellants, as trustees of the Bank, have an interest in the claim, but it is not there stated, even if the indorsements are competent evidence, what their interest is, nor that they have any other or greater interest than other creditors. They do not pretend that they advanced more than those two sums under the last agreement, and they admit that the respondent several times applied to them for money, and that they refused to supply his wants, which fully supports the allegations of the answer.

His theory is that they agreed to advance what was necessary to pay the expenses in the new prosecution of the claim, but the complainants deny that proposition, and insist that they let him have all they agreed to furnish, and if that allegation is true it affords strong ground to conclude that the instrument under consideration never was intended to create any such obligations as is supposed by the appellants. But if it will admit of such a construction then it is clear that the complainants cannot recover, as they never fulfilled the contract. They never advanced but \$100, and it is past belief that either party ever supposed that the expenses of prosecuting the claim to a successful result would not exceed that sum.

Decree affirmed.

JOHN LIONBERGER, *Plff. in Err.*,

v.

EDWARD S. ROWSE.

(See S. C., 9 Wall., 468-477.)

Power to tax banks—tax on shares may be paid by banks—construction of Act.

Congress, in imposing conditions on the power of the State to tax banks, had reference to banks of circulation.

The tax assessed on the shares in National Banks, may be required to be paid by the corporations respectively, instead of by the individual shareholders.

Congress meant no more by the second limitation in the proviso to the 41st section of the National

NOTE.—*Power of States to tax. Taxation of shares in National Banks, and of other corporations.* See note to Prov. Bk. v. Billings, 29 U. S. (4 Pet.), 514, and note to Dobbins v. Erie Co., 41 U. S. (16 Pet.), 426.

See 9 WALL.

Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National Banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.

[No. 129.]

Argued Mar. 17, 1870. Decided Apr. 4, 1870.

IN ERROR to the Supreme Court of the State of Missouri.

This case involves the question of the validity of the tax imposed by the State of Missouri on the shares of stock in National Banks, located in Missouri, under the existing laws of that State. The case is a representative one, the stockholders having in most instances refused to pay the tax. There is a large sum of money amounting to more than \$300,000, dependent upon the decision in this case.

The plaintiff in error is a stockholder of the Third National Bank of St. Louis. That institution was duly incorporated Dec. 25, 1863, under the provisions of the Act of Congress, entitled "An Act to Provide a National Currency, Secured by a Pledge of United States Stocks, and to Provide for the Circulation Thereof." Approved Feb. 25 1863. Prior to the passage of the Act of Congress last referred to, there were ten state banks in Missouri, all banks of issue, and chartered by the State under the provisions of the Banking Law of 1857. By the provisions of that law, the state banks were required to pay a *bonus* to the State, in lieu of all other taxation, of one per cent. upon the amount of their capital stock paid in.

After the passage of the Act of Congress of Feb. 25, 1863, to provide a national currency, and the amendatory Act of June 3, 1864, several of these state banks wound up their business as state banks, and their stockholders organized banking associations under the provisions of the Acts of Congress above referred to, and amongst those was the Third National Bank, organized by the stockholders of the Southern Bank of St. Louis, as above stated, on Dec. 25, 1863. Others of the state banks retained their organizations as such, and have still continued to do business under their original charters, except that they have long since withdrawn their notes from circulation.

In 1867, this being the condition of things, the plaintiff in error being the owner of two hundred shares of stock in the Third National Bank of St. Louis, was assessed upon a valuation of his shares of stock and a tax assessed against him on that account of ninety hundredths per cent. for state purposes, forty hundredths per cent. for county purposes, and forty hundredths per cent. for school purposes, being nearly two per cent. *ad valorem* upon his stock in the Third National Bank—the state banks which retained their organizations under the State Law of 1857, being only required to pay one per cent. upon the amount of capital stock paid in. The plaintiff resisted the payment of the tax; whereupon the collector proceeded to collect the tax by seizing the property of plaintiff.

Suit was brought in the St. Louis Circuit Court by the plaintiff in error against the collector, setting out in his petition the facts above stated. Defendant demurred to the petition, and the demurrer was sustained by the court. Judgment went upon the demurrer and the case was taken by writ of error to the Su-

preme Court of Missouri, where the judgment of the circuit court was affirmed; whereupon the plaintiff sued out this writ of error.

Messrs. Wm. M. Evarts, James O. Broadhead and C. D. Drake, for plaintiff in error:

1. The validity of the state taxation of the stock of the "Third National Bank of St. Louis," of which the plaintiff, now the plaintiff in error, complains, depends wholly upon the question whether such taxation is conformed to the permissive authority for taxation by the State, given by the 41st section of the Act of Congress of June 3, 1864.

The legislation of Missouri on the subject of bank taxation is as follows:

I. Amendment of the Constitution of Missouri, adopted in January, 1857, provides that the General Assembly shall have power to establish such bank or banks as may be deemed necessary for the interests of such State, but any bank so established, shall be based upon specie capital and made liable to redeem its issues in gold or silver; provided that the number of banks chartered shall never exceed ten, and the aggregate amount of capital shall never exceed \$30,000,000."

II. In the same year, 1857, the Legislature of Missouri passed a General Bank Act, and created at once the ten banks authorized by the Constitution. Among its provisions are the following:

"Sec. 1. Every bank which now is, or shall hereafter be, incorporated under the authority of the State, shall be subject to the liabilities and governed by the rules contained in this Act."

"Sec. 32. In consideration of the privileges granted by this Act to banks incorporated in this State, each banking company agrees to pay the State annually, one per cent. on the amount of capital stock paid by the stockholders, other than the State, which shall be in full of all *bonuses* and other taxes, to be paid to the State by the respective banks."

III. A subsequent Act of Mar. 18, 1861, further provides, that:

"Sec. 12. The one per cent. required to be paid by section 32 of article 1 of said Act, shall be received as full compensation for all taxes of every kind whatever; and it shall not be lawful for any county, city or town corporation to levy or collect any tax of any kind, upon or from any of the banks organized under said law."

IV. The Revised Code of Missouri, of 1855, provides for an *ad valorem* assessment of shares of stock in banks and other incorporated companies, and in the Act concerning revenue of Feb. 4, 1864, it is provided that shares of stock in banks and other incorporated companies shall be subject to assessment for taxation as other property.

This law was in force at the time of the taxation in this case.

V. The statute provides the mode of assessment as follows:

"Sec. 27. Persons owning shares of stock in banks and other incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, shall deliver to the assessor a list of all shares of stock held

therein, and the names of the persons who hold the same."

"Sec. 28. The tax assessed on shares of stock embraced in said list, shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from dividends accruing on such shares; and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

Ch. 12, p. 103, Gen. St. Mo., 1865.

It was under this state of the law of Missouri, that the tax upon the shares of the plaintiff in error in the Third National Bank of St. Louis was levied, and the question of the conformity of such taxation with the provisions of the 41st section of the Act of Congress of June 3, 1864, arises.

2. The taxation attempted by the State of Missouri cannot be supported upon the mere authority of the State, unaided by the federal authority (assenting to the taxation of the stock of national banks) given by the 41st section of the Act of Congress of June 3, 1864.

1. It is settled by adjudged cases in this court, that this Bank in its corporate capacity, is not subject to taxation by the laws or under the authority of a State, upon its franchise, or operations, or capital, but that it is wholly exempt from such taxation by reason of its relation to the Federal Government, as an agency or instrument in the exercise of its constitutional powers.

McCulloch v. Md., 4 Wheat., 316; *Osborn v. U. S. Bk.*, 9 Wheat., 738; *People v. Com.*, etc., 28 N. Y., 204; *Dobbins v. Com.*, etc., 16 Pet., 485.

2. It is also settled by decisions of this court, that such state taxation in the form of an imposition upon the shares of stock, equally requires the permissive authority of federal legislation for its competency and validity.

Gordon v. Appeal Tax Court, 8 How., 133; *Van Allen v. The Assessors*, 3 Wall., 573, 581, 598 (70 U. S., XVIII., 229, 233, 239); *People v. The Commissioners*, 4 Wall., 244 (71 U. S., XVIII., 344); *Bradley v. The People*, 4 Wall., 459 (71 U. S., XVIII., 439).

3. The authority of the state taxation in question can claim no aid or sanction from the 41st section of the National Currency Act, for the taxation complained of does not conform to the affirmative limitations of that section to the taxation conceded by its terms.

12 Stat. at L., 111.

1. The state taxation authorized by the Act of Congress (in its affirmative concession and aside from the subsequent restrictive conditions imposed), is limited to a permission that the shares of the National Banks held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under state authority.

This is the operative and essential limitation, upon and within which the general exemption from state taxation is relaxed, and beyond which the exemption is upon the highest consideration needed to be preserved.

Of itself, and without the specific additional restrictions afterwards imposed, it secures two great objects:

First. It preserves the corporation organiza-

tions, being instruments of the constitutional powers of the General Government, from any scrutiny or supervision of the state authorities, as preliminary to, or dependent upon, taxation, and also from the dominion which the taxation, the collection and the enforcement of taxes, imply and demand. The National Banks themselves are not subjected to the taxing power of the State at all.

Second. It secures, substantially, indiscriminate and impartial treatment for the permitted taxation, by merging the specific character of the property, as a subject of state taxation, in the mass and value of the property of the citizens of the State from which it exacts its revenues. It is for its value in and as part of the property of the individual taxed, and not for its nature and in its relation to the national and corporate uses and functions, that it is opened to the taxation of the State.

Besides, the regulative and prohibitory conditions upon state taxation subsequently imposed, all rest for their adequate and practical maintenance, upon this original and affirmative limitation of taxation.

II. The scheme of taxation of the State of Missouri is directly repugnant to this affirmative requirement of the 41st section.

It assesses the tax upon banks in their corporate capacity.

It compels the payment of the tax by the banks in their corporate capacity.

It thus subjects the national banks to the dominion of the taxing power of the State in their corporate capacity.

III. This scheme of taxation admits of and inevitably tends to taxation upon different principles, and upon different results to the tax payer, from those which would attend the assessment of these shares as a part of the value of the tax payer's personal property.

Upon this scheme, the shares of the national banks are made to bear the tax imposed according to their value, and not according to the general result of the valuation of the taxpayer's property, as yielding, or failing to yield, a surplus for taxation.

4. The taxation in question violates the restrictive and prohibitory conditions imposed upon the authority of state taxation upon the shares of national banks, by the 41st section of the National Currency Act.

This section provides, as the final condition to the validity of state taxation of the shares of national banks, that the tax so imposed shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State, where the national bank is located.

I. It is apparent from the existing legislation of Missouri respecting banks and their taxation, that, as matter of law and as matter of fact, the shares of stock in the state banks are not taxed at all.

This is fatal to the validity of the attempted taxation of the shares of the national banks.

Van Allen v. Assessors, 3 Wall., 578 (70 U. S., XVIII., 229); *Bradley v. People*, 4 Wall., 459 (71 U. S., XVIII., 438), *ut supra*.

II. It is equally apparent that by the existing legislation of Missouri, the rate of taxation of the capital of the state banks is not the rate imposed upon the national bank shares by the taxation complained of. Stat. of Mo., *ut supra*.

See 9 WALL.

That the Statute of Missouri, by contract with these state banks, has incapacitated itself from laying upon the capital or shares of the state banks the same rate which it exacts upon the stock of the national banks, only confirms the fatal fact that the equality and conformity required by the 41st section of the National Currency Act are not observed in the taxation complained of.

Messrs. M. Blair and F. A. Dick, for defendants in error:

The only fact relied on in plaintiff's petition to invalidate the tax against him was, the existence of certain banks under the general banking law of the State, of 1857, and the only use made of this fact was to argue that the banks so established were the only banks, or if not the only banks, were the only banks of the class (banks of issue), which could compete with the national banks, and hence were the only banks the tax of whose shareholders could properly be compared with the tax on shareholders in the national banks. The counsel for plaintiff complained that these holders were exempt, and hence that the plaintiff was also exempt.

The point argued by defendant's counsel, that the exemption of the shareholders in one or more banks by special contract, whilst the shareholders of the great mass of the banking capital of the State were subjected to taxation under the General Revenue Law, does not exempt the shareholders of the national banks, was not relied on by plaintiff in the state courts. If it should be presented here, it is sufficient to say that the proposition is the same substantially passed upon by this court in the case of *The People v. The Commissioners*, 4 Wall., 224, 256 (71 U. S., XVIII., 344, 349). There the shareholders insisted that, as no tax could be assessed on United States securities, and the first proviso of the 41st section required that the tax on their shares should not exceed that "assessed on other moneyed capital in the hands of individual citizens," it followed that they were exempt. The court replied that the standard contemplated by the law was taxable, not non-taxable moneyed capital.

A state revenue law, dated prior to the National Bank Act, taxing bank shares generally and equally with other moneyed capital in the hands of citizens, is equally operative on the shares of such banks as a subsequent Revenue Act, and meets the requirements of the Bank Act as fully as if it contained the proviso of the 41st section in terms. Such an Act cannot be suspected of the unfair discrimination this proviso was intended to guard against.

Mr. Justice Davis delivered the opinion of the court:

It appears by the record in this case that the plaintiff in error, a resident of St. Louis, is a shareholder in the Third National Bank of St. Louis, a corporation organized under the provisions of an Act of Congress entitled "An Act to Provide for a National Currency," approved February 25, 1863, and that a tax was levied under the authority of the State, of nearly two per cent. on the assessed valuation of the shares of stock.

There being a refusal to pay the tax, it was forcibly collected by the defendant in error, who was the collector of taxes for the City

and County of Saint Louis. On this being done, the plaintiff in error commenced his suit in the Saint Louis Circuit Court for the alleged wrongful act, claiming that the assessment and collection, if done under color of law, were without any legal authority whatever. The circuit court decided adversely to the claim set up, and the Supreme Court, on appeal, affirmed the decision. The case is brought here by a writ of error, to test the question of the validity of a tax imposed by the State of Missouri on the shares of stock in national banks located there under the existing laws of the State, and has received the careful consideration of the court, as well on account of the principle involved as of the large amount of money dependent on the decision of the suit.

It is no longer an open question in this court, since the decision in the case of *Van Allen v. Annessors*, 8 Wall., 578 [70 U. S., XVIII., 229], that the shareholders in a national bank are subject to state taxation, although the entire capital of the bank be invested in the bonds of the United States, which cannot be taxed by state authority. The difficulties which have arisen since that decision do not relate to the abstract right of taxation, but grow out of the supposed conflict of state legislation with the provisions of the Act of Congress on the subject. The 41st section of the Act of Congress of 3d of June, 1864, 13 Stat. at L., 111, placing these shares within the reach of the taxing power of the States, annexed two conditions to the exercise of the power. The State was forbidden to tax them higher than it taxed other moneyed capital in the hands of its own citizens, or to impose on them a tax exceeding the rate imposed upon the shares in any of the banks organized under state authority. If there was no discrimination in these particulars the State could lawfully tax shares in the national banks. It is conceded the tax exacted from the plaintiff in error was not greater than was assessed on other moneyed capital belonging to individuals or corporations, but it is claimed that it is higher than the rate paid by the state banks.

And this brings us to the consideration of the main question in the case. In order to understand the point in controversy, it is necessary to recur to the legislation of Missouri on the subject of banking. In the year 1857, the Constitution of the State having been amended for the purpose, the Legislature established a general banking law, by which ten banks of discount, deposit and circulation were authorized to be incorporated. The charter provided that, in consideration of the privileges granted, each banking company should pay to the State, annually, one per cent. on the amount of capital stock paid in by the shareholders (other than the State), which was accepted in full of all *bonus* and taxes to be paid to the State by the respective banks. In consequence of the Supreme Court of the State deciding (*Lexington v. Aull*, 30 Mo., 480), that this exemption only applied to state taxation, the charter was amended so as to make the one per cent. a full compensation for all taxes of every kind whatsoever. The ten banks chartered by this law were organized and continued to do business until 1863.

About that time, but before the assessment of the tax in this case, all these banks, with two

exceptions, relinquished their state charters, and organized as national banks, under an enabling Act of the Legislature; the Bank in which the plaintiff in error is a shareholder being one of them. The Exchange Bank and the Mechanics' Bank retained their organization under the state law, and still continued to do business under their charter.

In this condition of things it is contended that the tax in question is invalid, because the two state banks chartered in 1857, which did not, like the remaining eight, become national banks, cannot be taxed higher than one per cent., while the assessment of the shares of the plaintiff in error equals nearly two per cent. It is not denied that these two banks hold a very inconsiderable portion of the banking capital of the State, and that the shares of all other associations in the State (there being many), with all the privileges of banking except the power to emit bills, are taxed like the shares in national banks, but it is claimed the proviso in the 41st section of the National Banking Act, imposing a limitation on the power of the States, has reference alone to banks of issue. To ascertain the sense in which the word "bank" is used in the proviso to this section, it is necessary to recur to the mischief which Congress desired to guard against. The national banks were established to provide a national currency, at a time when the state banks furnished the entire paper circulation of the country. In providing a system by which the States, where national banks were located and did business, could tax their shares, it was important, as their notes came in competition with state bank paper, that there should be no unfavorable discrimination against them. It was easy to see that an unfriendly State could legislate so as to drive them out of circulation, and this consideration induced Congress to limit the state power of taxation in two particulars. In declaring that national bank shares should be taxed like other moneyed capital, and that no burdens should be imposed on them from which state banks were exempt, all was done that the necessity of the case required. There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation. It seems, therefore, clear, that the proviso to the 41st section was meant by Congress to apply to banks of issue. It is proper in this connection to observe, that the changed condition of the banking interests of the country, has been the occasion of further legislation by Congress on this subject, and that now the power of state taxation over the shares of national banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. 15 Stat. at L., p. 34.

Having determined that Congress, in imposing conditions on the power of the State to tax had reference to banks of circulation, the question arises whether the tax in this case was invalid because of the *status* of the two banks left in Missouri. According to the words of the law the tax was not warranted, but did Congress intend that the law should have such an effect? Did it contemplate that the shares of national banks should escape taxation, if the State

complied, so far as it had the ability to do so, with the requirements of the 41st section of the National Banking Act? In our opinion the answers to these inquiries must be in the negative. It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice. *Dwarris on Stat.*, chap. 12; *Perry v. Skinner*, 2 Mees. & W.. 477; *Stocker v. Warner*, 1 C. B., 149.

It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the national banks. The measure itself had reference to prospective legislation by the States and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different States; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law which by another it made practically unavailable? If the construction contended for by the plaintiff in error be allowed, then a State so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given to tax the shares of national banks. And this further consequence would follow, that the shareholders of national banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality, would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to such manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the 41st section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.

Testing the case in hand by this rule, it is apparent that the tax complained of was properly assessed and collected. Missouri has complied, so far as it had the ability to do it, with the demands of the law.

See 9 WALL.

The Legislature, as soon as the national banking system was created, passed a law enabling the ten banks of issue in the State to wind up their business, in order that their shareholders could, if they chose, transfer their interests to the new system. Eight of these banks availed themselves of the privilege, surrendered their charters as state corporations, and became national bank associations. Two of them declined the proposition tendered by the State, and are still doing business in St. Louis. There is no way the State could compel them to relinquish their charters, nor has it the power to tax their shareholders on their shares of stock. Having contracted with these banks to accept from them annually, in lieu of all taxes, one per cent. on their paid-in capital stock, it cannot turn round and assess a tax on the shareholders. As the State did all that it could to conform its legislation to the requirements of the law, it was, therefore, in a condition to impose the tax in question on the shares of stock held by the plaintiff in error.

It is objected that the mode of assessment provided by the general revenue law of the State is inconsistent with the provisions of the Act of Congress of June 3d, 1864, as it requires the tax assessed on the shares of stock, to be paid by the corporations respectively instead of the individual shareholders. This was one of the questions in the case of *The National Bank v. Commonwealth*, decided at this term, and it was there held that this mode of assessment was not inconsistent with the terms of the law, but in all respects unobjectionable. It is unnecessary to repeat the argument presented in that case, or to consider the point further, as we see no reason to question the soundness of that decision.

The judgment of the Supreme Court of Missouri is affirmed.

Cited—9 Wall., 590; 39 N. J. L., 385; 19 Blatchf., 246; 3 Dill., 338, 334; 2 Flipp., 70, 72; 48 Ind., 570, 571; 36 Am. Rep., 496 (71 Mo., 509).

THE CITY OF KENOSHA, *Plff. in Err.*,

v.

JOSHUA F. LAMSON.

(See S. C., 9 Wall., 477-486).

Action on coupons, not barred by lapse of less than 20 years—legislative ratification of bonds—effect of state decisions.

Coupons of bonds do not have the effect of extinguishing the interest due on the bonds.

An action upon coupons is not barred by the lapse of six years.

Such cause of action is not barred by lapse of time short of twenty years.

NOTE.—*Municipal bonds, how affected by change of ruling of highest court of State, or by change in Constitution.* See note to *Mitchell v. Burlington*, 71 U. S., XVIII., 350.

Suits on coupons detached from bonds.

The holder of coupons, detached from corporation or state bonds, payable to holder or to bearer, may sue upon them in his own name and recover without producing the bond. *Hedfield on Railways*, 608; *Williamson v. N. A. & S. R. R.*, 9 Amer. Ry. Times, No. 37; *Comrs. of Knox Co. v. Aspinwall*, 62 U. S., XVI., 208; *County of Beaver v. Armstrong*, 44 Pa. St., 63; *Thompson v. Lee Co.*, 70 U. S., XVIII., 177; *Natl. Exchbg. Bk. v. Hartford & C. R. R. Co.*, 8 R. L., 375; *Kennard v. Cass Co.*, Cent. L. J., Jan. 15th, 1874.

Where the Legislature ratified the loan of the credit of a city to a railroad company, this was equivalent to original authority.

Where, at the time such loan was made and the bonds were issued, the decisions of the court of the State favored the validity of the law, a later decision to the contrary cannot be followed.

[No. 142.]

Argued Mar. 23, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

The history and facts of the case appear in the opinion of the court.

Mr. John W. Cary, for plaintiff in error:

There was no authority in the City of Kenosha to issue these bonds, and they are, therefore, void.

In what follows in this case, I desire the court to read the word "scrip" "bonds," and regard what is said of section 8 as of section 4, and of chapter 6 as of chapter 138 of the private and local laws of 1857.

The plaintiff, in order to recover, was bound to show, affirmatively, that no such authority existed. There was no presumption in his favor on this point.

Thompson v. Lee Co., 8 Wall., 330 (70 U. S., XVIII., 178).

The question, therefore, for our consideration is, was the City of Kenosha authorized to issue these bonds in aid of said railroad company?

The question is not an open one in this court. It had already been passed upon by the Supreme Court, which is the proper tribunal to determine its validity under the Constitution of Wisconsin, and its decision on this question is conclusive upon this court.

Foster v. Kenosha, 12 Wis., 616.

That decision declared and decided that there was a total want of power in the city to create this debt, and in such a case this court have decided that the indebtedness of a municipal corporation is not valid.

Thompson v. Lee Co. (supra).

"The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the Statute, and is as binding upon the courts of the United States as the text."

It makes no difference that the bonds from which coupons were detached have been paid and extinguished. *Natl. Exchg. Bk. v. Hartford & C. R. R. Co.*, 8 R. I., 375; *Town v. Culver*, 86 U. S. (19 Wall.), 84; *Clark v. Iowa City*, 87 U. S. (20 Wall.), 583; *New London v. Ware*, 41 Conn., 542.

In Maine it has been held that holder of a coupon could not maintain an action on it as a distinct and independent security, as its language did not imply any negotiable or independent character. *Jackson v. Y. & C. R. R. Co.*, 1 Amer. Law Reg., N. S., 585.

It has been held in Connecticut that suit could not be maintained on coupons alone unless it contained a distinct promise to pay the amount represented. *Crosby v. New London & C. R. R. Co.*, 28 Conn., 121.

It is immaterial that the coupon contains no words of promise, as it evinces an intention to constitute in itself an obligation to pay and could have been designed for no other purpose. Being notes or drafts, not sealed, they are admissible in evidence and may be recovered upon under the common money counts. *Johnson v. Stark Co.*, 24 Ill., 75; *Mercer Co. v. Hubbard*, 45 Ill., 142; *Dan. on Negotiable Instruments*, sec. 1433; 2 Amer. Law Reg., N. S., 585.

Coupons detached are treated and regarded as bank bills and currency, and may be used on though the owner be not the holder of the bond. *Com. v.*

Leffingwell v. Warren, 2 Black, 603 (67 U. S., XVII., 262); *Shelby v. Guy*, 11 Wheat., 367; *McCluny v. Silliman*, 8 Pet., 270; *Greene v. Neil*, 6 Pet., 291; *Ross v. Duval*, 18 Pet., 45; *Massingill v. Downs*, 7 How., 767; *Nesmith v. Sheldon*, 7 How., 812; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 How., 504.

This case comes strictly within the above rule, which is the settled practice of this court. It is not a question of mercantile or commercial law; nor of impairing the obligations of contracts; but simply a question of power and authority arising on the construction of the Constitution and Statute Law of the State of Wisconsin. In such a case this court say, in *Mercer Co. v. Hackett*, 1 Wall., 96 (68 U. S., XVII., 550): "We would have felt bound to follow it"—the decision of the state court.

This case is not within the decision of *Gelpcke v. Dubuque*, 1 Wall., 175 (68 U. S., XVII., 520), for here the Supreme Court of Wisconsin has never changed its decision, but declared the law unconstitutional when it was first brought to its notice, and has always adhered to that decision.

Several Acts of the Legislature were introduced under the pretense of showing that this scrip and indebtedness had been ratified by the Legislature.

It will not be pretended that chapter 148 of the Laws of 1859, amending the provisions of the chapter of 1857, relative to a railroad commissioner, and the two Acts relating to the readjustment of the city debt of the City of Kenosha, passed in 1869 and 1863, directly or in terms ratify this subscription of stock, or the issue of this scrip; and we are, therefore, to consider whether they do it by implication, or whether it is not an utter perversion of their true scope and object to give them any such construction. If there was a legitimate object for which a Railroad Commissioner could be elected in the City of Kenosha, aside from this subscription and scrip, then certainly a law providing for the officer and the election of such officer should not be construed as a ratification of another transaction, wholly unwarranted and void.

Emigrant Industrial, etc., 96 Mass., 12; *Spooner v. Holmes*, 103 Mass., 507; 8 C. 3 Am. Rep., 491; *McCoy v. Washington Co.*, 3 Wall., Jr., 381; *Memphis v. Brown*, 5 Amer. L. T. Rep., 433; *Langston v. South Carolina*, 2 So. Car., N. S., 248; *Wobey v. Pole*, 4 Barn. & Ald., 1; *Matter of Imperial, etc.*, L. R., 11 Eq., 473, 486; *Murray v. Lardner*, 69 U. S., XVII., 367; 1 Am. Lead. Cas. (5th ed.), 407; *Durant v. Iowa City*, 1 Woolw., 69; *Smith v. Clark Co.*, 54 Mo., 58.

Coupons attached to railroad or other bond, payable to bearer, are negotiable instruments, and a purchaser thereof in good faith, before due, acquires a good title thereto. *Everton v. Natl. Bk. of Newport*, 66 N. Y., 14; 3 C., 23 Am. Rep., 9; *Hotchkiss v. Bank*, 88 U. S. (21 Wall.), 241; *Tilden v. Blaine*, 88 U. S. (21 Wall.), 354; *Clark v. Iowa City*, 87 U. S. (20 Wall.), 583; *Dinsmore v. Duncan*, 57 N. Y., 573; *Chapman v. Rose*, 56 N. Y., 140.

To be negotiable, a coupon must be so upon its face without reference to any other paper; if it is not payable to order or bearer, and does not contain other equivalent words, it is not negotiable. *Augusta Bk. v. Augusta*, 49 Me., 507.

When, upon their face, coupons refer to the bonds to which they were attached, and purport to be for interest accrued thereon, the purchaser of them is charged with notice of all which the bonds contained. *Harshman v. Bates Co.*, 32 U. S., 506; *McClure v. Township of Oxford*, 94 U. S., 423.

The City of Kenosha acquired a legal and proper interest to the extent of \$150,000 in that railroad in 1858. The City subsequently issued its scrip in payment of the interest on said bonds, issued for that intent and other purposes to the extent of over \$80,000.

We therefore find that all the duties of this Railroad Commissioner were properly applicable to the legitimate interests and indebtedness of the City.

But, we may well inquire: is it competent for the Legislature to ratify and confirm a bond or piece of scrip which is utterly void? Supposing the Legislature had, by express terms, declared a contract void before in full force, would such Act, without consent on the part of the contracting parties, make valid and binding what was before void? Such is not the doctrine in Wisconsin.

Hasbrouck v. Milwaukee, 18 Wis., 87.

Mr. Matt. H. Carpenter, for defendant in error:

Aside from the Constitution of Wisconsin, the following points are clearly established by the adjudications of the Supreme Court of the United States, and are conclusive of the plaintiff's right to recover:

1. The issue of bonds in aid of a railroad running to a city, is for a municipal purpose.

Rogers v. Burlington, 8 Wall., 665 (70 U. S., XVIII., 83); *Meyer v. Muscatine*, 1 Wall., 884 (68 U. S., XVII., 564).

2. The charter, therefore, gave sufficient authority to loan the credit of the city and give bonds. See charter above quoted.

3. Where the power exists to issue the bonds under certain limitations, and in certain contingencies, a municipal corporation which has issued the bonds, is estopped to deny as against a *bona fide* holder that the power was properly exercised.

Gelpcke v. Dubuque, 1 Wall., 208 (69 U. S., XVII., 524); cases cited in note.

But it is objected that the provision of the charter above quoted, and which, if valid, authorized the issuance of these bonds, is in conflict with the Constitution of Wisconsin and, consequently, null and void. It is necessary, therefore, to consider this objection.

This precise question came before the Supreme Court in *Dean v. Madison*, 7 Wis., 688. Again in *Clark v. Janesville*, 10 Wis., 136. From these decisions it is evident that in 1857, when these bonds were issued, and in 1860, three years afterwards, the grant of power contained in the Kenosha charter would have been held constitutional and the bonds, issued under it, valid.

But in the Wisconsin series, is found the case of *Foster v. Kenosha*, 12 Wis., 616, directly opposed to the principle of these cases in the 7th and 10th Wisconsin reports. The court held the bonds void for the very reason that in *Dean v. Madison* it held them valid; that is, because the Legislature had not limited the amount of debt to be contracted. These bonds, when made in September, 1857, were perfectly valid upon the authority of *Dean v. Madison*, and *Clark v. Janesville* (*supra*), were circulating in the market and passing from hand to hand, with the full sanction of our Supreme Court, until the decision in *Foster v. Kenosha*; and henceforth they were not worth

the same amount of blank paper in the state court.

Dean v. Madison, 7 Wis., 688.

The bonds are valid because the Legislature had not restricted the power.

Clark v. Janesville, 10 Wis., 136.

The bonds are valid, so far as regards this objection, because the Legislature had imposed the restriction of a popular vote.

Foster v. Kenosha (*supra*).

The imposition of a popular vote is no restriction whatever, and the bonds are absolutely void.

The decision of *Foster v. Kenosha* is not to be followed by this court, for two sufficient, adjudicated reasons:

1. It was pronounced after these bonds were issued, and totally reverses the rule of decision upon this subject, existing in the courts of the State at the time the bonds were issued.

Gelpcke v. Dubuque, 1 Wall., 175 (68 U. S., XVII., 520); *Ohio Trust Co. v. Debolt*, 16 How., 432; *Havemeyer v. Iowa Co.*, 8 Wall., 294 (70 U. S., XVIII., 88).

2. The decisions of the Supreme Court of the State being inconsistent, this court is at liberty to adopt either rule.

Pease v. Peck, 18 How., 595 (59 U. S., XV., 518), and the principle of *Foster v. Kenosha* is wholly untenable.

The Constitution, in the article in question, is addressed solely to the Legislature. "It shall be the duty of the Legislature, and they are hereby empowered, to provide for the organization of cities and villages, and to restrict their power," etc., etc.

But suppose the Legislature provides for the organization of a city, and does not restrict its power, the question is: what is the consequence?

There are two views, either one of which may be supported by a respectable argument.

1. That the provision is merely directory to the Legislature. 2. That the provision in question is in the nature of a limitation upon the power to provide for the organization of cities; in which case an Act of the Legislature incorporating a city, but not making the necessary restriction, would be absolutely void.

Foster v. Kenosha, 12 Wis., 616, is remarkable for steering between these two conclusions.

A city created by Act giving it unrestricted powers of taxation, is a good city, and may levy taxes and raise money for proper municipal purposes (*Foster v. Kenosha*), and the construction of a railroad leading to a city, is a legitimate object of municipal enterprise. *Clark v. Janesville*, 10 Wis., 176.

Then our bonds are good. The true principle is believed to be this: the provision in question is addressed solely to the Legislature. It is made their duty to restrict the power of a city which it creates, so as to prevent abuses. This is necessarily a subject of legislative discretion. The Legislature must determine what are abuses to be prevented and what restrictions are necessary to secure this end. When the Legislature has imposed one restriction, for instance a popular vote on the question, the courts cannot take up the subject and impose another.

See, *Gibbons v. Ogden*, 9 Wheat., 18; *Luther v. Borden*, 7 How., 1; *Bk. of Rome v. Rome*, 18 N. Y., 88; *Grant v. Courter*, 24 Barb., 232;

Moers v. Reading, 21 Pa., 189; *R. R. Com. v. Clinton Co.*, 1 Ohio St., 77.

Conceding the original invalidity of these bonds, because the power to contract indebtedness was not limited in amount; still it is manifest that after a particular amount of bonds had been issued, a ratification of such bonds by the Legislature would cure the defect; because such ratification of a given amount of indebtedness would be equivalent to an original authority to issue that amount, which it is conceded would have been all right under our Constitution. And the Legislature has given this ratification over and over again.

Ch. 148, Pr. Laws, 1859; Ch. 151, Pr. Laws, 1862; Ch. 114, Pr. Laws, 1868; *Shaw v. R. R. Co.*, 5 Gray, 178; *Geipeks v. Dubuque*, 1 Wall., 220 (68 U. S., XVII., 580); *Morgan v. Beloit* (*ante*, 205).

It is a general rule admitting of no exception, so far as I know, that the Statute of Limitations does not apply to interest matured on a contract until the principal or some installment of the principal, becomes due.

Grafton Bk. v. Doe, 19 Vt., 468; *Henderson v. Hamilton*, 1 Hall, N. Y., 316.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of United States for the District of Wisconsin.

The suit was brought against the City of Kenosha, to recover the interest on several coupons annexed to bonds issued by the City, September 1, 1857, and which had accrued in the years 1860 and 1861. The bonds were each for \$500, and to an amount in the aggregate of \$100,000.

They are headed "Issued according to law to the Kenosha and Rockford R. R. Company, to aid in the construction of their railroad," and were payable twenty years from date at the People's Bank in the City of New York with interest at the rate of ten per cent. per annum, to be paid semi-annually, upon the presentation of the proper coupons for said interest. For the payment of the bonds and interest, the faith of the City is pledged. The bonds are certified by the Mayor and City Clerk to have been issued under an Act of the Legislature passed March 2, 1857, and giving to the City authority to loan its credit for the sum specified; and also in pursuance of a vote of the freeholders of the City, taken for the purpose of the loan of \$100,000 to the Railroad Company.

The following is a copy of one of the coupons: "\$25. The City of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1860, at The People's Bank in the City of New York, on presentation of this coupon, being the interest due on that day, on the bond of said City, numbered one, dated 1st day of September, 1857." Signed by the Mayor and Clerk of the City.

The plaintiff was the holder of several of these interest coupons, falling due in the years above mentioned.

The declaration recites in very general terms the several bonds, to which the coupons the plaintiff holds had been originally annexed, setting forth that they had been sold and disposed of to *bona fide* purchasers, and have since passed from hand to hand in the stock market,

like other negotiable securities, so that he cannot produce them to the court; that the interest has accrued on the same, which the defendant has neglected and refused to pay at the time and place designated; and that the interest and coupons are owned by him, the latter of which he brings into the court to be canceled.

The defendant pleaded: 1, *nil debet*; 2, the Statute of Limitations; that the several supposed causes of action had not accrued to the plaintiff within six years from the commencement of the suit. The plaintiff took issue on the first plea and demurred to the second, which demurrer was sustained.

The jury found a verdict for the plaintiff on the first issue of the several coupons.

From the bill of exceptions it appears that the plaintiff gave in evidence 172 coupons, which was objected to, but the objection was overruled. It was admitted that all the coupons, with the exceptions of four which were annexed to a bond produced, were coupons of different bonds of the same issue, but which bonds were not given in evidence. After the plaintiff rested, the counsel for the defendants prayed the court to charge the jury: 1. That the bonds declared on, as well as the coupons, should have been produced in order to sustain the declaration under the issue; and 2. That the City of Kenosha had no authority to issue the bonds; which prayers were overruled.

We agree that if this were an action upon the bonds to recover installments of interest that had accrued thereon, although such installments had been duly assigned to the plaintiff, there would be great difficulty in maintaining it in his name, as well as without producing the bonds, as the proper evidence that interest was due. The plaintiff, under such circumstances, doubtless, would have a remedy for withholding the interest; but it is not necessary or material to stop and point it out in the present case; for we do not regard the action as founded upon the bonds, but upon the coupons. They are recited in very general terms, it is true, in the declaration; but, it is by way of explaining and bringing into view the relation the coupons originally held to the bonds; and which, in an important sense, they still hold, though distinct as it respects ownership, as they represent the interest that had become due upon them. The relation we refer to is, that these coupons are not received, or intended to have the effect of extinguishing the interest due on the bonds: as this collateral security, or rather, this evidence of the interest, upon well settled principles, cannot have that effect without an express agreement between the parties. Besides, the coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. There is no extinguishment till payment.

The recital is by way of inducement, as is familiar to special pleaders at common law, which Mr. Chitty says is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference. 1 Chit. Pl., 290. The office of an inducement is explanatory, and does not, in general, require exact certainty. Thus, says Mr. Chitty, when an agreement with a third person is stated only as an inducement to the defendant's promise, which is the prin-

capital cause of action, it is considered, in general, sufficient to state such agreement without certainty of name, place, or person (*Id.*, 291), and where the matter is unnecessarily stated by way of inducement, and might be struck out as surplusage, and, as we shall show hereafter, may be said of that in the present case, the failure to make proof of the statement is not material.

The action, then, being founded upon the coupons, the material question arising on this branch of the case is: whether or not the plea of the Statute of Limitations constitutes a good defense. It is admitted that more than six years have elapsed since the interest accrued on the coupons, and, if barred by this lapse of time, the defense is complete, and the court below erred in sustaining the demurrer.

As we have seen, the coupons were made contemporaneously by the City with the bonds for the accruing interest thereon. This appears on their face. The City of Kenosha, on the 1st September, etc., will pay \$25 at the People's Bank, etc., on presentation of this coupon, being the interest due that day on the bond of said City, numbered one, dated 1st September, 1857, which bond itself contains a covenant for the same interest. The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature; and the bond, being of a higher security than a simple contract debt, is not barred by lapse of time short of twenty years; and, as we have seen, this contemporaneous coupon does not operate as an extinguishment of the interest, unless there has been an express agreement to that effect. These coupons are, substantially, but copies from the body of the bond in respect to the interest and, as is well known, are given to the holder of the bond for the purpose: first, of enabling him to collect the interest at the time and place mentioned without the trouble of presenting the bond every time it becomes due; and second, to enable the holder to realize the interest due, or to become due, by negotiating the coupons to the bearer in business transactions, on whom the duty of collecting them devolves. This device affords great convenience to all persons dealing in these securities, especially to the holders in foreign countries, who otherwise would be obliged to forward the bond to the place of payment of the interest each time it became due, or trust them to the hands of the correspondents in the country where the payment is made.

This convenience in the collection by the use of coupons, as is apparent, very much facilitates the negotiation of these securities abroad, and enhances their value in the foreign market. And any decision that would have the effect to lessen or impair the higher security for the interest as found in the bond, by the use of these coupons, would necessarily, to that extent, defeat the purpose for which they were designed. As we have seen, there is nothing in the contract between the parties that would lead to the conclusion that the nature or character of the security by the bond for the interest was to be changed or lessened by the issue of the coupons, but the contrary; for if any such change had been intended, it should have been in some way indicated in the body of them. There was but

one contract, and that evidenced by the bond, which covenanted to pay the bearer \$500 in twenty years, with semi-annual interest at the rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal. The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due. Their great convenience and use in the interests of business and commerce should commend them to the most favorable view of the court; but, even without this consideration, looking at their terms, and in connection with the bond, of which they are a part, and which is referred to on their face, in our judgment it would be a departure from the purpose for which they were issued, and from the intent of the parties, to hold, when they are cut off from the bond for collection; that the nature and character of the security changes, and becomes a simple contract debt, instead of partaking of the nature of the higher security of the bond, which exists for the same indebtedness. Our conclusion is, that the cause of action is not barred by lapse of time short of twenty years. Recurring again to the declaration, we have said that the preamble, or inducement, was unnecessary, and might well be rejected as surplusage. As we have seen, it recites, in very general terms, the bonds to which the several coupons in suit were annexed. Now, each coupon itself contains, substantially, on its face, all this information. It is issued for interest due at a certain day and place on a bond, giving its number and date. Another form adds the amount, but this is unimportant, as the bond is sufficiently identified without it. The production of the coupon, therefore, at the trial, will show the relation it bears to the bond, and, if our opinion is sound, that in this connection it cannot be legally severed from it till the interest is paid, a count upon the coupon is all that can be material.

The only remaining question in the case is as to the authority of the City of Kenosha to issue bonds to which the coupons were annexed.

The Act of 1857 of the Legislature (chap. 133, Private Laws), which amends and consolidates the several Acts relating to the charter of the City, confers full authority upon the Common Council to borrow on the corporate credit of the City any sum of money for any term of time, at any rate of interest, and payable at any place deemed expedient, issuing bonds or scrip therefor. It is admitted this authority would be sufficient, but it is insisted that the statute exceeds the authority of the Legislature under the 8d section of the 11th article of the State Constitution, which, it is asserted, requires the Legislature to limit or restrict the amount of money to be raised by the City. Without inquiry into this question, it is sufficient to say that after the City had passed the ordinance lending its credit to the Railroad Company to the amount of \$100,000, the Legislature ratified it. This was equivalent to an original limit of this amount.

It is urged, also, that the Supreme Court of Wisconsin has held that the Act of the Legislature conferring authority upon the City to lend its credit, and issue the bonds in question, was in violation of the provision of the Constitution above referred to. 12 Wis. 616. But, at

the time this loan was made, and these bonds were issued, the decisions of the court of the State favored the validity of the law. The last decision cannot, therefore, be followed.

Gelpcke v. Dubuque, 1 Wall., 175 (68 U. S., XVII., 520).

The judgment is affirmed.

Dissenting, *Mr. Justice Miller*.

Cited—14 Wall., 297; 16 Wall., 663; 20 Wall., 587; 98 U. S., 473, 474; 105 U. S., 71; 107 U. S., 84; 1 Dill., 342; 3 Dill., 148, 149; 38 N. J. L., 265; 1 Flipp., 181, 183; 17 Blatchf., 19; 18 Blatchf., 384; 8 McCrary, 41; 7 Kan., 506; 19 Minn., 298; 48 Mo., 188; 25 Wis., 163; 8 Am. Rep., 99 (48 Mo., 188); 38 Am. Rep., 648 (80 N. Y., 449).

THE CITY OF KENOSHA, *Plff. in Err.*,

v.
JOSHUA F. LAMSON.

In action on coupons, bonds need not be produced.

In action upon coupons the bonds need not be given in evidence.

Kenosha v. Lamson, *ante*, 725, followed.

[No. 148.]

Argued Mar. 23, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

The case is stated by the court.

See, also, the preceding case between these parties.

Mr. J. W. Cary, for plaintiff in error.

Mr. Matt. H. Carpenter, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Wisconsin.

This was an action of *assumpsit* upon 516 coupons against the City of Kenosha, described in the declaration and notice accompanying it. They were all given in evidence, and when the plaintiff rested, the counsel for the defendants prayed the court to instruct the jury that the bonds, as well as the coupons, should have been given in evidence, which was refused. And further, that the City possessed no authority to issue the bonds, which was also overruled. The verdict was for the plaintiff.

The first question was decided against the plaintiff in *Knox Co. v. Aspinwall*, 21 How., 539 (62 U. S., XVI., 208), and the second in a case at the present term between the same parties. [Next preceding case].

Judgment affirmed.

Dissenting, *Mr. Justice Miller*.

WILLIAM H. GLEASON, Lt.-Governor of the STATE OF FLORIDA, *Plff. in Err.*,

v.

THE STATE OF FLORIDA, *ex rel. THE ATTORNEY-GENERAL*.

(See S. C., 9 Wall., 779-784).

Writ of error—must be allowed—not matter of right.

The foundation of the jurisdiction of this court over the judgments of State Courts, is the writ of error.

No writ of error to a State Court can issue without allowance, either by the proper Judge of the State Court, or by a Judge of this court.

A writ of error to a State Court is not a matter of right.

[No. 339.]

Argued Feb. 11, Apr. 1, 1870. Decided Apr. 4, 1870.

IN ERROR to the Supreme Court of the State of Florida.

On motion to dismiss.

This case arose upon an information in the nature of a writ of *quo warranto*, in the court below, in the name of the State, by the Attorney-General, against the plaintiff in error, charging him with exercising the office of Lieutenant-Governor, in violation of the State Constitution. The court below having denied a motion for the removal of the cause to the Circuit Court of the United States for the Northern District of Florida, and having overruled various defenses set up by the respondent, entered a judgment of ouster against him. Thereupon he petitioned the *Chief Justice* of said court for a writ of error to this court, on the ground that the said judgment of ouster was adverse to the claim set up by him under the Acts of Congress, known as the Reconstruction Acts, under which he claimed to be eligible to the office of Lieutenant-Governor, notwithstanding the Constitution of said State. This petition was denied, on the ground that the court had not denied him any right, title or privilege under any Act of Congress, nor questioned his right to hold any office conferred upon him thereunder; that the court, on the contrary, had denied his right to hold the office in question under the provisions of the Constitution of the State, not conflicting with any Act of Congress, treaty or provision of the Constitution of the United States. The respondent then made an application to an associate justice of this court, who signed a citation, but made no allowance of a writ of error. During the pendency of this motion to dismiss, the plaintiff in error filed a motion for leave to suggest a diminution of the record, there having been no allowance of a writ of error.

Under said motion, said plaintiff in error filed an affidavit, in which he set up the facts above stated, and alleged that the said associate justice of this court made an allowance of the writ of error on one of the papers presented to him.

A further statement of the case appears in the opinion of the court.

Mr. B. F. Butler, for plaintiff in error.

Mr. T. O. Howe, for defendant in error:

If the judicial power of the United States extends to this case, it is because it arises from the Constitution and laws of the United States.

But the case does not arise under the Constitution or the laws of the United States, because its correct decision does not depend on the construction of either.

Cohens v. Va., 6 Wheat., 379; *Marbury v. Madison*, 1 Cranch, 137; *Martin v. Hunter*, 1 Wheat., 304; *Owing v. Norwood's Lessee*, 5 Cranch, 344; *Story, Const.*, 1647, 1656.

If the cause were one arising either under the Constitution or the laws of the United States, then Congress could have conferred upon this court appellate jurisdiction. But the question

would still remain: has Congress conferred such jurisdiction upon this court?

Barry v. Mercein, 5 How., 119; *Durousseau v. U. S.*, 6 Cranch, 818; Curt. Com., sec. 112; *Wiscart v. D'Auchy*, 3 Dall., 321; Conkl. Tr., 24.

If this court has jurisdiction to review the judgment of the Supreme Court of Florida, it must be given under the 25th section of the Judiciary Act of 1789. But to give jurisdiction under that Act, three things must appear on the record:

1. That the plaintiff in error had some right under some authority of the United States.

2. That he pleaded such right in the court below.

3. That the State Court denied such right.

It is not enough for the party to have such a right, unless he plead it, because this court can only know what is contained in the record.

It is not enough to plead such a right unless he has it, otherwise every cause tried in a State Court could be reviewed here; and, of course, if he have such a right and plead it, yet it is not denied by the court that there is no ground of appeal.

Crowell v. Randell, 10 Pet., 368; *McKinney v. Carroll*, 12 Pet., 66; *Ins. Co. v. Polleys*, 13 Pet., 157; *Coon v. Gallaher*, 15 Pet., 18; *Fisher v. Cookerell*, 5 Pet., 248; *Reed v. Marsh*, 13 Pet., 158; *Com. Bk. v. Buckingham*, 5 How., 817; *R. B. Co. v. Marshall*, 12 How., 165.

When the case turns on the construction of a state law, this court has no jurisdiction.

Grand Gulf R. R. Co. v. Marshall (supra); *Gill v. Oliver*, 11 How., 529.

Mr. Chief Justice Chase delivered the opinion of the court:

The court has considered the affidavit of the plaintiff in error, submitted by his counsel as evidence of the allowance of a writ of error in this case by one of the justices of this court; and without determining now whether, in any case, the affidavit of a party to the record can be used as evidence of that fact, we are obliged to say that the affidavit submitted to us has failed to satisfy us that such an allowance was, in fact, made. The affidavit states that three papers, namely: a petition for the writ of error, the form of a bond, and a citation, were presented to the associate justice, and lays some stress upon the fact that the papers were three in number. It omits to mention that any copy of the record of the State Court was presented to the judge, without which it is obvious there could be no allowance of a writ of error. It seems to us highly probable, therefore, that the plaintiff in error is mistaken in his recollection. A copy of the record was probably one of the three papers of which he speaks. In the absence of any affidavit from the clerk who prepared the papers, and of any showing of the loss of the petition by the Clerk of the Supreme Court of Florida, with whom the allowance supposed to have been indorsed on it must, in regular course, have been filed, we cannot regard the evidence of allowance as sufficient, and must proceed to dispose of this cause as if no such allowance were claimed to have been made.

This case comes before us on a motion to dismiss the writ of error.

The record shows an information in the nature of a writ of *quo warranto*, in the Supreme
See 9 WALL.

Court of the State of Florida, in the name of the State, by the Attorney-General of the State against William H. Gleason, charging him with exercising the office of Lieutenant-Governor in violation of the State Constitution, and demanding an answer by what warrant or authority he claimed to hold that office.

To this information Gleason filed an answer denying the jurisdiction of the court and the lawfulness of the proceeding against him, on several distinct grounds, all of which were overruled by the court, and he was required to answer upon the merits.

Thereupon he put in a demurrer, and subsequently, before argument on the demurrer, filed a petition for the removal of the cause into the Circuit Court of the United States for the Northern District of Florida; in the exercise, as he claimed, of his right under certain Acts of Congress particularly specified, and generally under the laws of the United States.

The petition was denied and the demurrer was overruled, and leave was given to him to plead to the information or show cause why judgment of ouster should not be entered against him.

In pursuance of the leave thus given, Gleason showed cause and, among other things, alleged that he was eligible and was elected to the office held by him under Acts of Congress known as the Reconstruction Acts, and was, therefore, entitled to the office, though not qualified by three years' residence in the State, according to the provisions of the State Constitution.

But this defense, as well as all other defenses set up by him, was overruled by the court, and judgment of ouster was rendered against him, to reverse which he has prosecuted this writ of error.

In support of the motion to dismiss, it has been argued that the record presents no question except such as arise wholly under the Constitution and laws of Florida, and not under the Constitution or laws of the United States; and therefore, no question of which this court has jurisdiction under the 25th section of the Judiciary Act; on the other hand, it has been maintained, with much force, that one of the chief points in controversy in the State Court was, whether eligibility to office at the first election under the Constitution framed under the Acts of Congress, known as the Reconstruction Acts, was determined by these Acts, or by the Constitution submitted to the people and adopted at that election. The plaintiff in error claimed that under these Acts he was eligible, was elected and was entitled to hold his office which claim was denied by the Supreme Court of Florida, and it has been insisted in his behalf that the jurisdiction of this court depends, not upon the actual validity of his claim, but on the fact that it was specially set up and asserted by him under the laws of the United States, and that the decision of the State Court was against its validity.

Considered under this view, it seems to us that a writ of error might have been properly enough allowed under the 25th section of the Judiciary Act. But, on looking into the record, we find no allowance of the writ. And this has been repeatedly held to be essential to the exercise, by this court, of revisory jurisdiction over final judgments or decrees by the courts of the

States. In the case of *Twitchell v. The Commonwealth* [ante, 223], the rule which governs the allowance, by national courts and judges, of writs of error to State Courts, was thus stated: "Writs of error to State Courts have never been allowed as of right. It has always been the practice to submit the record of the State Court to a judge of this court, whose duty has been to ascertain whether any question cognizable here on appeal was made and decided in the proper court of the State, and whether the case, upon the face of the record, will justify the allowance of the writ." And this may now be considered as the settled construction of the Judiciary Act on this subject. The foundation of the jurisdiction of this court over the judgments of State Courts is the writ of error; and no writ of error to a State Court can issue without allowance, either by the proper judge of the State Court or by a judge of this court, after examination as just stated.

In this case the plaintiff in error has evidently acted under the impression that a writ of error to a State Court is a matter of right. Under this impression he applied to the *Chief Justice* of the Supreme Court of Florida for his signature to a citation; but that magistrate, who had presided in the court where the proceeding for ouster had taken place, refused his signature, upon the ground that the State Court had decided no question cognizable here upon writ of error. Application was then made to a judge of this court, by whom a citation was signed; but there was no allowance of a writ of error by him.

Under these circumstances, the issuing of the writ of error was unauthorized, and the writ, not having been allowed, gives no jurisdiction to this court.

It must, therefore, be dismissed.

Cited—9 Wall., 784; 1 Sawy., 715; 5 Sawy., 82.

BOARD OF SUPERVISORS OF THE COUNTY OF WASHINGTON, *Plff. in* *Err.*,

v.

UNITED STATES, *ex rel.* CLARK DURANT.

(See S. C., "*Supervisors v. Durant*," 9 Wall., 415-419.)

Injunction from State Court cannot prevent U. S. mandamus.

A State Court cannot, by injunction, prevent the Circuit Court of the United States from enforcing its judgment against a city by *mandamus*, to compel it to levy a tax.

It is immaterial whether the injunction of the State Court was before or after the judgment obtained in the circuit court, or before or after the institution of the suit.

[No. 183.]

Argued Mar. 18, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

This case arose upon an information for a writ of *mandamus* filed in the court below by the defendant in error, to compel the Board of Supervisors of Washington County, Iowa, to levy and collect a tax to pay the amount due him on a certain judgment for

\$25,587.50, previously obtained by him on certain bonds in the District Court of the United States for the District of Iowa. An alternative writ of *mandamus* was issued, made returnable to the succeeding term of the court below. To this writ the respondent answered, denying the validity of the bonds on which said judgment had been obtained, and set up an injunction issued by a State Court to prevent the levy by it of the taxes in question.

To this return the relator demurred. The court sustained the demurrer, and ordered a peremptory writ of *mandamus* to enter. Whereupon the respondent sued out this writ of error.

Mr. Henry Strong, for plaintiff in error:

The question is one of jurisdiction, and is to be decided in the light of those fundamental canons of interpretation which furnish a ready and the only solution in cases of concurrent and conflicting jurisdiction.

In the administration of the powers of the Federal Court it is recognized as a fundamental principle, that the judgment of the State Court is binding upon the Federal Court, when the State Court had jurisdiction of the parties and subject-matter, and the controversy arises out of a contract created under the laws of the State; and the Federal Courts are powerless to reverse, modify, or in any manner interfere with such a judgment of the State Court, and cannot relieve a party from obedience to a writ issued thereon.

Corydon v. Goodman, 2 Black, 574 (67 U. S., XVII., 257); *Randall v. Howard*, 2 Black, 585 (67 U. S., XVII., 269); *Peck v. Jenness*, 7 How., 624; *Parish v. Ferris*, 2 Black, 606 (67 U. S., XVII., 817).

This court is to regard this decision in the same light as if this were another court in the same State, of concurrent jurisdiction with the court by whose judgment and decree the respondent is enjoined from doing what the relator seeks to compel it to do. Where the State and Federal Courts have concurrent jurisdiction, they bear the same relation to each other as the courts of the same State having concurrent jurisdiction, and are absolutely concluded by the decrees of each other.

Mills v. Duryee, 7 Cranch, 481.

It has been frequently held that whichever court, State or Federal, first acquires jurisdiction, can maintain it to the end and the other cannot in any manner interfere, however illegal or wrongful may be the judgment of that court.

Freeman v. Howe, 24 How., 451 (65 U. S., XVI., 749).

Persons, no less than property, in the custody of the law by the writ of a State Court, are withdrawn from the effect of the process of the Court of the United States.

In the leading case of *Taylor v. Carryl*, 20 How., 583 (61 U. S., XV., 1028), *Chief Justice* Taney, in dissenting, says: "This court in deciding the case of *Hogan v. Lucas*, 10 Pet. 400, did nothing more than adhere to the rule which I believe is universally recognized by courts of justice; that is, that between courts of concurrent jurisdiction, the court that first obtains possession of the controversy or the property in dispute, must be allowed to dispose of it finally, without interference or interruption from the co-ordinate court. And this rule applies where the concurrent jurisdictions are two courts of

the United States or two courts of the State, or one of them of the State and the other a court of the United States."

Payne v. Drove, 4 East, 523; see *Sampson v. Peaslee*, 20 How., 575 (61 U. S., XV., 1025); *Ex parte Robinson*, 6 McLean 363; *Elliott v. Peirce*, 1 Pet., 828; *Stearns v. U. S.*, 2 Paine (C. C.), 300; *Rhoads v. Selin*, 4 Wash. (C. C.), 716; *Parker v. Kane*, 22 How., 1 (63 U. S., XVI., 286).

In *Leffingwell v. Warren*, 2 Black, 599 (67 U. S., XVII., 261), this court has said: "The construction given to a State Statute by the highest judicial tribunal of such a State is regarded as a part of the statute, and is as binding on the courts of the United States as is the text. If the highest judicial tribunal of the State adopts new views as to the proper construction of such a statute and reverse its former decisions, this court will follow the weight of settled adjudications."

See, also, *Shelby v. Guy*, 11 Wheat., 361, *McCluny v. Silliman*, 8 Pet., 270; *Green v. Neil*, 6 Pet., 291; *Ross v. Duval*, 13 Pet., 45; *Masingall v. Downs*, 7 How., 767; *Nemith v. Sheldon*, 7 How., 812; *Van Rensselaer v. Kearney*, 11 How., 297; *Webster v. Cooper*, 14 How., 488; *U. S. v. Morrison*, 4 Pet., 124.

"A controversy once decided by a competent tribunal cannot be re-examined by another court of concurrent jurisdiction," and in the case at bar this court cannot relieve respondent from the judgment of the State Court. *Parish v. Ferris*, 2 Black, 606 (67 U. S., XVII., 317).

This court has never reviewed the judgment of an inferior court of a State, where there was an appeal to the Supreme Court of the State upon a subject within the jurisdiction of that court.

Adams v. Preston, 22 How., 478 (63 U. S., XVI., 273); *Jeter v. Hewitt*, 22 How., 352 (63 U. S., XVI., 345); *Beauregard v. N. O.*, 18 How., 497 (59 U. S., XV., 469); *Almonester v. Kenton*, 9 How., 1; *Strader v. Baldwin*, 9 How., 261.

Mr. James Grant, for defendant in error: There is no argument for us to make here. This court has repeatedly decided the question in our favor.

Mr. Justice Strong delivered the opinion of the court:

Since the decisions which have been made by this court during the last four years, there is almost nothing in the record now before us remaining open for adjudication. Indeed, it is not now contended that *mandamus* is not a proper remedy in cases like the present, when a relator has obtained a judgment, which can be satisfied only by the levy of a tax, and when the proper officers of the municipality, against which the judgment has been obtained, refuse, or neglect to levy it. That it is a legitimate remedy has been ruled in very many cases. *Knox County v. Aspinwall*, 24 How., 376 (65 U. S., XVI., 785); *Von Hoffman v. Quincy*, 4 Wall, 585 [71 U. S., XVIII., 403]; *Supervisors v. U. S., ex rel. Bank, Id.*, 435 [71 U. S., XVIII., 419]; *Riggs v. Johnson County*, 6 Wall, 166 [73 U. S., XVIII., 768]; *Weber v. Lee County, Id.*, 210 [73 U. S., XVIII., 781]; and *The Mayor v. Lord* [ante, 704]. In such a case "the writ is (to use the language of the court in *Riggs v. Johnson County*)" neither a prerogative writ, nor a new suit. On the contrary, it is a proceed-

ing ancillary to the judgment which gives the jurisdiction, and, when issued," it "becomes a substitute for the ordinary process of execution, to enforce the payment of the same, as provided in the contract." It is a step toward the execution of the judgment, and necessary to the jurisdiction of the court.

It is insisted, however, that even if the Circuit Court may award a *mandamus* to aid in the enforcement of its judgments, the writ should not have been awarded in this case, because the District Court of Washington County had enjoined the defendants against levying and collecting any tax for the payment of the bonds and coupons, for a portion of which the relator had obtained his judgment. This injunction the defendants pleaded, and to the plea the relator demurred. That such an injunction was wholly inoperative to prevent the Circuit Court of the United States from enforcing its judgment by *mandamus* to the defendants to compel them to levy the tax which the law authorized and required, is no longer to be doubted. Its invalidity to work such an effect has been placed beyond question by the rulings of this court in the cases already cited. In *Riggs v. Johnson County*, where it appeared that an injunction had been obtained, in one of the State Courts, upon the county commissioners, enjoining them against levying any tax to pay certain municipal bonds and coupons, a *mandamus* was, nevertheless, sustained to compel the levy of a tax, at the suit of one who had obtained judgment in the circuit court for some of the coupons. That case is full authority for the doctrine that an injunction of a State Court cannot control, or in any manner affect the action, the process, or the proceeding of a circuit court, not because the latter has any paramount jurisdiction over State Courts, but because the tribunals are independent of each other. It is true that in *Riggs v. Johnson County* it appeared the relator in the information, or suggestion for the *mandamus*, was not a party to the injunction suit, while the relator here was a party defendant. That, however, can make no difference. The present relator, though made a party with the other defendants, was not enjoined. The decree upon the bill for an injunction was exclusively against the Board of Supervisors of Washington, at the suit of others than the relator. And had he been enjoined, it is not easy to see how that fact could have limited the power of the Circuit Court. We have already remarked that the true reason why the injunction was not a bar to the *mandamus* is, that the District Court of the State and the Circuit Court are independent courts, and that neither can interfere with the process or proceedings of the other. It would hardly be contended that a State Court can enjoin a defendant against paying a judgment which has been, or may thereafter be recovered in a Circuit Court of the United States. If it may, federal jurisdiction is a myth. It is at the mercy of state tribunals. Yet there is no substantial difference in principle between the allowance of such an injunction, and that of one against a proceeding in aid of an execution, a *mandamus* to levy an authorized tax to pay a judgment. The district courts of Iowa are independent of each other. Will the injunction of one district court limit the power of another district court to enforce its judg-

ment? To this no one would hazard an affirmative answer. Certainly the Circuit Courts of the United States are as exempt from state control by State Courts, as are the districts courts of the State from control by each other.

It is of course immaterial whether the injunction of the District Court of Washington County was before or after the judgment obtained by the relator in the Circuit Court of the United States, or whether before or after the institution of the suit. It is not a question which court first obtained possession of the case. In the case of *The Mayor and Aldermen of the City of Davenport v. Lord*, ante, 704, the facts were that the plaintiffs in error had been enjoined against levying a tax, before suit was brought in the circuit court, yet it was held that the injunction was no sufficient answer to the alternative *mandamus* commanding them to levy a tax to pay the judgment afterwards recovered.

The plaintiffs in error are thus met at every point of their case by decisions of this court heretofore made, decisions which justify the court below in sustaining the demurrer to their return to the alternative writ, and in awarding a peremptory *mandamus*.

The judgment of the Circuit Court is affirmed, with costs.

Cited—86 U. S., 398; 1 Hughes, 285; 4 Hughes, 351; 30 N. J. L., 661; 5 Dill., 323; 3 Wood, 232-234; 1 McCrary, 399.

THE BOARD OF SUPERVISORS OF
WASHINGTON COUNTY, IOWA, *Pff.*
in Err.,

v.

THE UNITED STATES, *ex rel.* RICHARD
MORTIMER.

This case differs in no essential particulars from No. 133, *Supervisors v. Durant*, ante, 732, and for the reasons given in that case, the judgment is affirmed. [No. 187.]

Argued Mar. 18, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

See the preceding case of *Board of Supervisors v. Durant*.

Mr. Henry Strong, for plaintiffs in error.

Mr. James Grant, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

This case differs in no essential particular from No. 133 [preceding case], decided at this term. For the reasons given in the opinion filed in that case, this judgment must be affirmed.

The judgment of the Circuit Court is affirmed, with costs.

DAVID W. JONES, *Appt.*,

v.

MATTHEW BOLLES.

(See S. C., 9 Wall., 364-370.)

Equity jurisdiction—annulment of contract—parties

Equity has jurisdiction of fraud, misrepresentation and concealment, and such jurisdiction does not depend on discovery.

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Where the agreement complained of is perpetual, and the only effectual relief against it is the annulment of it, this cannot be decreed by a court of law, but can by a court of equity.

Where a company is directly interested, though no relief is prayed against it, but rather in its favor, it is proper that it should be made a party, complainant or defendant.

Where the bill states that the appellees purchased a large number of shares of a company, and paid therefor, there is an allegation of a large interest, sufficient to sustain a bill by him in behalf of himself and other stockholders.

[No. 149.]

Submitted Mar. 24, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The bill in this case was filed in the court below, to perpetually restrain and enjoin the defendant and appellant, David W. Jones, from bringing an action against his co-defendant, and to restrain his co-defendant, the Mineral Point Mining Company, from paying to the said Jones any money for mineral rents, or purchase money of the real estate therein described.

The court below entered a decree in favor of the complainant; whereupon the respondent, Jones, took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. M. H. Carpenter and Geo. W. Lakin, for appellant:

The basis of the prayer for relief is, that Jones (the appellant), threatens to bring a suit against his co-defendant, the Mineral Point Mining Company, upon a false and fraudulent claim for the purpose of extorting money, and that thereby complainant is liable to suffer injury and sustain damage, and one of the defendants, the Company, is liable to be greatly embarrassed in conducting its affairs.

The demurrer admits these allegations to be true; but how does a court of equity acquire jurisdiction? The defendant, the Mineral Point Mining Company, is not charged with fault or collusion. It is a Corporation, and is not charged with having solicited the complainants to act as its guardians or agents or officers, and if it had, a most singular use of authority would be presented by bringing an action against the principal by the agent, to prevent it from being embarrassed in conducting its affairs. It is not alleged that the Company, if sued by Jones, will not defeat the action. It is not alleged that it is incapable of transacting its business and protecting its stockholders. It is not shown how such large stockholders, as the complainant and his associates have not the entire control of the affairs of the Company. It is not shown how the Company could not and should not have brought an action in its own state court to remove a cloud upon its title, if it was likely to be embarrassed by Jones setting up a false and fraudulent claim.

It is not shown how the Mineral Point Mining Company is likely to or can injure the complainant or any of its stockholders, by Jones bringing a threatened suit.

Clearly, then, there is a misjoinder of defendants.

If there is no collusion nor concert of action charged between defendants, and relief be demanded against both or all, in regard to the same thing, and no cause of action be stated

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against one, there is a misjoinder of parties as to both or all, and either may demur. That a demurrer will lie as to a defendant improperly joined, *vide*, Story, Eq. Pl., sec. 544.

If Jones made false representations whereby complainant was induced to purchase stock and was injured, the courts of common law afford an ample remedy. If Jones made false representations or true representations which he afterwards attempted to falsify, and afterwards attempted to do that which, if consummated, would operate as a fraud upon complainant, the courts of law still afford a remedy.

First. The courts of law possess as ample power to guard against fraud as do courts of equity.

Second. If Jones' representations operated as an estoppel against his setting up a claim against the Company, it would be as operative as a defense in law, as it would in a court of equity. If the threatened action had been, or were to be, brought by Jones against the Company, the answer is: the claim is false, fraudulent, and brought for the purpose of extortion. This affords a perfect defense in law. If the claim were true and not false, but Jones had estopped himself from enforcing it by making false representations, that is, by representing, to the purchasers of over two-thirds of the stock, that he had no claim against the Company, and the contrary of those representations, acted upon, would injure and embarrass the Company, the defense is still perfect in the action at law; therefore, the demurrer should have been sustained upon the ground that a court of equity had not jurisdiction, because a court of law had full and adequate jurisdiction of the subject-matter of the action. But again; the demurrer should have been sustained because the facts stated do not constitute an equitable cause of action.

It does not show wherein or how much damage the plaintiff is liable to sustain, and does not pretend that any has been sustained. Courts of equity will protect against great threatened injury where the mischief will be irreparable. There is no allegation here of irreparable injury; no averment that Jones is irresponsible; no statement of facts from which injury can be inferred. The only allegation upon that subject is, that the stock which plaintiff now holds is liable to become greatly depreciated in value.

The bill is not one for discovery. All the facts are shown and susceptible of proof, without any testimony to be furnished by the answer. There is no averment in the bill of complaint of the amount claimed by Jones. Upon this subject there is no such averment as affirmatively shows the jurisdiction of the United States Circuit Court between citizens of different States. There is no averment of even the probable amount to which the stocks of complainant might deteriorate.

Stretch the doctrine of equitable estoppel to its utmost limit, and does it operate upon oral representations of title to real estate? For what are our Registry Laws, and our Statutes of Fraud?

It is a rule of law, that the admissions of a party are competent evidence against himself, only in cases where parol evidence would be admissible to establish the same fact; or in

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other words, when there is not in the judgment of the law, higher and better evidence in existence to be produced.

Well. Can. Co. v. Hathaway, 8 Wend., 486; *Jenner v. Joliffe*, 6 Johns., 9; *Hasbrouck v. Baker*, 10 Johns., 248; *For v. Reil*, 3 Johns., 477.

The whole of complainant's case rests upon a loose, verbal, alleged admission, made under circumstances of all others most likely to be misunderstood or misconstrued.

They are susceptible of precisely the explanation given by the defendant, Jones. His explanation carries upon its face intrinsic evidence of its truthfulness, and the high character of the witness entitles it to the highest consideration.

The attempts to hold a party responsible for general conversation, held at a social party, and that conversation relating to real estate, the title of which might have been fully understood by the examination of an abstract which was publicly exhibited, seems to us most extraordinary.

The plaintiff was elected Treasurer of the Company as early as the fore part of February, 1866. The stock ledger and transfer book of the Company were placed in his keeping, and he was to issue stock certificates.

The parties to be benefited by the success of plaintiff are Buttrick, President of the Company, Hill, the Secretary, and the plaintiff, Treasurer; and the Treasurer sues his principal, and the Company, if it defends, can only defend through these officers of the Company.

It has not interposed any defense. The officers through whom alone it can defend are interested personally against its making any defense. They bring and cause to be brought this action with the intention that it shall be placed in default for their benefit. It is difficult to conceive of trickery more palpable, or chicanery more disreputable.

(No counsel appeared in this court for appellee).

Mr. Justice Bradley delivered the opinion of the court:

This is an appeal in equity from the Circuit Court for Wisconsin.

Bolles, the appellee, a citizen of Massachusetts, on behalf of himself and all of the stockholders of the Mineral Point Mining Company, filed his bill of complaint in the court below against Jones, the appellant, and the said Company, the one a citizen and the other a Corporation of Wisconsin, for an injunction to restrain the appellant from suing for, claiming, or demanding against the said Company the purchase money of a certain tract of mining land in Iowa County, Wisconsin, containing about 23 acres) or any mineral rents for mineral raised on such land. The matters set forth in the bill as ground for this relief was a charge of misrepresentation and fraud on the part of the appellant perpetrated at Boston, Massachusetts, in November, 1865, whereby he induced the appellee, who was a broker, to purchase for himself and other persons a large amount of the capital stock of the said Mining Company. The substance of the specific charges was that the appellant, Jones, and others, agents of the Company, represented to the appellee that the Company was seised in fee of the said tract of land; that it had been conveyed to the Company by

the appellant for the consideration of \$30,000, which had been fully paid and satisfied, and that the title of the Company was perfectly unincumbered; and to begot further assurance in the appellee, they exhibited a warranty deed from the appellant to the Company, and an abstract of title showing an unincumbered title to the land. They further represented that the land was of great value for mining purposes, and that the appellant had no interest in the property; that the appellees being entirely ignorant of the facts, except as represented to him by Jones, and relying on these representations, purchased on his own account and in trust for others, a large amount of the capital stock of the Company, and paid upwards of \$25,000 for it, and afterwards sold still larger amounts to parties who paid for the same on the faith of the said assurance that the property was unincumbered. The bill then alleged that at the time of the giving of the deed referred to, an agreement was made between Jones and the Company (a copy of which is set out), the existence of which was carefully concealed by Jones, when he made the representations complained of (but which he now claims to be valid and subsisting), by which he claims a large balance to be due to him for mineral rents and purchase money of said land, and threatens to bring an action against the Company therefor, which, if successful, will greatly depreciate the stock of the Company and seriously embarrass it.

The appellant, Jones, in his answer to the bill, denies the principal charge in the aggregate as made, which is altogether too narrow a mode of denial; admits that he, with the President and Secretary of the Company, were at Boston at the time alleged, and attended a meeting on the subject at the appellee's house, and he understood that the Secretary had made representations to the effect complained of, but that the room was large and pretty well filled, and he did not hear it; that he afterwards expostulated with the Secretary for having made such a statement, and took some pains to inform some persons that it was not true. But he does not allege that he ever so informed the appellee. He denies that he made any such representations himself. He admits the agreement complained of, and insists upon its validity. Other points are made in the answer, but this is sufficient to show the principal issue made in the suit.

The circuit court, after full proof, declared in favor of the appellee, enjoined the appellant from bringing any action against the Company, directed him to execute a release, and declared the agreement entered into between the Company and the appellant void.

We have examined the proofs in the cause and find them to be very full and convincing against the appellant, and are satisfied with the decree of the circuit court, unless the same be invalid for some jurisdictional or technical reason.

It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. The objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation and concealment; and it does not depend on discovery. But in this case a court of law could not give adequate relief. The agreement complained of is perpetual in its nature, and the only effectual

relief against it, where the keeping of it on foot is a fraud against parties, is the annulment of it. This cannot be decreed by a court of law, but can by a court of equity.

It is next objected that there is a misjoinder of defendants by reason of making the Mining Company a party. But the Company is directly interested, and though no relief is prayed against it, but rather in its favor, it is eminently proper that it should be made a party, complainant or defendant. It could not be made complainant against its will and besides its own agents joined in the fraudulent representations that were made. As a separate and independent personality, therefore, distinct from the stockholder interest, there was propriety in making it a party defendant.

It is also objected that the appellee, Bolles, does not distinctly state or prove the amount of his interest in the Company. The bill expressly states that the appellee purchased on his own account and in trust for other parties a large number of shares, and paid therefor upwards of \$25,000; and then afterwards states that the appellant threatened to bring an action against the Company to enforce his presented claim for rents and purchase money, whereby the stock of the Company, which the appellee alleges he purchased in good faith, and which he still held, was liable to become greatly depreciated in value. This is surely an allegation of a large interest, and the statement is nowhere denied in the answer. The appellant avers only his ignorance on the subject. But the allegation is fully corroborated by the proof, at least so far forth as relates to the purchase of stock by the appellee. No question was made on the examination as to his still holding the stock.

We do not perceive any legal grounds of objection to the decrees and it is, therefore, affirmed.

WILLIAM H. BUSHNELL, *Plff. in Err.*

v.

S. H. KENNEDY ET AL.

(See S. C., 9 Wall., 387-394.)

Jurisdictional facts must be pleaded—objection to jurisdiction.

Every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the National Constitution and laws, gives to the court jurisdiction of his suit.

Valid objection to jurisdiction of Circuit Court over a suit which was removed to that court by defendant cannot be taken by him under the 12th section of the Judiciary Act.

[No. 131.]

Argued Mar. 17, 1870. Decided Apr. 11, 1870.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This is a writ of error to a judgment or order of the court below, remanding this cause to the State Court in New Orleans, from which it had been removed to the circuit court, under the 12th section of the Judiciary Act of 1789.

NOTE.—Colorable conveyances to enable suit to be brought. Motive of transfer, when no objection. *Campbell v. Smalley*, 26 U. S. (1 Pet.), 620.

The history of the case and a statement of the facts appear in the opinion of the court.

Masra, J. Hubley Ashton and E. C. Bittings, for plaintiff in error:

The prohibition or restriction contained in the 11th section of the Judiciary Act of 1789, against or upon the exercise of jurisdiction by the Circuit Court in a suit to recover the contents of a chose in action in favor of an assignee, unless a suit might have been prosecuted in that court by the assignor to recover such contents, does not extend to a suit commenced in a State Court by a citizen of the State in which the suit is brought against a citizen of another State of which the Circuit Court has obtained jurisdiction by process of removal under, and in pursuance of, the 12th section of the Act of 1789.

It will be observed that the restrictive provision in regard to suits by assignees of choses in action, is contained in the section conferring original jurisdiction, and is not found in the 12th section, which relates to a certain description of suits within the judicial power of the United States, in virtue of the character of the parties, brought by original process in State Courts, and which provides for the removal of such suits from the State Courts, and the exercise of jurisdiction in them by the Circuit Courts.

Mr. Justice Story doubted the authority of Congress, under the Constitution, to create such an exception as that found in the 11th section, in suits between citizens of different States *Bullard v. Bell*, 1 Mason, 251; and obviously it should not be extended beyond the reach of the particular mischief which the exception or restriction was intended to guard against.

Sore v. Pilot, 6 Cranch, 335; *Bk. of the U. S. v. Planters' Bk.*, 9 Wheat., 909.

It has been judicially held, that a suit against a foreign corporation may be removed, and the Circuit Court will retain jurisdiction of it, although such action could not be there commenced, under the 11th section, by original process.

Bliven v. N. E. Screw Co., 3 Blatchf., 111; *Barney v. The Globe Bk.*, 11 Am. Law Reg., 221.

The plaintiff has an original right of action, if any, against the defendant, independent of any assignment by Mills & Frisbey, his agent in the alleged transaction recited in the petition.

Moses v. MacFarlan, 2 Burr., 1012; *Clarke v. Shee*, Cowp., 197; *Penniman v. Patchin*, 5 Vt., 348; *Mason v. Waite*, 17 Mass., 580; *Hall v. Marston*, 17 Mass., 579; *Lime Rock Bk. v. Plimpton*, 17 Pick., 160; *Thompson v. Perkins*, 3 Mason, 232; *Parker v. Donaldson*, 2 Wils. & S. 21, *et cas. cit.*; *Edmond v. Caldwell*, 15 Me., 340.

It is submitted, lastly, that this is not a suit to recover the "contents" of a chose in action, within the sense and meaning of the 11th section of the Judiciary Act.

Deshler v. Dodge, 16 How., 630; *Barney v. Globe Bk.*, 11 Am. Law Reg., 229; *Bobyshall v. Oppenheimer*, 4 Wash. (C. C.), 482.

Mr. Thomas J. Durant, for defendant in error:

The petition avers the plaintiffs in the court below to be assignees of a debt due by Bushnell, the plaintiff in error, to Mills & Frisbey, but it contains no averment that Mills & Frisbey were competent to bring suit against Bushnell in the United States Circuit Court. This

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would not have been sufficient to give the Circuit Court jurisdiction, had the suit been originally brought there.

See sec. 11, Act, Sep. 14, 1789; 1 Stat. at L., 79; *Turner v. Bk. of N. A.*, 4 Dall., 8; *Mollan v. Torrance*, 9 Wheat., 538.

The same rule governs where the case is one transferred as this is from a State to a Federal Court.

No case can be removed from a State Court to a Circuit Court of the United States, unless by both the Constitution and the Judiciary Acts. The United States courts might have taken jurisdiction of it, had it been originally brought there.

Conk. Tr. (1856), 177; *Smith v. Rines*, 2 Sum., 345; *Beardsley v. Torrey*, 4 Wash., 288.

Mr. Chief Justice Chase delivered the opinion of the court:

A suit was brought by Kennedy & Co., merchants of New Orleans, against William H. Bushnell, to recover from him the balance of \$10,000, which had been intrusted or loaned by them to Mills & Frisbey, doing business at Baton Rouge, for the purchase of cotton, to be shipped to the firm in New Orleans. Bushnell borrowed the whole sum of Mills & Frisbey under a promise to return it within six days; repaid, in fact, \$2,500, but failed to refund the balance. Thereupon Mills & Frisbey assigned all their claim to the indebtedness of Bushnell to Kennedy & Co., who filed their petition against him in the Third District Court of New Orleans, and prayed a writ of attachment which was issued accordingly.

Certain parties resident in New Orleans were made garnishees and required to answer interrogatories touching the moneys, credits or property of Bushnell in their hands or under their control. These interrogatories were answered by the peremptory denial of the garnishees, that they had in their hands or under their control anything belonging to Bushnell.

Afterwards, a citation was issued against Bushnell and served personally upon him, requiring an answer to the petition.

Thereupon he appeared and filed a petition, averring that all the members of the firm of Kennedy & Co. were citizens of Louisiana, and that he was a citizen of Connecticut; and prayed that the suit might be removed into the Circuit Court of the United States for the District of Louisiana. This petition was allowed, and the cause removed according to its prayer.

By an order of the Circuit Court, the suit was remanded to the State District Court, and it is this order which has been brought here for revision by the writ of error.

That Kennedy & Co., as assignees of Mills & Frisbey, were entitled under the laws of Louisiana to sue in the State Court upon the indebtedness assigned to them, in their own names, was apparently conceded upon the argument at the bar, and we shall not examine the point.

But it seems to have been the opinion of the Circuit Court that they could not maintain a suit in that character in a court of the United States, without averring in their petition that their assignors, Mills & Frisbey, were citizens of another State than the defendant, entitled, if no assignment had been made, to maintain

suit upon the indebtedness against the defendant.

The ground of this opinion doubtless was the disability to sue in the National Court imposed by the 11th section of the Judiciary Act of 1789, upon the assignee of a chose in action, in cases of which those courts would not have jurisdiction if the suit were brought by the assignors.

That section defines the jurisdiction of the Circuit Courts of the United States, and declares that these courts shall have original cognizance of all suits "between a citizen of a State where the suit is brought and a citizen of another State," subject to two limitations, namely: that (1) "No civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ; nor (2) shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action if favor of an assignee, unless a suit might have been prosecuted in said court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

That the indebtedness of Bushnell to Mills & Frisbey was a chose in action cannot be doubted; for under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract. Nor can it be denied that every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the National Constitution and laws, gives to the court jurisdiction of his suit. *Turner v. Bank of N. A.*, 4 Dall., 8.

In the case before us the suit was brought in the State Court, where no question of jurisdiction, founded upon citizenship, could arise. In that court, therefore, there was no necessity for any averment in respect to citizenship. But under the 12th section of the Judiciary Act, any defendant, being a citizen of another State than the plaintiff or petitioner, is entitled, upon application at the proper time, to have his cause removed to a Circuit Court of the United States; and in the case under consideration, the defendant, as has been already stated, filed his petition, averring the requisite facts as to his own citizenship and the citizenship of the petitioners, and, thereupon, obtained an order for removal.

The order was, doubtless, rightly made. The jurisdiction of the cause was regularly transferred to the Circuit Court, and the cause stood in that court as if brought there by original process. The jurisdiction thus acquired by the Circuit Court was in no sense appellate. Removal, under our peculiar system of state and national jurisdictions, is simply a mode in which the right to resort under certain circumstances to the latter rather than the former is secured to defendants as well as plaintiffs.

Two questions, then, arise in this cause:

(1) Whether the 11th section of the Judiciary Act applies to a suit instituted by the assignees of such a chose in action, as is shown in the pleadings. And,

(2) Whether valid objection can be taken

to jurisdiction of such a suit when removed to the Circuit Court by the defendant under the 12th section.

Upon the first question, it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee: though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. *Bullard v. Bell*, 1 Mason, 259 (1817); *Bk. of Ky. v. Wister*, 2 Peters, 321 (1829). So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. *Chappedelaine v. Dechenaux*, 4 Cranch, 308 (1808). And it has also been determined that the assignee in a chose in action may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. *Deshler v. Dodge*, 16 How., 631 (1853). And it has recently (*Barney v. Globe Bank*, 2 Am. Law Reg., N. S., 229, 1863) been very strongly argued that the restriction applies only to contracts "which may be properly said to have contents;" "not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed."

And this view of the restriction seems to be warranted by the consideration of the mischief which it was intended to prevent. Not a little apprehension was excited at the time of the adoption of the Constitution in respect to the extent of the jurisdiction vested in the national courts; and that apprehension was respected in the Judiciary Act, which soon afterwards received the sanction of Congress. It was obvious that numerous suits, by assignees, under assignments made for the express purpose of giving jurisdiction, would be brought in those courts if the right of assignees to sue was left unrestricted. It was to prevent that evil and to keep the jurisdiction of the National Courts within just limits that the restriction was put into the Act.

This view has the sanction of Chief Justice Marshall, who, in the case of *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat., 904 (1824), used this language: "It was apprehended that bonds and notes given in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in a Federal Court."

And when it is remembered what class of actions it is, which, upon the principles of the common law, can be maintained by an assignee in his own name, it may well be admitted that it would not have been an unreasonable construction of the restriction if it had been applied only to notes, bonds, and other written contracts, containing promises to pay money, upon which an assignee could sue without using the name of the assignor. Of such contracts, certainly, it may with more propriety be said

that they have "contents," than of claims for damages arising either from torts or from breaches of contracts.

It is true that at an earlier day a different construction was given to it. In *Sere v. Pilot*, 6 Cranch, 382, it was held that an assignee, by act of the law, as the general assignee of the effects of an insolvent, could not sue in the Circuit Court unless the insolvent himself might sue. It is not easy to reconcile this opinion with the later judgments; but it is not necessary now to determine definitely the true construction of the restriction, as we think that the jurisdiction of the Circuit Court over the cause before us can be well supported on the 12th section. That section, as we have already stated, provides for the removal of suits by defendants. The restriction in the 11th section is not found in the 12th. Nor does the reason for the restriction exist. In the 11th section its office was to prevent frauds upon the jurisdiction, and vexation of defendants, by assignments made for the purpose of having suits brought in the name of assignees, but in reality for the benefit of assignors. In the 12th it would have no office, for the removal of suits could not operate as a fraud on jurisdiction, and was a privilege of defendants, not a hardship upon them.

It is true, indeed, as was said in argument, that the section provides that after removal "the cause shall then proceed in the same manner as if it had been brought by original process;" but we cannot recognize the validity of the inference that the defendant, before pleading in the Circuit Court, may move to dismiss the suit for want of jurisdiction. This construction would enable the non-resident defendant in a State Court to remove the suit against him into a Circuit Court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the Act, is wholly inadmissible. And it is clear that the language of the Act does not require it. Its plain meaning is that the suit shall proceed, not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against his consent, but by his own act, and the suit is to proceed as if brought by original process, and the defendant had waived all exception to the jurisdiction, and pleaded to the merits. Under the 11th section the exception to jurisdiction is the privilege of the defendant, and may be waived; for the suit is still between citizens of different States, and the jurisdiction still appears in the record. The first act of the defendant, indeed, under the 12th section, is something more than consent, something more than a waiver of objection to jurisdiction, it is a prayer for the privilege of resorting to federal jurisdiction, and he cannot be permitted afterwards to question it. *Saylor v. Northwestern Ins. Co.*, 2 Curtis, C. C., 212.

We cannot doubt, therefore, that the Circuit Court had jurisdiction of the case under consideration. We are all of opinion that the court erred in remanding the cause to the jurisdiction of the State Court, and the order to that effect must be reversed.

Cited—14 Wall., 293; 92 U. S., 24; 105 U. S., 666; 106 U. S., 563, 666; 2 McCrary, 434; 2 Flipp., 135; 13 Blatchf., 223; 3 Wood, 373, 374.

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THE PHOENIX INSURANCE COMPANY,

Piff. in Err.,

v.

JOHN G. COPELIN.

(See S. C., 9 Wall., 461-467.)

Abandonment—duty of underwriter—clause in policy.

An offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences.

If the underwriter take the vessel into his possession to repair her, he must do it as expeditiously as possible.

If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon.

The underwriter's liability is not varied by a clause in the policy, stipulating "that the acts of the insurers in recovering, saving and preserving the property insured in case of disaster, shall not be considered an acceptance of an abandonment."

[No. 128.]

Submitted Mar. 16, 1870. Decided Apr. 11, 1870.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This suit was brought in the St. Louis Circuit Court, by the defendant in error, to recover on a certain policy of insurance. On petition of defendant, the cause was removed into the Circuit Court of the United States for the District of Missouri.

The case having been submitted to the court without a jury, the court found that there was a due execution and delivery of the policy for \$5,000 on the steamboat, Benton, valued in the policy at \$45,000; that, Nov. 8, 1865, the boat was sunk by a snag about sixty miles above Omaha; that this was a peril within the policy; that there was no right under the facts shown to abandon for a total loss, though the plaintiff gave notice of such abandonment; that there was no acceptance of the abandonment; that the defendant, under the provisions of the policy, took possession of the boat for the purpose of raising and repairing her, and tendered her to the plaintiff; that the defendant did raise and repair her and, May 9, 1866, tender her to the plaintiffs; that the boat was employed mainly for the Missouri River trade; that she would have been worth \$5,000 more to her owner if tendered earlier in the season; that the repairs made were not sufficient to constitute indemnity for the injury; that it would require \$5,000 more in repairs to complete such indemnity; that the cost of raising and repairing the boat was \$12,150.82, of which \$1,763.70 was for repairs; that when tendered she was worth \$12,000; that she was worth \$25,000 when the injury occurred; and that the defendant did not point out these defects on refusing to receive the boat.

On these facts the court rendered judgment for plaintiff, for the amount of the policy. The defendant brought the case here on a writ of error.

Messrs. James O. Broadhead and F. A. Dick, for plaintiff in error:

NOTE.—*Abandonment.* See note to Pennock v. Dialogue, 27 U. S. (2 Pet.), 1. *What is abandonment, effect of; when insured may abandon; not bound to abandon.* See note to Bradley v. Maryland Ins. Co., 87 U. S. (12 Pet.), 378.

It is found by the court below: That there was no right, under the facts shown on the part of the insured, to abandon for a total loss, although he gave notice that he did so abandon; and that there was no acceptance by defendant of such abandonment.

If there was no abandonment and no right to abandon as for a total loss, the question becomes simply one of damages under the policy.

It is provided by the terms of the policy, that the acts of the assurer or assurers, or their agents in preserving, securing or saving the property insured, in case of damage or disaster, shall not be considered or held to be a waiver or acceptance of abandonment.

It is claimed, however, that although there was not a total loss, yet the Insurance Company has rendered itself liable for a total loss; in other words, there is a constructive total loss; but it is absurd to say that there is a constructive total loss, when there is no abandonment, nor any right to abandon.

2 Arn., 992; *Gloucester Ins. Co. v. Younger*, 2 Curt., 828; *The Henry Ebbank*, 1 Sumn., 400; *The Boston*, 1 Sumn., 328; *Comegys v. Vasse*, 1 Pet., 198.

It turns a partial into a total loss, and thereby affects a sale to the underwriters of the property insured.

In this case there is no abandonment; such is the fact found by the court. Of course, the Company can get no property in the vessel; and yet it is bound to pay as for a total loss.

But it is said that the repairs and tender of the boat were not made in a reasonable time and, therefore, the defendant must pay the whole amount of the policy.

Under all the circumstances, if the boat was not repaired and tendered in a reasonable time, it was the fault of the plaintiff; and the plaintiff should be held to the strict letter of the contract, which is to pay his proportion of the expenses of raising and repairing the boat, the defendant being held to a complete repair of the boat, or to the payment of such a sum as would be necessary to put her in complete repair, and by this rule the plaintiff is entitled to no judgment on the policy.

Cases are cited by defendant in error, to show that when the vessel is not repaired and tendered in a reasonable time, the Insurance Company is liable as for a total loss. In those cases it was held, that where the vessel is not tendered in a reasonable time, the defendant forfeited his right to return her, and was considered as having accepted the abandonment. In the case of *Reynolds v. Ocean Ins. Co.*, 1 Met., 160, the language of the court is: "The vessel was not tendered in a reasonable time, and by the delay defendants forfeited their right to return her, and must be considered as having accepted the abandonment." But in this case the court below expressly find the fact to be that there was no acceptance of an abandonment; and yet it imposes upon the defendant the consequences of such an acceptance—that is, a liability for a total loss.

Messrs. Glover & Shepley and John H. Rankin, for defendant in error:

Although the abandonment might not have been binding upon the assurers in this case when it was made, yet their failure to properly repair the vessel and tender her to the assured within

a reasonable time, made the abandonment complete, and the Insurance Company liable as for a total loss.

Peele v. Suffolk Ins. Co., 7 Pick., 254; *Reynolds v. Ocean Ins. Co.*, 1 Met., 160; *Peele v. Merch. Ins. Co.*, 3 Mason, 27; *Norton v. Lexington Ins. Co.*, 16 Ill., 285; *Reynolds v. Ocean Ins. Co.*, 22 Pick., 191.

The defendant assumes, upon the authority of the case last cited, that the plaintiff was bound to point out the deficiencies in the repairs made necessary by the sinking of the boat.

Such is not the law of that case. The court simply declared the consequences that should follow if the defects were pointed out by the assured, and not supplied by the underwriters, etc.

As the assurers in this case well knew that they had not properly repaired the vessel, it would have been an idle ceremony to notify them thereof. The law never requires a party to do an entirely useless thing.

Mr. Justice Strong delivered the opinion of the court:

Nothing in this record requires us to look beyond the special finding of the facts made by the court, or to do more than determine whether, upon the facts found, the plaintiff below was entitled to the judgment given.

By the finding it is established that the boat insured struck a snag and sunk in the Missouri River, on the 3d day of November, 1865, and that the injury was caused by one of the perils against which the Company had insured. Though the plaintiff had no right to abandon for a total loss, he gave notice that he did so abandon, but the defendants did not accept such abandonment. They did, however, under the provisions of the policy, take possession of the vessel for the purpose of raising and repairing her, and returning her to the plaintiff. Accordingly they raised the boat, proceeded to repair her and tendered her to the plaintiff at the home port, on the 9th of May, 1866, more than six months after she had been injured. It was further found, that the repairs and tender were not made within a reasonable time; that had the boat been tendered earlier in the season, so as to be used for the spring trade on the river, she would have been worth \$5,000 more to the plaintiffs; that when she was tendered to him, the repairs made were not sufficient to indemnify him from the injury the boat had sustained; that it would have required an expenditure of \$5,000 more to have made the additional repairs necessary to complete the indemnity; and that the plaintiff refused to receive the boat when she was tendered to him, but did not point out the deficiencies in the repairs. It is still further found that the expense of raising and repairing the boat actually incurred by the defendants was \$12,150.62 of which \$1,763.70 was the cost of the repairs made; that the boat, as tendered to the plaintiff, was worth \$12,000, and that when injured she was worth \$25,000. Upon the facts thus found, the circuit court gave judgment for the plaintiff, for the amount named in the policy.

As the sum insured by the policy was not greater than the sum required to make the additional repairs necessary to indemnify the plaintiff, it is difficult to perceive why, in any

aspect of the case, he was not entitled to the judgment given. The defendants complain, however, that they have been held liable as for a constructive loss, when there was no right to abandon, and when the abandonment of which the plaintiff gave notice was not accepted. Doubtless, had the defendants taken possession of the boat, as they were authorized to do, by the provisions of the policy, and had they raised, completely repaired, and returned her to the plaintiff in a reasonable time, they could not have been held liable for a total loss. It is an established fact that there was no right to abandon when they did take possession of the vessel. And it was expressly stipulated in the policy, that the acts of the assured, or insurers, or of their joint or respective agents, in preserving, securing or saving the property insured, in case of danger or disaster should not be considered, or held to be, a waiver or acceptance of an abandonment. It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences. And an acceptance need not be expressly made. It may even be refused, and yet the insurers, by their conduct, may make themselves liable as for a total loss. Though, by the terms of the policy, these defendants had a right to take possession of the boat, and repair her for account of the plaintiff, yet this was a privilege accorded to them only, that they might thus make indemnity for the loss. Taking possession to make partial repairs, not amounting to indemnity, was not contemplated by the contract. It was not authorized. Nor did the contract warrant taking possession of the boat, and holding her for an unreasonable time. The insurers were bound to repair and return without unnecessary delay. In holding longer than was necessary for making repairs, they must be regarded as acting, not as insurers, but as owners, for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners. On no other theory can this delay be considered lawful. It is true the policy stipulated that the acts of the insurers in preserving, securing or saving the property insured in case of danger or disaster, should not be considered or held an acceptance of abandonment, but this manifestly refers only to authorized acts. Retaining possession of the boat an unreasonable time, and then offering to return her unrepaired, were not authorized acts and, consequently, they are unaffected by the stipulation. They must, therefore, be regarded as constructive acceptance of an abandonment. This is a principle asserted and well sustained by the authorities. In *Peele v. The Suffolk Insurance Company*, 7 Pick., 254, where the jury had found that the underwriters, who had taken possession of the stranded vessel, had not offered to restore her in a reasonable time, the court said: "The underwriter has his duties as well as his rights. If he take the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage if not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must

See 2 WALL.

be considered as taking her to himself under the offer to abandon." The principle, said the court, rests upon the very nature of the law of insurance, which is a fair and honest indemnity for loss. The same doctrine was asserted in *Reynolds v. The Ocean Insurance Company*, 1 Met., 160, and it was also held that the underwriter's duty and liability in such a case, are not varied by a clause in the policy of insurance, stipulating "that the acts of the assurers in recovering, saving, and preserving the property insured in case of disaster, shall not be considered an acceptance of an abandonment." Such, also, was the ruling in a case between the same parties, 22 Pick., 191, and in *Norton v. The Lexington Fire, Life and Marine Insurance Company*, 16 Ill., 235. It is in our judgment sustained by sound reason.

The plaintiffs in error, however, insist that the doctrine cannot be applied to the present case, because the court below found there was no right, under the facts shown on the part of the plaintiff, to abandon for a total loss, although he gave notice that he did so abandon, and that there was no acceptance by the insurers of such an abandonment. But this must be considered in connection with the other facts found. It is equally a fact in the case, that the defendants took possession of the boat, repaired her very insufficiently, and after having held her an unreasonable time, offered to return her. The legal effect of this we have seen. Taking these facts together, the finding that the defendants did not accept the abandonment which the plaintiff offered at a time when he had no right to abandon, means no more than that there was no express or avowed acceptance. This is quite consistent with the judgment that, by their failure to return the boat within a reasonable time, they made themselves liable to pay the full amount of the policy.

We cannot follow the plaintiffs in error into an examination of the evidence, in order to inquire whether it was not the fault of the assured that the boat was not repaired and tendered to him in a reasonable time. Our judgment is necessarily founded exclusively upon the finding of facts by the court. That is equivalent to a special verdict, and upon that we think the plaintiff below was entitled to the judgment which he obtained.

The judgment of the Circuit Court is affirmed.

Cited—18 Wall., 249, 250; 21 Wall., 161; 95 U. S. 134; 98 U. S., 443; 8 Dill., 106.

GUIDO PFISTER AND NICHOLAS JOHNSON, Claimants of the Schooner GREY EAGLE, *Appts.*,

v.

JOHN GREENING AND CHARLES N. DEOTT.

(See S. C., "*The Gray Eagle*," 9 Wall., 505-512.)

Negligence in vessel—contribution for damage.

The omission to exhibit the proper light, though a fault which puts a vessel *prima facie* in the wrong, does not exempt other vessels from the consequences of negligence on their part.

It is a fundamental rule of admiralty law, that where both parties are in fault, both must contribute to make good the damage.

[No. 148.]

Argued Mar. 24, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The libel in this case was filed in the District Court of the United States for the District of Wisconsin, by the appellees, to recover damages sustained by a collision.

The said court entered a decree dismissing the libel. The court below reversed this decree on appeal, on the ground that both vessels were in fault, and entered a decree in favor of the libelants, for \$8,895.85, being half the damages sustained, and half the costs; whereupon the claimants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. N. J. Emmons and J. H. Van Dyke, for appellants:

The *Perseverance* was engaged in a direct violation of positive law; and if the unlawful act was even contributory only to the injury, she cannot recover.

Article 2 enacts: "The lights mentioned in the following articles and no others, shall be carried in all weather between sunset and sunrise."

She did not set up a false light to avoid any immediate or impending danger. Her grave offense was voluntary. She was on good and safe anchorage ground; and merely to economize a few hours time, she hazarded life and property, and brought upon herself the just penalty of her wrong.

Her non-observance of the regulations was not necessary nor even proper; it was a willful default; and there are no circumstances appearing in the case, tending to show that a departure from the regulation was necessary. Had she been compelled by stress of weather to keep under way, her act, perhaps, might be differently considered.

In construing the Act of July 7, 1838, *Mr. Justice Wayne* said, in the case of *Waring v. Clarke*, 5 How., 465: "If a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses, until it is proved that the collision was not the consequence of it."

The Delaware v. The Osprey, 2 Wall., Jr. 275.

The *Grey Eagle* used the diligence which good seamanship dictated, and all that the law requires, acting upon the supposition that *The Perseverance* had truthfully indicated her position.

Strout v. Foster, 1 How., 89; *The Delaware v. The Osprey*, [supra]; *Peck v. Sanderson*, 17 How., 178 (58 U. S., XV., 205); *The Columbus*, Abb. Adm., 384; *The Grace Girdler*, ante, 113; *The Nichols*, ante, 157.

The *Grey Eagle* cannot be held responsible for what may afterwards prove to have been an error or mistake in orders given in a moment of peril and danger, and when the collision had become inevitable or imminent, nor for mistakes originating in or proceeding from the fault of the other vessel.

The Genesee Chief, 12 How., 443; *Fashion v. Wards*, 6 McLean, 152; *The Northern Indiana*, 3 Blatchf., 92; *Union S. Co. v. N. Y. & Virg. S. Co.*, 24 How., 307 (65 U. S., XVI., 699); *The Nichols* (ante, 157); *The Columbus*, Abb. Adm., 384.

If we concede all the fault that is attributed

to us by the circuit court, there should have been no division of damages. At most, the faults were egregiously unequal, and the decree dismissing the libel should have been affirmed.

Ralston v. The State Rights, Crabbe, 22; *Wilson v. The Envoy*, 1 Phil., 188; *Ward v. The M. Doumaran*, 6 McLean., 231; *The Nichols* (ante, 157).

Messrs. George Willey and John E. Carey, for appellees:

Under the established doctrine of this court, the findings of the circuit court, unless palpably erroneous, are to be taken as final on questions of fact, and the circuit court having found as a fact that there were grave contributing faults on the part of the appellants' vessel, we are, in strictness, relieved from further discussion of the case.

The Grafton, 1 Blatchf., 173; *The Samson*, 4 Blatchf., 28; *Walsh v. Rogers*, 13 How., 283; *The Marcellus*, 1 Black. 414 (66 U. S., XVII., 217); *The Potomac*, 2 Black, 581 (67 U. S., XVII., 263); *Newell v. Norton*, 3 Wall., 257-268 (70 U. S., XVIII., 271-273.)

The exigencies of the vessel having reference to the lateness of the season, the extent of the voyage to be accomplished, and her duty toward her cargo, made it improper for her to incur the delay of lying by at night. She had lost her signal lights by stress of weather, and had been unable to replace them.

It was, then, a question of lying by at night, incurring a probable loss of her voyage and great responsibilities as to both vessel and cargo, or proceeding, showing the best light she could to call attention of other vessels to her, the night (as we shall see in another connection) being light enough for other vessels to see her and determine her course in ample time to avoid her. Undoubtedly, the rules of navigation prescribed by the Act of Apr. 29, 1864, are to be observed. But article 19 expressly provides that "In obeying and construing these rules, due regard must be had to all dangers of navigation."

It is evident from the whole decision of the district judge, that no grave consideration was given to the question, whether there might not have been mutual faults which would require a division of the damages.

It is to this proposition, and to our claim that the case, if it shows fault on our part, equally shows gross fault on the part of *The Grey Eagle*, that we mainly ask the consideration of this court.

The light was discovered a mile away. Grant that its first indication would be of a vessel at anchor. It is not certain that the least vigilance, or even ordinary attention to the light after it was made, would have corrected the error at once; and yet it was not discovered until they were within "about three lengths" of each other.

The course of the vessels respectively was E. by S. and W. N. W., obviously converging courses. The *Perseverance* held her course of E. by S. close-hauled, until the very instant of collision, as was her duty.

The least watching of the light after the first observation had been made, would have admonished *The Grey Eagle* that our light was moving, that as she had the wind free and on

the larboard side, it was her duty to avoid our vessel which had the wind on her starboard side. And she would have discovered this in ample time to do so, if she had given any attention to the movements of our light.

The night was such that the sails of The Perseverance could easily have been seen a quarter of a mile off.

Is it to be held that a careless, hasty observation of objects ahead, which a vessel is rapidly nearing, is sufficient, and that upon such an observation, it is good and prudent seamanship to dismiss all further care or attention to the matter? Will such a rule contribute to the safety of navigation?

And in this connection we beg to refer to *Chamberlain v. Ward*, 21 How., 548 (62 U. S., XVI., 211). There the defendants' vessel was held in fault for not displaying the proper light. "The weight of the testimony," the court says, "tends strongly to show that they were little better than if they had been actually extinguished." What stronger case could be put, as to fault in respect to lights? And yet, the court goes on to inquire whether the night was not such as to have enabled the steamer to see the propeller, though substantially without any light, in ample time to avoid the collision, and find the steamer equally in fault for not doing so, and divide the damages.

The court says: "All we mean to decide is: that the neglect of the propeller to show signal lights, did not vary the obligations of The Atlantic to observe the rules of navigation, and to adopt all reasonable and necessary precaution to prevent the collision."

Mr. Justice Bradley delivered the opinion of the court:

This case is an appeal in admiralty from the Circuit Court of Wisconsin, reversing a decree of the district court. The libel was filed by the appellee as owner and master of the schooner, Perseverance, which, with her cargo, was sunk by collision with The Grey Eagle, in the Straits of Mackinaw about two o'clock A. M. on the 24th day of November, 1864. The Perseverance had lost her lights in a storm, and was sailing with a white light contrary to the rules prescribed by the Act of Congress approved April 22, 1864. She was sailing down the strait on a course E. by S., with the wind south, and discovered the lights of The Grey Eagle about a mile ahead, coming up the strait on a course of about W. N. W. The witnesses differ a little as to these points, but this is according to the testimony. The libel alleges, and the evidence of the appellees corresponds with the statement, that when The Grey Eagle was first seen, or soon afterwards, she showed a red light; but that this soon disappeared, after which she showed a green light until near the moment of the collision, when she again showed her red light. The libelants claim that they had a right to suppose that The Grey Eagle would pass on the starboard of The Perseverance, but that shortly before the disaster she kept away, and although the master of the latter called on her to "luff" several times, in a loud voice, and at the same time ordered his

own man at the wheel to put the wheel hard astarboard, The Grey Eagle made no reply, but kept on her course, and in less than two minutes struck The Perseverance, stem on, abreast the starboard quarter, with such force as to sink her in about two minutes, the master and crew with difficulty saving their lives.

The district court dismissed the libel, principally on the ground that The Perseverance, having lost her lights, ought to have laid by at anchor in the night time, and was expressly prohibited from sailing with a white light. The circuit court reversed this decision, and decreed that both vessels were in fault, and that the damages should be divided between them.

The appellants in this court, as in the courts below, strongly relied on the point, that The Perseverance was sailing with a white light at night, contrary to the express prohibition of the statutory regulations in that behalf, and, therefore, that the common law rule, which prohibits a recovery by a party who was himself in fault, and who contributed to the damage sustained, ought to be applied to her. But this court has frequently held that the omission to exhibit proper light, though a fault which undoubtedly puts a vessel *prima facie* in the wrong, does not exempt other vessels from the consequences of negligence on their part. It was so decided in the case of *Chamberlain v. Ward*, 21 How., 548, 567 [62 U. S., XVI., 211, 217]. That case arose under the Act of March 2, 1849, it is true; but that Act seems quite as stringent in its provisions as the Act of 1864, and the court, in reference to this question, says: "Failure to comply with the regulation, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all losses or damage resulting from the neglect; but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent collision. Absence of signal lights in cases falling within the Acts of Congress, renders the vessel liable to the extent already mentioned, but it does not confer any right upon the other vessel to disregard or violate the laws of navigation, or to neglect any reasonable and practicable precaution to avoid a collision which the circumstances afford the means and opportunity to adopt." 21 How., 567 [62 U. S., XVI., 218]. We are of opinion that the same construction must be given to the Act of 1864, and that the exhibition of a prohibited light, as well as the omission to exhibit the proper lights, is insufficient to relieve another vessel from the duty of observing the laws of navigation and of using all practicable precautions to avoid a collision. It is a fundamental rule of admiralty law that where both parties are in fault, both must contribute to make good the damage, and this rule will not be deemed to be abrogated without an express declaration of Congress to that effect.

Supposing, then, The Perseverance to have been in fault for not supplying herself with red and green lights, and for exhibiting a white

light, or for not casting anchor and lying by till morning, or for any other reason—which, as her owner or master has not appealed, it is to be presumed she was—(see *Chittenden v. Brewster*, 2 Wall., 196 [89 U. S., XVII., 841]; *McDonough v. Danneberg*, 8 Dall., 198)—the only remaining question for us to consider is, whether The Grey Eagle was also in fault, so as to be chargeable with contributing to the collision. This question, we think, has been properly answered by the circuit court. It is admitted by the answer of the appellants that the light of The Perseverance was seen when about a mile distant, bearing about one point on The Grey Eagle's port bow, and was supposed to be a light on shore, or upon a vessel at anchor; and that The Grey Eagle was kept away about a point and steadied in her course to give berth to the light; and that it was not discovered to be a vessel's light in motion, by the commanding officer, until The Perseverance was within three lengths of her. This is a very remarkable admission. The courses of the two vessels, after this light was seen, must have been at an angle of about two points of the compass with each other, and it is demonstrable from all the evidence taken together that The Perseverance must have passed from The Grey Eagle's port bow to her starboard bow before the collision took place, and yet it is said that the commanding officer did not discover that the light was in motion until within three lengths of her. The appellees' witnesses all testify that the red light of The Grey Eagle was first seen, and then disappeared, after which her green light only was seen until just before the collision. This shows that The Perseverance had crossed The Grey Eagle's course and that her motion must have been seen had a proper lookout been kept on the latter. It also shows that The Perseverance properly kept on her course; and had The Grey Eagle kept on hers, the collision would not have occurred. The night was not dark; the sails of the vessels could be seen nearly or quite a quarter of a mile. It seems to us evident that there must have been great negligence on the part of those having charge of The Grey Eagle. From the evidence of the appellants' witnesses it appears that there was much confusion on board of her just as the collision was about to take place. One of the men on the lookout forward says: "When I sung out to put the wheel down, the mate sung out to put the wheel up." The man at the wheel testified to the same thing, and says that he obeyed the mate's orders, and that, undoubtedly, caused the collision. Had the mate been on the lookout, as an officer in command, with a light ahead, ought to have been, the difficulty would not have occurred. We are, therefore, of opinion that the men in charge of The Grey Eagle were delinquent in their duty under the circumstances of the case, and that this delinquency contributed to cause the collision in question and, as a consequence, that the loss should be divided between the parties.

The decree of the Circuit Court is affirmed.

Att'g—2 Bias., 25.

S. C.—1 Bias., 478.

Cited—13 Wall., 479; 14 Wall., 359; 91 U. S., 316; 2 Hughes, 24, 144; 5 Hughes, 115, 122; 1 Bro., 249; 1 Holmes, 469; 2 Low., 44.

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THE STEAMBOAT KEOKUK AND BARGE FARLEY, THE LA CROIXE and MINNESOTA STEAM PACKET COMPANY, Claimant and Respondent, AND WILLIAM F. DAVIDSON, Stipulator of said Claimant, *App't.*, ●

v.

JOHN ROBSON.

(See S. C., "The Keokuk," 9 Wall., 517-521.)

Lien on vessel by owner of cargo—when created.

The owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master.

But the law creates no lien on the vessel as a security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made, and the cargo has been delivered to the custody of the master.

[No. 140.]

Argued Mar. 22, 1870. Decided Apr. 11, 1870.

THE libel in this case was filed in the District Court of the United States for the District of Wisconsin, by the appellee, to recover damages for an alleged failure to deliver a cargo of wheat, according to contract. A decree was entered by said court in favor of the libellant, for \$3,972.30, and costs. This decree having been affirmed, on appeal, by the court below, the claimant took an appeal to this court. A further statement of the case appears in the opinion of the court.

Mr. John W. Cary, for appellant:

The reception of goods by the master on board of the ship or boat, or at a wharf near the ship or boat, for the purpose of carriage thereon, or by any person authorized by the master or owner to receive thereon, binds the ship or boat to the safe carriage and delivery of the goods.

1 Pars. Mar. L., 182, 183, and *n.*

The vessel is liable for damages to goods delivered before bills of lading are signed. *Small v. Corwith*, 19 Law Rep., 198.

It is not essential to the validity of a contract of affreightment, that a bill of lading should be signed by the master, even when he has control of the ship by a verbal agreement with the owners.

Fland. Ship., 450, and *n.*; 1 Conk. Adm., 181.

The law creates no lien on a vessel, as security for the performance of a contract to transport cargo, until a cargo is shipped under it. *The Freeman v. Buckingham*, 18 How., 182-188 (59 U. S., XV., 341, 349).

In *Vandervoort v. Mills*, 19 How., 82 (60 U. S., XV., 550), the Supreme Court of the United States laid down the following rule in admiralty: "Maritime liens are *stricti juris*, and will not be extended by construction."

But this rule is explained in *Bulky v. Cotton Co.*, 24 How., 886 (65 U. S., XVI., 599). The court says: "It is insisted that the vessel is exempt from responsibility, upon the ground that the one hundred bales of cotton, to be carried on his vessel, were never laden on board her, and we are referred to several cases in this court, and in England, in support of

NOTE.—Lien of the contract of affreightment on the vessel. See note to *The Freeman v. Buckingham*, 59 U. S. XV., 341.

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this position. * * * * * We think no well founded distinction can be made as to the liability of the owner of the vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel." See *Newhall v. The R. C. Winslow*, 8 Law Monthly, 78.

When the first clerk brought the bills to the captain while under way, he had notice of the shipment; and on inquiring, would have ascertained the facts. This was notice to put him on inquiry about the barge, if he had been disposed to do his duty.

Messrs. N. J. Emmons and J. H. Van Dyke, for appellee.

Mr. Justice Davis delivered the opinion of the court:

The libel in this suit was filed by the appellee against the steamer, Keokuk, to recover damages for failing to deliver a cargo of wheat according to contract. The answer denies that there was any contract of affreightment binding the vessel and subjecting it to a maritime lien, and this presents the only issue in the case. It appears by the record that the La Crosse and Minnesota Steam Packet Company, a corporation engaged in the carrying trade on the Upper Mississippi River, as a part of its business, transported wheat in bulk on barges owned by it, and which were towed by its boats between La Crosse, Wisconsin and Winona, Minnesota. On the 23d day of October, 1865, the steamer Keokuk, one of the Company's regular line of boats, towed the barge Farley to Winona, and left her there, moored to the dock. Four days after this, and while the steamer was absent, Robson, a shipper at Winona, without notice to any one connected with the line of his purpose to do so, took possession of the barge and loaded it with wheat to be sent to La Crosse. On the evening of the same day the Keokuk arrived at Winona, and after discharging and receiving freight and passengers, left on her return trip to La Crosse, without the barge, which was found on the morning of the next day at the dock, sunk, and the wheat seriously damaged. It does not appear how the accident occurred, nor is it important, in the view we take of the case, to determine that question. If it were, we would be unable to account for it, for there is nothing in the record, on the subject, outside of the charge that the barge was unseaworthy, which the evidence does not sustain.

It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it. *The Freeman v. Buckingham*, 18 How., 188 [59 U. S., XV., 343]. The inquiry then arises whether there was any contract to carry the wheat in question, and, if so, was the barge containing it delivered to the custody of the steamer? It is very clear, had

the steamer taken the barge in tow, the lien would have attached, although the bills of lading were not executed, because the act of towing the barge would be evidence that the grain was received, and that there was a contract to carry it safely. And the steamer would be equally liable if the barge had been left at the landing by the fault of the officers of the boat. But the evidence not only fails to prove this, but establishes the contrary conclusion. The only witness on the part of the libellant, whose testimony has any bearing on the subject, is his book-keeper. He says, that on the night in question he gave to the second clerk of the steamer, who was on the levee checking freight, two bills of lading, with the statement (of this he is not positive), "These are the bills of that barge," to which the clerk made some assenting remark. But the clerk denies that he knew the contents of the papers when handed to him, or that anything was said at the time from which he could infer their contents. And his subsequent conduct shows that the observation of the book-keeper, if any was made, failed to arrest his attention; for he put the papers in his pocket and remained on the levee until he had completed his work, and afterwards, without examining them, placed them in the condition in which they were received by him on the desk of the first clerk.

If he is not mistaken in his recollection, that the first clerk was present on the occasion, and that he told him "here are the bills" (which is very doubtful from the evidence), yet it is manifest the first clerk attached no importance to the bills, for he did not notice them until after daylight, when the Keokuk was far on her way to La Crosse. Each clerk, doubtless, acted on the supposition that the other knew to what particular freight the bills related, but it seems both were equally uninformed concerning them. It is not pretended that in any other way than this, was any information conveyed to any one connected with the boat of the intended shipment of grain by the libellant. Neither the master, nor any person on the steamer, or in the employment of the Company, had notice that he had taken the barge and loaded it with grain, or that he contemplated doing so. If it be conceded the course of business between the two parties justified him in taking possession of the barge and loading it, without the direct permission of the master, yet it falls far short of showing that the barge, when loaded, was considered in the custody of the steamer without notice to any of her officers. Indeed, it would be unreasonable to suppose the parties dealt with each other on any such understanding, for it would place the advantage altogether on the side of the shipper, who would be relieved of care and risk as soon as the barge was filled with grain, and the master could exercise no discretion about receiving it.

As there was, then, no agreement in this case which changed the legal rights of the parties, it is clear the steamer is not subject to a maritime lien. The wheat and barge were, at the time of the accident, in the control of the libellant, and their custody was not changed by handing unsigned bills of lading to the second clerk of the steamer, who did not know their contents, nor had any reason to suppose they

related to the barge, Farley. It was the misfortune of the libellant that he transacted his business so loosely, and if it be the Corporation is somewhat to blame for this, the steamer has not, on that account, committed any fault for which she is chargeable in admiralty. As no one in her behalf contracted with the libellant to transport the barge to La Crosse, and as he did nothing to transfer the possession to the steamer, the libel cannot be sustained.

The case of *Bulkley v. Naumkeag Cotton Company*, reported in 24 How., 886 [65 U. S., XVI., 599], is cited in opposition to the views we have presented, but it is not applicable. There the goods were delivered to a lighter in the control of the ship; here the shipper took control of the barge, and did not deliver either barge or cargo to the steamer.

The decree of the Circuit Court is reversed, and this cause is remanded to that court, with directions to dismiss the libel.

Cited—2 Wood, 493.

THE STEAMBOAT KEOKUK AND BARGE
PAT. BRADY, THE LA CROSSE AND MINNESOTA STEAM PACKET COMPANY, Claimant
and Respondent, AND LEWIS J. HIGBY
AND DAVID FERGUSON, Stipulators of
said Claimants, *Appts.*,

v.

HOME INSURANCE COMPANY.

(S. C., as "*The Northern Belle*," 9 Wall., 526-531.)

Carrier's duty—seaworthy vessel, what is—damages from rottenness of vessel.

It is the carrier's duty to know the condition of his vessel, and to see that she is seaworthy.

She must be so tight that the water will not reach her cargo, so strong that ordinary applications of external force will not spring a leak or sink her; so sound that she will safely carry the cargo in bulk through the ordinary shocks to which she must every day be subjected.

A carrier will be liable for damages to cargo arising from the sinking of a rotten, old and insufficient barge.

[No. 139.]

Argued Mar. 21, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The libel in this case was filed in the District Court of the United States for the District of Wisconsin, by the appellee, to recover damages resulting to a cargo of wheat, by reason of the sinking of a barge in the Mississippi River. The court entered a decree in favor of the libellant, for \$5,034.69, with costs.

The court below having affirmed this decree, on appeal, the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. John W. Cary, for appellant.

Messrs. N. J. Emmons and J. H. Van Dyck, for appellee:

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1. The respondent, as a common carrier, having failed to bring itself within either of the exceptions contained in the bill of lading, is liable for the loss of the cargo of the barge. No authorities are necessary in support of such familiar propositions.

2. The facts upon which the case depends are found against respondent, both courts below concurring in such finding. This court will not reverse, unless manifest error or mistake is pointed out and made clearly to appear. *The Grace Girdler* (*ante*, 113), and cases cited in *note*.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from a decree in admiralty, holding the steamboat *Keokuk*, and her barge *Pat. Brady*, liable on contract of affreightment.

The owners of the steamboat, *Keokuk*, undertook to carry for John Robson, in their barge *Pat. Brady*, 5,000 bushels of wheat, from Hastings, Minnesota, to La Crosse, Wisconsin, and safely deliver the same; the unavoidable dangers of the river and fire only excepted. On the voyage the barge was sunk and the wheat damaged, and the Home Insurance Company, which had given a policy on the wheat and paid it, brought this suit to recover the loss.

As the decision of the case turns, in our view, upon the fitness of the barge, for the purpose of the voyage, or, in the language of the admiralty, on its seaworthiness—a question which, as applicable to the peculiar condition of this navigation, is before us for the first time—we propose to examine into some of the principles on which that question must be decided.

For many years the grain, which was transported by steamboats on the western rivers, was first put in sacks, and then placed in the hold of the vessel, or if that was filled, was laid around on the decks. But as this commerce in the cereals increased in importance, including, as it does, the wheat, rye, corn, oats, barley, etc., of that immense agricultural region, it became a necessity to have the freight as cheap as possible.

The cost of sacks in which the grain was carried, and the labor of filling and securing them and loading and unloading, was a heavy item in transportation.

The railroads which had become active competitors for this carrying trade, did not use sacks, but placed the grain in bulk in the cars adapted to the purpose. To facilitate the loading and unloading of grain, these railroad companies introduced on their lines, and at the termini of their roads on the rivers, immense buildings called grain elevators. In these buildings the grain was carried by machinery into the bins, and then by its own gravity let down through conductors into the cars, which were thus loaded in a few minutes. The introduction of this mode of loading and carrying grain by the railroads, and the competition which they presented to river transportation, introduced in the latter the use of barges, in which grain was carried in bulk, without sacks and loaded from elevators, as was done by the railroads.

This mode of river transportation, which is often auxiliary to the railroads, has superseded almost entirely the old mode of carrying by

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sacks in the hold of the vessel, and its present importance and future growth can hardly be overestimated.

It is, therefore, of great consequence to determine, upon sound principles, the rights and liabilities of the carrier and the owner of the cargo in these cases, in regard to these barges, so far as they are open for consideration.

The barges are owned by the same persons who own the steamboat by which they are propelled; are generally considered as attached to and making part of the particular boat in connection with which they are used, though quite often an individual or corporation owning several boats, running in a particular trade, has a large number of these barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.

The question that arises in the case before us has reference to the extent of the duty or obligation which the law imposes upon the owners of such a steamboat, in regard to the condition of the barge in which grain is so carried in bulk, as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely, with the exception of the unavoidable dangers of the river and of fire.

This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter and has no means of obtaining any sure information if he should attempt it.

When we come to consider what shall constitute fitness or unfitness for the voyage, we must take into account the nature of the service which she is to perform, and the dangers attending the navigation in which she is engaged. This is very different in the narrow current and shallow water of the river, from what it is in open seas or lakes, or their bays and inlets.

The necessities of river navigation require steamboats and barges to pass through narrow and crooked channels, and to venture in very shallow water, a water which is constantly varying in depth, and a channel which often changes its course in a few days very materially.

The consequence of this is, that both steamboats and barges often get aground temporarily, and are soon got off and resume their voyage. Often they rub the bottom of the river for many feet on crossing a sand bar at low water, and pass on without injury or interruption.

These large steamboats, having a barge or barges in tow, lashed to them loosely as they must be, are often brought against their sides with much force. They land for the purposes of their ordinary business, at every ten or twelve miles of their voyage, at the towns and landings on the river, and in doing so must necessarily impinge with more or less force against the barge, which is between the boat and the shore.

See 9 WALL.

These are daily and hourly external forces to which the barge is subjected in the ordinary course of navigation.

It is the duty of the carrier to see that his barge is capable of resisting these forces, without subjecting the cargo to injury. She must be so tight that the water will not reach the cargo; so strong that these ordinary applications of external force will not spring a leak in her or sink her; so sound that she will safely carry the cargo in bulk through these ordinary shocks to which she must every day be subjected. If she is capable of this, she is seaworthy; if she is not, she is unfit for the navigation of the river. No other tests can be given, and this must be determined by the facts in each particular case.

In the one now under consideration, there is not much difficulty.

The injury occurred May 12. About the latter part of June following, another accident occurred and loss of a cargo on the same barge. She was placed upon the ways for repairs. We have the depositions of several witnesses who examined her carefully at this time. One of these witnesses says that he found over ninety timbers rotted and gone, so much so that they were not strong enough to make a fastening to. At one point there were four side timbers rotted out, so as to leave about five feet without support. Her floor timber ends were much decayed. Another witness says: "On one side we found about fifty rotted timbers, some of them entirely rotted off; on the other about the same, fifteen or twenty of them rotted entirely off."

A third witness, a ship-carpenter, confirms this, and says that the effect of this would be that any strong pressure against her sides or bottom, from getting aground or surging against a steamboat, would cause her to leak; an inference which it hardly needed a ship-carpenter to draw for the court.

The evidence shows that the steamboat was descending the river in the night, when a slight shock was felt on the barge, so slight that it was not communicated to the boat.

It did not stop nor retard neither the barge nor the boat, but in a few minutes the former was found to be sinking, and had to be grounded on the nearest sand-bar. It is argued by the claimants that the barge struck a sunken rock or snag, with such force as to tear open her planks, and that the sinking was one of the unavoidable dangers of the river.

But, without attempting any nice criticism of that phrase, we are entirely satisfied that there was no shock or force which a strong, well built barge would not have sustained without injury. The slight character of the shock, the rotten condition of the barge, the additional fact that she was an old barge which had been repaired and had her name changed a year or so before the accident, all prove this. No snag or rock was proved to exist there. It was, in all probability, an ordinary rub over a sand-bar, which the barge, in her decayed condition, could not stand without leaking.

The decree of the Circuit Court is affirmed.

Aff'g.—1 Biss., 529.
Cited—95 U. S., 74; 5 Hughes, 207; 5 Ben., 63; 3 Biss., 499.

THE STEAMBOAT NORTHERN BELLE
AND BARGE PAT. BRADY, THE LA CROSSE
AND MINNESOTA STEAM PACKET COMPANY,
Claimant and Respondent, AND LEWIS J.
HIGBY AND DAVID FERGUSON, Stipu-
lators of said Claimants, *Appts.*,

v.

JOHN ROBSON.

(Not previously reported, but See 9 Wall., 526.)

*Loss from unseaworthiness of vessel—inspection
of, a duty.*

Where damage to a cargo of wheat occurred by reason of the timbers of the barge in which it was carried being in a rotten condition, the owners of the barge were properly held liable.

The failure of her owners to have her thoroughly inspected after a prior accident to her, is without excuse. It is a duty to have a barge often examined and thoroughly inspected.

[No. 141.]

Argued Mar. 21, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The case is sufficiently stated by the court. See, also, the preceding case of *The Keokuk v. Ins. Co.*, *ante*, 746.

Mr. J. W. Cary, for plaintiff in error.

Mr. N. J. Emmons, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

In this case the same parties as in the case just decided, about a month later made, another contract for the carrying of wheat in the same barge, *Pat. Brady*, for the same voyage, the barge being this time attached to the steamboat, *Northern Belle*.

After the accident of the 12th May, which we have just considered in the other case, the barge was merely repaired by moving a plank or two which seemed to be injured, and replacing them by others. In two or three days she was again in use, and on the 19th June took on board another cargo for Robson.

Very soon after leaving Hastings, the barge was run on a sand-bar, and soon commenced leaking so that the wheat was wet and greatly damaged. For this Robson recovered a decree in the district court which was affirmed on appeal to the circuit court.

Much testimony was taken to show that, owing to the violent wind and the condition of the channel, this running of the barge on the sand-bar was inevitable. It is not necessary to inquire whether this were so, for we are satisfied the loss would not have occurred if the barge had been sound and fit for the voyage. It was the rotten condition of her timbers, as shown by the same testimony we have commented on in the former case, that rendered her unable to resist the ordinary pressure which such accidents subject barges to every day.

We do not deem it necessary to go into the testimony on this, further than to remark that the failure of the owners of *The Pat Brady* to have her thoroughly inspected after the first accident, is without excuse.

She was then an old barge, and the circumstances of that action should have suggested a suspicion of her condition.

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But we do not place the decree on the ground of special want of care in that particular. It is the duty of the carrier who offers these barges for service, to have them often examined and thoroughly inspected, so as to be sure of their condition. He should not use a barge after she has become from age, decay or injury, unfit for use, and should repair them often and well, so long as they can, by repairing, be safely used, and no longer.

For this the best interests of all parties require that he should be held rigidly responsible. The decree of the Circuit Court affirmed.

JOSEPH GATES, Assessor of Internal Revenue, etc., *Plff. in Err.*,

v.

DAVID M. OSBORNE AND JOHN H. OSBORNE, Survivors of Themselves and C. DENNIS, Deceased.

(See S. C., "*The Assessor v. Osbornes*," 9 Wall., 567-575.)

Assumpsit for taxes illegally assessed—who may sue—in what court—jurisdictional facts must be alleged—reversal.

Where internal revenue taxes are illegally assessed, if the injured party pays the taxes under protest, he may maintain an action of *assumpsit* against the collector to recover back the amount so paid.

Neither the collector nor the assessor can be sued in the Circuit Court of the United States by any party who is a citizen of the same State with such collector or assessor.

Assumpsit for money had and received is the appropriate remedy to recover back moneys paid under protest for internal revenue duties illegally assessed.

Where the parties are citizens of the same State, the action must be brought in the State Court, but the defendant may remove the cause into the Circuit Court for trial.

When the jurisdiction of the Circuit Court depends upon the citizenship of the parties, the facts necessary to give the Circuit Court jurisdiction must be distinctly alleged.

Where the court below was without jurisdiction and has improperly given judgment for the plaintiff, the judgment in the court below must be reversed.

[No. 161.]

Argued Apr. 1, 1870. Decided Apr. 11, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

This suit was brought by the defendants in error, July 20, 1866, in the Circuit Court of the United States for the Northern District of New York, against the plaintiff in error, as Assessor of Internal Revenue for the 24th Collection District of the State of New York, to recover damages claimed to have been sustained in consequence of alleged illegal assessments of internal revenue taxes, made by the latter as such assessor, upon certain articles manufactured by the former, within the period intervening between the months of June, 1864, and June, 1866.

In the 1st clause of the agreed statement of facts, it is agreed that "the plaintiffs for several years past have been manufacturers of reaping and mowing machines at the City of Auburn, and within the Twenty-Fourth Collection District of the State of New York"; and in the 8th

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clause of the same statement, it is said that "the defendant, as the Assessor of the Twenty-Fourth District, was directed by the Commissioner of Internal Revenue, to require, and he accordingly did require of the plaintiffs, that they should return, etc., the number of tons," etc. In the declaration it is alleged that the plaintiffs bring "Their certain declaration against Joseph Gates, the Assessor of Internal Revenue for the Twenty-Fourth District of the State of New York, which is in and within the said Northern District of New York"; and the declaration begins, "And whereas, the said D. M. Osborne & Company, so being the exclusive manufacturers of the said reapers and mowers known as the Kirby Harvester and Mower, at their said manufacturing establishment in the said City of Auburn, and within the said Twenty-Fourth Collection District of the State of New York," etc.

From this and other statements in the record of like import, it seems the parties were all residents within, and probably citizens of, the State of New York.

The court found for the plaintiffs and gave judgment in their favor for \$9,805.12, besides costs. Whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty. Gen., and W. A. Field, Assistant Atty. Gen., for plaintiff in error:

A Circuit Court of the United States has no jurisdiction of a suit originally brought therein to recover back internal revenue taxes paid under protest, or brought to recover damages for an alleged illegal assessment of internal revenue taxes, collected or paid, unless the citizenship of the parties is such as to give it jurisdiction, and this citizenship must be distinctly averred. *Ins. Co. v. Ritchie*, 5 Wall., 541 (72 U. S., XVIII., 540); *Hornthall v. Keary* (*ante*, 560).

The order to the circuit court must, therefore, be to dismiss this suit for want of jurisdiction.

Mr. D. Wright, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Damages are sought to be recovered by the plaintiffs of the defendant, as the assessor of internal revenue taxes for the Twenty-Fourth District in the State of New York, because, as they allege, he illegally assessed against them certain internal revenue taxes upon certain articles which they manufactured during the period specified in the declaration.

They brought their suit on the 20th of July, 1866, and the declaration contains forty-one counts. Twenty-eight of the counts relate to certain internal revenue taxes alleged to have been illegally assessed by the defendant against the plaintiffs upon certain iron castings of two classes therein described. One class consisted of castings of iron exceeding ten pounds in weight for each casting, and the other class consisted of castings of iron of ten pounds weight for each casting, or less, as more fully set forth in the first fourteen counts.

Machines, in a finished condition, for reaping and mowing, were also manufactured by the plaintiffs during the same period, and the remaining thirteen counts relate to assessments

made by the defendant against the plaintiffs upon reaping and mowing machines which were in a finished condition; and the charges, that the last named assessments were also illegal, and that the defendant, as such assessor, transmitted the list to the collector of the district, and that the plaintiffs paid the taxes under protest, as in the case of the assessments upon the castings of iron, which were in fact used as component parts of the finished machines.

For several years prior to the assessment of the taxes in question the plaintiffs had been manufacturers of the Kirby Harvester and Mower, at Auburn, within that Collection District. They were the exclusive licensees for the manufacture and sale of those machines under the several patents granted for that invention, and the agreed statement shows that they make the castings used as parts of the machines as well as the machines in their organized and finished condition, and it is admitted that the castings which they make cannot be used for any other purpose than as component parts of their machine, nor as parts of any different machine made by any other manufacturers.

Castings manufactured by the plaintiffs are made from pig iron, upon which the internal revenue duties are imposed under the Acts of Congress have been fully paid. All the castings after being taken from the molds, require to be polished, examined, and tested, to see if they are perfect and fit for the purpose before they can be used as component parts of a reaper or mower, and many of them have also to be painted and varnished.

Reapers and mowers, when sold by the plaintiffs, include as parts thereof all the necessary pieces of castings and of woodwork to constitute a complete working machine; but they do not put all of the several parts together until the purchaser is ready to use the machine in the field, as it is much more convenient to transport the several parts in their separate condition than the embodied machine.

Prior to the year 1865 the plaintiffs had never made any returns to the assessor or assistant assessor of any castings which they manufactured, nor had they ever been required to make any such return, either by the assessor, assistant assessor, or commissioner; but the commissioner, in March of that year, directed the defendant, as such assessor, to require of the plaintiffs such a return, specifying the number of tons of such castings which they had manufactured, of the two classes mentioned in the declaration, for the six months next preceding the month of March of that year, and also the number of finished machines which they had manufactured and sold during the same time, in order that the same might be separately taxed, as follows: (1) That the castings of ten pounds weight or less each casting might be taxed at the rate of five per cent. *ad valorem*. (2) That the castings exceeding ten pounds in weight each casting might be taxed at the rate of \$3 per ton. (3) That the finished machines sold during that time might be taxed five per cent. *ad valorem*, without any deduction being made for the castings used as component parts of the machines.

Pursuant to the directions of the commissioner the plaintiffs made the required return, and paid the taxes to the collector, under protest, and

brought this suit to recover compensation for the illegal acts of the defendant. Process having been served, the defendant appeared and pleaded that he was not guilty, which was duly joined by the plaintiffs, and the parties entered into a stipulation waiving a jury, and consenting that the cause might be tried by the court without the intervention of a jury: 18 Stat. at L., 5.

Hearing was accordingly had before the court and judgment was rendered for the plaintiffs in the sum of \$9,805.12, besides costs and charges. Whereupon the defendant sued out a writ of error and removed the cause into this court.

Besides the first assessment, which included the month of July, 1864, and extended to February, 1865, both inclusive, there were subsequent assessments for each month following, up to and including May, 1866, and the agreed statement finds that the same state of facts apply to every month thereafter until the passage of the Act of the 13th of July, 1866, which transferred reapers and mowers to the free list. 14 Stat. at L., 149.

Where internal revenue taxes are illegally assessed it is well settled that the injured party, if he complies with the conditions specified in the Act of Congress upon that subject, and pays the taxes under protest, may maintain an action of *assumpsit* against the collector to recover back the amount so paid. *Phila. v. Collector*, 5 Wall., 731 [73 U. S., XVIII., 616].

Collectors in such cases are not required to reimburse themselves for such liabilities, but the provision is, that all such judgments against them shall be paid by the commissioner, including the costs and expenses of the suit. Such a judgment against the collector is in the nature of a recovery against the United States, and consequently the amount recovered is regarded as a proper charge against the revenue collected from that source. Grant all that and still the concession does not touch the question involved in this case, as the suit in the case before the court is against the assessor to recover back taxes paid to the collector, which presents a question never adjudicated in this court. Assessors may, perhaps, be liable for an illegal assessment in cases where they have no jurisdiction to make any assessment, but the question whether an assessor is liable to an action of *assumpsit* for taxes paid to a collector is a very different question, and it is quite certain that such a theory finds no support in any prior decision of this court. *Barhyle v. Shepherd*, 35 N. Y., 238; *Weaver v. Decendorf*, 3 Den., 117; *Swift v. Poughkeepsie*, 37 N. Y., 511; *Dickinson v. Billings*, 4 Gray, 42; *Railroad v. Charlestown*, 8 Allen, 215.

Actions of the kind may, under some circumstances, undoubtedly be maintained against the collector, and it may be that an assessor, acting in a case where he has no jurisdiction, may be liable to the injured party for an illegal assessment of internal revenue taxes, but neither the collector nor the assessor can be sued in the Circuit Court of the United States by any party who is a citizen of the same State with such collector or assessor. Suits in such cases, that is, where the plaintiff and defendant are citizens of the same State, may be brought in the State Courts, but such suits cannot be maintained in the Circuit Courts under existing laws unless the plaintiff and defendant are citizens of different

States. Consequently, where the parties are citizens of the same State, the action must be brought in the State Court, but the defendant, if he sees fit and seasonably takes the proper steps, may remove the cause into the Circuit Court for trial.

Cases arising under the revenue laws were declared to be cognizable in the Circuit Courts by the Act of the 2d of March, 1833, unless where it appeared that other provisions for the trial of the same had been previously made by law. Laws for the assessment and collection of internal revenue duties were not in existence at that time, but those provisions were extended by the 50th section of the Act of the 30th of June, 1864, to cases arising under the Acts of Congress providing for the collection of internal revenue duties, and the same section provides that all persons authorized to assess, receive or collect such duties or taxes under those laws shall be entitled to all exemptions, immunities, benefits, rights and privileges therein enumerated or conferred. 18 Stat. at L., 241.

Such an action to recover back internal revenue duties, illegally assessed, and paid under protest, might, undoubtedly, have been maintained in the Circuit Courts while that provision remained in force, although both parties were citizens of the same State, as the jurisdiction was made to depend upon the subject-matter, but the first proviso in the 67th section of the Act of the 30th of July, 1866, expressly enacts that the original Act, to wit: the Act of the 2d of March, 1833, shall not be so construed as to apply to cases "arising under any of the Internal Revenue Acts, nor to any case in which the validity or interpretation of those Acts shall be in issue." 14 Stat. at L., 172; *Philadelphia v. Collector*, 5 Wall., 728 [73 U. S., XVIII., 615]; *Ins. Co. v. Ritchie*, *Ibid.*, 541 [73 U. S., XVIII., 540].

Unquestionably, the effect of that proviso was to confine the original Act to the purposes for which it was passed, and to limit its scope and operation, standing alone and unaffected by the 50th section of the subsequent Act, to cases arising under the Acts of Congress providing for the collection of import duties. But that proviso left the 50th section of the Act of the 30th of June, 1864, untouched and in full force, and if legislation had stopped there, persons duly authorized to assess, receive, or collect internal revenue duties would still have been entitled to the same exemptions, immunities, benefits, rights and privileges under the original Act as persons employed to assess, receive, or collect import duties. Legislation, however, did not stop there, but the 68th section of the Act of the 13th of July, 1866, repealed the 50th section of the Act of the 30th of June, 1864, altogether, subject to the proviso contained in the same repealing section, which enacts that any case removed, from a State Court into the Circuit Court, under the former regulations upon the subject, shall be remanded, unless the justice of the Circuit Court shall be of the opinion that the same, if pending in the State Court, might be removed into the Circuit Court under the new provision contained in the 67th section of that Act.

Since the passage of the Act and the repeal of the 50th section of the prior Act, the Circuit Courts have no jurisdiction of cases arising un-

der the internal revenue laws to recover back duties illegally assessed and paid under protest, unless the plaintiff and defendant therein are citizens of different States. Such actions must be commenced in the State Courts if the parties are citizens of the same State, but the defendant may, at any time before the trial, upon petition to the Circuit Court of the district in which he is served with process, remove the cause, upon due proceedings therein, into such Circuit Court, and the provision is that the cause thereafter shall be heard and determined as a cause originally commenced in that court. 14 Stat. at L., 171, sec. 87.

Assumpsit for money had and received is the appropriate remedy to recover back moneys paid under protest for internal revenue duties illegally assessed; and, if commenced in a State Court, the action may be removed on petition of the defendant, into the Circuit Court for the district where the service was made, and in that state of the case the jurisdiction of the Circuit Court is clear beyond doubt, irrespective of the citizenship of the parties, but if the action is originally commenced in the Circuit Court the cause must be dismissed for the want of jurisdiction, unless it appears that the parties were citizens of different States.

Three propositions are submitted by the plaintiffs as being severally sufficient to take the case before the court out of the operation of that rule: (1) They contend that it does not appear that the case was not removed from the State Court into the Circuit Court, as required to give the Circuit Court jurisdiction under existing laws. (2) That it does not appear that the plaintiff and defendant in the case are not citizens of different States, as required to confer jurisdiction upon the Circuit Court. (3) That the case was properly cognizable in the Circuit Court at the time it was commenced, and that the subsequent repeal of the provision conferring such jurisdiction does not impair the right of the plaintiffs to maintain the suit.

Unsupported in fact as the first proposition is, it does not seem to be necessary to enter into any argument to refute it. Suffice it to say, that the record shows that the suit was commenced in the Circuit Court, and that it was not removed into that court from the State Court, which is all that need be said in reply to the first proposition.

When the jurisdiction of the Circuit Court depends upon the citizenship of the parties, it is not enough that it does appear that they are not citizens of the same State, but the facts necessary to give the Circuit Court jurisdiction must be distinctly alleged. Circuit Courts are courts of special jurisdiction and, therefore, they cannot take jurisdiction of any case, either civil or criminal, where they are not authorized to do so by an Act of Congress. *Sheldon v. Sill*, 8 How., 449; *Turner v. The Bank*, 4 Dall., 10; *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. U. S.*, 13 Pet., 616.

Jurisdiction in such cases was conferred by an Act of Congress, and when that Act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing Act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the Act of Congress. *Norris v. Crocker*, 18 How., 438; *Yeaton v. U. S.*,

5 Cranch, 281; *The Rachel*, 6 Cranch, 329; *The Irresistible*, 7 Wheat., 551; *Maryland v. R. R. Co.*, 8 How., 584; 1 Kent (11th ed.), 465; *Butler v. Palmer*, 1 Hill, 324.

Applying these principles to the present case, it is clear that the Circuit Court had no jurisdiction of this case. Usually, where a court has no jurisdiction of the case, the correct practice is to dismiss the suit, but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction and has improperly given judgment for the plaintiff. In such a case the judgment in the court below must be reversed, else the plaintiff would have the benefit of a judgment rendered by a court which had no authority to hear and determine the matter in controversy.

Judgment reversed, and the cause remanded, with directions to dismiss the case for the want of jurisdiction.

Cited—10 Wall., 444, 552; 12 Wall., 8; 17 Wall., 307; 98 U. S., 225, 401; 100 U. S., 233; 8 Blatchf., 31, 143; 16 Bank. Reg., 84; 8 Hughes, 245.

THE LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMSHIP COMPANY, Claimant of the Steamer CITY OF PARIS, *Appt.*,

v.

HENRY P. SIMMONS ET AL.

(See S. C., "*City of Paris*," 9 Wall., 634-639.)

Duty of Steamer in a harbor—improper speed of.

Steamer in a harbor should not enter a narrow track between two vessels, without being very careful first to see that her passage would involve no danger to any approaching vessel in its transit.

The speed of the steamer should not be higher than was consistent with the safety of other vessels in so crowded a thoroughfare.

Where a schooner was pursuing her regular course, the duty rested upon the steamer to see her and keep out of her way.

[No. 152.]

Argued Mar. 29, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

The libel in this case was filed in the District Court of the United States for the Eastern District of New York by the appellees, to recover damages sustained by a collision. The said court entered a decree in favor of the libelants, for \$8,474.52, with interest and costs.

The court below having affirmed this decree, on appeal, the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. T. C. T. Buckley and R. D. Benedict, for appellant:

1. The courts below treated the liability of the steamer as presumptively established by the fact of collision, ignoring, it is respectfully submitted, the rule that "No presumption of liability arises from that fact" (*Vide, The John Fraser*, 21 How., 194 (62 U. S. XVI. 110); and also the principle that "Before the loss occasioned by a collision can be fastened on a party, it must be established by preponderating evidence that it was occasioned by his culpable negligence."

If the proofs show that the claimant has endeavored, by all means in its power, with due care and proper display of skill to prevent the occurrence of the action, there can be no liability.

See, also, *The Morning Light*, 2 Wall., 560 (69 U. S., XVII., 864); also, *The "Grace Girdler"* (ante, 118); *The Virgil*, 2 W. Rob., 205; *The Lochibo*, 8 W. Rob., 318.

It is indisputable that the respondents' schooner with a free wind was crossing a thoroughfare which was the legitimate track of outward bound steamers. If the law imposes on such steamers the obligation to give way to her, the correlative obligation also exists, that the schooner shall observe the movement and do nothing to thwart or impede it.

It is also equally well settled, that when a lookout on such vessel should discern a steamer approaching, the sailing vessel should keep her course, and the steamer has the right to regulate her movements on the basis that that rule will be fully complied with.

The Sezonias, 15 Law Times, 118; *Whitridge v. Dill*, 23 How., 458 (64 U. S., XVI., 583), as to want of a lookout; *Steamship Co. v. Rumball*, 21 How., 383 (62 U. S., XVI., 148); *The Velasquez*, L. R., 1 P. C., 494; *The Agra*, L. R., 1 P. C., 501.

Mr. E. H. Owen, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the Eastern District of New York.

The cause was one of collision. The vessels concerned were the schooner, Percy Heilmar and the steamer, City of Paris. The schooner was 78 feet in length; her tonnage, new measurement, was 107 tons; her carrying capacity was about 170 tons. The City of Paris was an iron screw steamer. She was 375 feet long, and 40 feet beam. Her register was 1669 tons, English measurement. Her engines were 600 horse power. The schooner was laden with coal, and was on a voyage from Philadelphia to Pawtucket, Rhode Island, by way of Long Island Sound.

The steamer was engaged in running between the Ports of New York and Liverpool. The collision occurred on the morning of the 14th of April, 1866, below the Battery, in the North River. The schooner had arrived at the Port of New York that morning. The tide being unfavorable for ascending the East River, she stood over towards Jersey City to find a suitable place to anchor, intending to wait there until the tide in the East River should be favorable. While proceeding to carry out this purpose, heading about west by north, with the wind free, the steamer ran into her, striking her on the starboard side, about the main chains. The blow was of such violence as to prostrate her mainmast and cut her nearly in two. As soon as she was struck the steamer put on steam and carried her forward to avoid raking, or being raked by other vessels, which the pilot of the steamer says "would have done more damage than sinking a dozen schooners." The schooner hung for a time on the steamer's bow. The pilot says: "As soon as we got below, a little out of danger, a little

room, then we stopped the steamer, backed on her hard, backed out from the schooner, and she went down." All this happened so quickly that those on board had difficulty in escaping with their lives. They lost everything else. The captain was knocked overboard and rescued by a small boat which happened to be present.

The course of the schooner was nearly at right angles with the course of the steamer. It lay between a brig and a ship—both with their heads to the eastward, and one a little astern of the other. They were about three hundred feet apart. The brig was on the starboard and the ship was on the port side of the schooner. The course of the steamer was between the same vessels, with the ship on the starboard and the brig on her larboard side. The pilot says he picked out this course, though it was "pretty narrow." The subject was talked over. His plan was to go under the stern of the brig and ahead of the ship.

As almost invariably happens in this class of cases, each vessel has a theory which vindicates itself and condemns its adversary; and, as usual, each theory is earnestly supported by those on board the vessel which propounds it. In this case it is clear there is fault and responsibility somewhere. Our duty is to find where they belong and to pronounce accordingly. The district court adjudged against the steamer, and the circuit court affirmed the decree.

The theory of the schooner is, that she was keeping her course, as she had a right to do, and that the steamer was wholly in fault. The steamer maintains that as soon as the schooner had passed under the stern of the brig, she described the steamer for the first time and luffed, intending to pass between the brig and the steamer; that the steamer backed hard to enable her to do so, and that the schooner thereupon immediately fell off into the line of the steamer's course, and thus brought about the catastrophe. The steamer insists that if the schooner had kept her course, without luffing, the steamer would have passed under her stern; that if the schooner had continued her course after luffing, she would have passed between the steamer and the brig, and that her subsequent change of course was a gross fault, the sole cause of the collision, and deprives her of all claim to damages for the consequences. These conflicting views define the sphere of our inquiries in the case.

The morning was clear. The river was crowded with vessels sailing and at anchor. The condition of things required the greatest circumspection on the part of the steamer. Her rate of speed was probably from seven to eight miles an hour. The combined speed of both vessels was not less than ten miles an hour. The schooner was first seen by Mathewson, who was then, and had been from the time the steamer left the wharf, on her fore-castle head as a lookout. He says that when first seen the schooner was from three to four points off the port bow of the steamer and, he thinks, was distant about four hundred yards. Captain Kennedy, of the steamer, thinks she was a quarter of a mile off. Estimates of distance, under such circumstances, are little to be relied upon. It is to be presumed the witnesses in this instance made it large enough. Conceding

that the distance to be passed by both vessels, to the point of collision, was a full quarter of a mile, the combined speed of ten miles an hour would have brought them together in a minute and a half. Mathewson reported the schooner as soon as he saw her. The orders that were given show the perturbation which existed. Captain Kennedy says: "When the schooner was reported, the pilot and myself both ordered the helm hard a starboard. I said, along with the pilot, hard a starboard, and at the same time reduced the engines dead slow. * * * The next order was to stop the engines and reverse full speed. I worked the indicator myself." The orders to slow, to stop, and to reverse the engines, came too late. The steamer had but a little way to go. The headway she was under could not be arrested at once. It carried her forward with such force that her impact was necessarily fatal to the schooner. Her starboarding did no good. She could not go to the port side more than two points without colliding with the brig. She passed within an ordinary ship's length of the stern of that vessel.

We think that if there had been due care and vigilance the schooner would have been seen at an earlier period. There was nothing to prevent it. The result evinces gross negligence. As soon as it was seen that the schooner was approaching the track of the steamer, the steamer should at once have stopped or reversed her engines, and have done all in her power to avert the impending peril. Acts of Congress, April 29, 1864, 18 Stat. at L., 61, art. 16. She ought not to have entered upon the narrow track between the ship and the brig, without being very careful first to see that her passage would involve no danger to any approaching vessel in its transit.

The results proved that the speed of the steamer was higher than was consistent with the safety of other vessels in so crowded a thoroughfare, and hence higher than she was warranted to assume.

For these faults she must be condemned.

Was the schooner in fault?

When she passed the brig and reached the steamer's track she was pursuing her regular course. This she had a right to do, and the duty rested upon the steamer to see her and keep out of her way. Act of 1864, art. 15. At this point blame is imputed to her. Locman, the pilot on the brig, says, "She luffed a little, and then kept off immediately after she luffed." The pilot on the steamer says she luffed "a very little while. It seemed to me about long enough to get his wheel down and then hove it up again. He appeared to be in a confused state; got frightened, and did not know exactly what to do." The conduct of the schooner must be considered in the light of the facts. They were enough to produce consternation. As she passed the stern of the brig the peril of her position became apparent. A steamer of immense power was bearing down directly upon her, and rapidly approaching. Escape seemed impossible and destruction inevitable. There was no time for reflection or precaution. The vessel and the lives of all on board were at stake. The acts complained of were done in the excitement of the moment, and *in extremis*. Whether they were wise it is

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not material to inquire. If unwise, they were errors and not faults. In such cases the law in its wisdom gives absolution. *The Grace Girder* [ante, 118]. Is it by no means clear to our minds that if the schooner had failed to luff the results would not have been still more disastrous. It is quite probable that the steamer would have struck her midship, have passed over her, and destroyed the lives of all on board. Her conduct neither caused nor aggravated the catastrophe. After reaching the steamer's track she had no power to avoid it. We find in the record no ground upon which we can hold her responsible in any degree for the casualty.

The fact that both the courts below concurred in condemning the steamer and in exonerating the schooner is entitled to our respectful consideration. *The Grace Girder*, *supra*.

The decree of the Circuit Court is affirmed.

Cited—1 Bro., 307; 2 Sawy., 385.

THE STEAMBOAT SUFFOLK COUNTY, HER TACKLE, ETC., THE EAST RIVER FERRY COMPANY, Claimant, *Appt.*,

CHARLES E. JAYNES ET AL.

(See S. C., "*The Suffolk County*," 9 Wall., 651-655.)

Collision—defense not sustained—immaterial variance.

Defense, that a tug injured by collision attempted suddenly and without notice, to sheer across the course of the ferry-boat, not sustained.

The libellant is not bound, at the hazard of losing his case, to state with perfect accuracy, within two or three hundred feet the point of the collision.

[No. 132.]

Argued Mar. 17, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, by the appellees, to recover damages resulting from a collision. The court found for the libellants, and entered a decree for \$2,613.62. The circuit court affirmed this decree, on appeal, and the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. Beebe and Donohue, for appellant.

Messrs. Townsend, Scudder and Jas. C. Carter, for appellees.

The argument being confined to the facts, no abstract is here given.

Mr. Justice Miller delivered the opinion of the court:

This appeal brings before the court a case of collision, occurring in the East River, between New York and Brooklyn, in which the tug boat, Joseph Baker, was injured by the steam ferry-boat, Suffolk County.

The tug was a small boat of about seventy tons burden. The ferry-boat was a large steamboat, capable of carrying a thousand passengers, and much faster than the tug.

They were going in the same general direc-

NOTE.—*Collision; rules for avoiding; steamer meeting steamer.* See note to *Williamson v. Barrett*, 54 U. S. (13 How.), 101.

tion in the East River, about two hundred feet from the New York shore; the tug ahead and the ferry-boat astern, and endeavoring to pass between the tug and the shore when the collision took place. There was no signal by whistle or otherwise given by the ferry-boat, to warn the tug of the danger, and the pilot of the tug seems to have had no apprehension of danger until the other vessel was within two or three feet of his boat. There was room enough for the ferry-boat to have passed outside or inside, and as she was behind the other and could have easily kept out of her way, unless the collision can be clearly traced to some fault on the part of those in charge of the tug, the ferry-boat must be held responsible.

Such a fault is alleged in the answer of claimants, in this: that the tug attempted, suddenly and without notice, to sheer across the course of the ferry-boat at a time when they were so near together that no exertion of those in charge of the ferry-boat could prevent the collision.

We do not think this defense is made out by the evidence. The pilot of the ferry-boat swears to it positively. The pilot of the tug swears as positively that she had not changed her course at all for some time, and that the courses of the two vessels were the same.

The truth seems to be about as stated by the pilot of another ferry-boat, The Seneca, who stopped his vessel to look at the two which came into collision, because they were so near that he expected it. He says they were going in one direction, and that both were slightly curving towards the New York shore, and the tug a little more on the turn than the other boat.

We cannot go minutely into all the testimony on this point. It is sufficient to say that we think this is the fair result of it, and that it does not relieve the ferry-boat from the responsibility of the collision.

The counsel for appellants has made a very ingenious argument in favor of two propositions growing out of the allegation of the libel in regard to the manner and the place of the collision.

The allegation is, "That first, after passing the foot of Jackson Street, the channel rounds a little towards the north, and the boat of your libellant, pursuing the regular channel, gradually rounded with it, so that she was still, at the time of the collision, upon a course not precisely parallel with that of The Suffolk County, but at a slight angle therewith." If we understand the argument, it is, as the pilot has sworn, that he was pursuing a direct course, in which he had made no change for some time previous to the collision. He thus contradicts the libel, which, in that respect, must be held to be true.

That the testimony of the libellant's pilot being false, and the allegation of the libel, stating a change which would to some extent bring the tug across the course of The Suffolk County, the evidence of the pilot of that boat, thus far corroborated by the libel, should be taken as true, when he swears that the tug made a sudden and unexpected sheer across his port, which rendered the collision unavoidable.

But, conceding that the pilot of the tug, in his desire to make clear his freedom from all blame, did not state the course of the vessel with accuracy, the statement of the other pilot is liable to the same suspicious influence, and is equally

at variance with the allegation of the libel, and with all the other testimony in the case. The libel does not state a rank or sudden sheer, or any change of course which would bring the tug across the bow of the other vessel. It says she was gradually rounding with the channel, which brought her on a course not precisely parallel with that of the ferry-boat, but at a slight angle therewith. And as we have already stated, the weight of the testimony supports this allegation, so far as the relative course of the two vessels, and any change in that course is in question.

The other proposition is, that on the production of a map of the locality of the accident, including the channel of the East River, it is shown conclusively that the collision occurred before the vessels reached the point where this curve in the channel required a change in the course of the boats. And it is maintained that as the testimony shows that the collision did not occur at the place alleged, the whole case of libelants must fail; that it was so material to their case to show that the reason for the gradual curve of the boat was the change in the course of the channel, that if there was no such change in the channel before the collision, the change in the course of the vessel was without excuse, and was the cause of the collision.

It surely cannot be necessary to say that the libellant is not bound, at the hazard of losing his case, to state with perfect accuracy, within two or three hundred feet the point of the collision or curve of the channel, except so far as they may be material to the question of who was in fault. Now, the case here requires of the claimants to show that by a sudden and unexpected change in the course of the tug boat she was brought so directly across the course of the ferry-boat that the latter could not avoid the collision. The relative positions of the boats to each other and their relative courses were correctly stated in the libel, and such change in the course of the tug boat as was made, was correctly stated. We cannot see that it was material whether this slight and gradual change was made a little before arriving at the corresponding curve in the channel or not, nor whether the collision occurred at that precise point of the river or a little before it was reached.

We concur with the decree rendered in favor of libellants, both by the District Court and the Circuit Court and it is, accordingly, affirmed.

THE PROPELLER PORTSMOUTH, FRANK
WILLIAMS, Claimant, *Appt.*,

v.

THE SALT COMPANY OF ONONDAGA.

(See S. C., 9 Wall., 682-687.)

Jettison, when fault of master—mistake in entering wrong port—carrier liable for—master's duty after vessel stranded.

If a jettison of a cargo is rendered necessary by any fault of the master, the jettison must be attributed to that fault, rather than to the sea peril.

NOTE.—Liability of carrier by water for loss or damage of goods. See note to Moore v. Amer. Trans. Co., 66 U. S. XVI., 674.

The master was at fault in mistaking Waukegan for Chicago, at night, and in attempting to enter the port of the former place, when he might safely have remained out in the lake until morning.

A loss sustained by such cause is to be attributed to the fault of the carrier, and not to the dangers of lake navigation.

After the vessel was stranded, it was the master's duty to take all possible care of the cargo.

[No. 162.]

Argued Apr. 1, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The libel in this case was filed in the District Court of the United States for the Northern District of Illinois, by the appellee, to recover damages resulting from an alleged breach of a certain contract of affreightment, whereby a loss of over 1,000 barrels of salt had occurred. The said court found for the libellant and entered a decree for \$2,460.94, with costs. The court below having affirmed this decree, on appeal, the claimant took an appeal to this court.

The facts of the case are very fully stated by the court.

Mr. Robt. Ras, for appellant, gave no argument in this court.

Messrs. George F. Comstock and H. F. Waite, for appellee:

1. "The dangers of lake navigation," excepted in the bill of lading, are those which belong to the category of inevitable accidents. To that extent the exception qualifies the common law liability of the carrier. It confers no exemption when a reasonable exertion of human skill can avoid the peril and prevent the loss.

Ang. Car., 167, *et seq.*; *The Niagara v. Cordes*, 21 How., 7 (62 U. S., XVI., 41).

2. The situation was briefly this: the captain of the vessel judging that he had sailed far enough from the Fox Islands (260 miles distant) to reach Chicago, seeing some lights on shore and hearing the whistle and the sound of cars, jumped to the conclusion that he had reached that port. His propeller was perfectly safe in the open lake where she was; he steered at a violent rate of speed in a dark, foggy and windy night, for the harbor. In fact, he was thirty to forty miles short of his destination. The mistake being discovered, his speed was too great to arrest the vessel in due time. She went aground on the pier at Waukegan, and he threw his cargo overboard in order to get away as quickly as possible.

This was not a danger of the lake navigation. There was no danger until it was produced by his own careless mistake and inconsiderate conduct.

The original mistake of taking Milwaukee for Racine (25 miles apart), had no cause whatever, except a loose reckoning as to the distance sailed in a day and night. For this he and his employers only were responsible. This original error mainly produced a similar one off Waukegan. He mistook that port for Chicago. If the lights and signs in a dark night were such as to distinguish one of these ports from the other, the captain was bound to know the difference. If they were not, then he was bound to wait until he could find out where he was. In either case he deviated from his course without justification or excuse.

3. Nothing was done to save the cargo from
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the consequences of the mistake. The propeller lay where she was grounded, and within a few feet of the Waukegan pier, for twenty-four hours, without a single effort to save any portion of the cargo. As the winds and waves were subsiding, the captain began to throw overboard the salt of the libellant. There is decisive evidence that the whole or greater portion of the jettisoned goods might have been saved. The contrary evidence of the captain and some of his subordinates is entitled to no consideration, because no effort was made.

Mr. Justice Strong delivered the opinion of the court:

The contract of the appellant was to deliver the two thousand barrels of salt at Chicago to the consignee named, "the dangers of lake navigation only excepted," and whether the failure to deliver was caused by the excepted dangers is now the only question. A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault, or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present, and enter into the case. *Lawrence v. Minturn*, 17 How., 100 [58 U. S., XV., 58]. This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. *Ins. Co v. Sherwood*, 14 How., 365. Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss. And there is, perhaps, greater reason for applying the rule to exceptions in contracts of common carriers than to those in policies of insurance, for in general, negligence of the insured does not relieve an underwriter, while a common carrier may not, even by stipulation, relieve himself from the consequences of his own fault. *Vide, The Niagara v. Cordes*, 21 How., 29 [62 U. S., XVI., 48].

In view of this recognized construction given to such clauses in bills of lading as "perils of the sea excepted," or, as in this case, "the dangers of lake navigation only excepted," it is plain that the appellant has shown no sufficient excuse for the failure to deliver the salt to the consignee of the libellant.

The propeller, with the salt on board, left Fox Island, in Lake Michigan, about seven o'clock in the evening of October 9th, 1866, bound directly for Chicago. The weather was foggy and the wind was blowing from the northeast, with a considerable sea. The fog continued during that night and all the next day, and the wind blew freshly, though not so as to prevent the propeller's carrying her fore-sail. Nothing particular occurred until about sunset of the evening of the 10th, when, as described by the master, the fog lifted for a minute, and a loom of the land on the west side of the lake was discovered, and the master, mate and engineer "could just see a church steeple and a house, as near as they could calculate." They concluded the place was Racine, in Wisconsin. Acting on that conclusion, the propeller was

continued on generally south by east, half east and southeast, then south by west, and south-west, and finally west, until a whistle was heard, which the master took to be that of a propeller at the Chicago pier. This must have been at about three o'clock in the morning of the 11th. Soon after a light was discovered, and this was assumed to be the Chicago light. The sound of cars running and of car whistles was also heard, which the master inferred to be caused by making up trains at Chicago. Accordingly he attempted to enter port, but when the propeller came very near the pier, it was discovered not to be the pier of Chicago, and the vessel was immediately backed. It was, however, too late. She grounded and held fast. The clerk was at once sent ashore and dispatched to Chicago for a tug. Meanwhile the propeller remained at the place where she had taken the bottom, which proved to be Waukegan, some thirty or forty miles from Chicago, until the tug arrived, late in the afternoon of the 11th. No lighter was sent for, and no efforts made to save the cargo, but after the arrival of the tug, about one thousand barrels of the salt was thrown overboard to lighten the propeller, though the wind had then subsided, and she was apparently in no danger. The next morning she was got off, and she proceeded to her port of destination. Such are the leading facts of the case. They are proved mainly by the testimony of the master and hands on board the propeller, and there is no controversy respecting them.

It is manifest that the master was first at fault in mistaking the land which he dimly saw on the evening of the 10th for Racine. He was, in fact, then from thirty to forty miles farther from Chicago than he supposed he was. His supposition was unwarranted by the evidence he had. He thought the place was Racine, not because of its appearance when he saw the steeple and the house. His view of those objects was very indistinct. His language is: "We could just see a church steeple and a house, as near as we could calculate." The outline of the shore he does not pretend to have seen, or anything which, by its appearance, justified his conclusion that he was opposite Racine. His sole reasons for assuming that such was his position are to be found in his having consulted with his engineer about the quantity of steam carried, and in his own estimate of the time when he expected to reach that place. At best, therefore, his conclusion was based upon a conjecture. Considering that the voyage from Fox Island had been through a thick fog, and in a heavy sea; that the wind had not been quite steady; that the speed of the propeller had not been measured by the log, or by observations; and considering also another fact, to which the master testifies, that he did not know the distance from Fox Island to Racine, it seems to us his conjecture that the propeller was opposite Racine at sunset of the 10th was no reliable guide to the subsequent conduct of the voyage. It was, however, accepted as a guide, and it led directly to the disastrous fault afterwards committed of mistaking Waukegan for Chicago. The master, judging that he had steamed far enough from Racine, readily concluded that the light he saw, and the whistle and running

cars he heard were at the place of his ultimate destination, and without any careful verification of his opinion he attempted to enter the port. The light he saw, it is true, was a white light, like that at Chicago. But there were other white lights on the west shore of the lake. Waukegan had one. The whistle and the running cars were not peculiarities at Chicago. There was enough in his situation to awaken doubt, and to induce caution. We think that, in his circumstances, the attempt he made to enter the port was inexcusably rash. It was not a necessity. His duty to the owners, and still more to the freighters, was to exercise the highest prudence, as well as skill, to guard against loss. According to his testimony he might safely have remained out in the lake until morning, or he might have signaled for a tug to take the propeller in. It was his duty to do one or the other. He did neither. He testifies he would have gone out into the lake and waited until daylight had he not supposed he had found a harbor. He had no right to act upon such a supposition, which at best was no more than a careless conjecture. He admits, what must be evident, that he could have seen plainer had he waited till daylight before attempting to enter, and that he might have known the pier was Waukegan pier. He thinks a tug could have found the propeller had he signaled, but he neglected to signal. The second engineer also testifies that the propeller attempted to enter the port at her usual speed of eight and a half or nine miles an hour, which, if the statement be correct, was much too great. It is true his statement varies from the account given by the master and chief engineer; but the chief engineer and the master were both upon deck, and the second engineer was in immediate charge of the engine until within three minutes of the time when the signal was given to stop, and even during those three minutes the chief engineer was outside of the engine room. The second engineer must, therefore, have best known at what rate of speed the propeller was moving. In view of all this, we have no hesitation in coming to the conclusion, that the loss sustained by the libelants is to be attributed to the fault of the carrier, and not to the excepted dangers of lake navigation.

Were it necessary, it would be easy to show that the conduct of the master after the vessel was stranded was entirely unjustifiable. It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it. Losses arising from dangers of navigation, within the meaning of the exception in the bill of lading, are such only as happen in spite of the best human exertions, which cannot be prevented by human skill and prudence. *The Niagara v. Cordes*, cited above. But in this case no effort was made to save the cargo. The salt was not thrown overboard until after the arrival of the tug. The fog had then lifted. The wind and the sea had subsided. It is evident the salt might then have been saved, if it could not have been removed before.

The decree of the Circuit Court is affirmed, with costs.

Cited—3 Sawy., 540; 1 Holmes, 250; 68 N. Y., 304.

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WILLIAM DOWNING, *Appt.*,

v.

JAMES MCCARTNEY ET AL.

An appeal of one of three joint defendants not proper.

Where the decree below was joint against three, and only one appealed, and there is nothing in the record showing that the other two had notice of the appeal, or that they refused to join in it, the appeal will be dismissed.

[No. 163.]

Argued Apr. 4, 1870. Decided Apr. 11, 1870.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.
Mr. W. C. Goudy, for appellant.
Mr. James Hughes, for appellees.

Mr. Chief Justice Chase delivered the opinion of the court:

The decree below was joint against the three complainants. Only one has appealed; and there is nothing in the record showing that the other complainants had notice of this appeal, or that they refused to join in it.

The appeal, therefore, must be dismissed.

JOSIAH A. NOONAN, *Plff. in Err.*,

v.

ALFRED F. R. BRADLEY, Administrator,
 etc., of JOHN B. LEE, Deceased, for the use
 of the Executors of ORSON TOWSLEY, Deceased.

(See S. C., 9 Wall., 394-408.)

Suits by administrator out of his State—plea of want of authority—construction of contract.

In the absence of special statute no suit can be maintained by an administrator in his official capacity, except within the limits of the State from which he derives his authority.

If he desires to prosecute a suit in another State, he must first obtain a grant of administration therein, in accordance with its laws.

The rule that a plea to the merits admits the representative character of the plaintiff, and his right to sue in that capacity, is only applicable where no other plea than one of that kind is interposed.

A plea which puts in issue the representative character of the plaintiff, is a good plea in bar to the action.

A party who takes an agreement prepared by another, and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him.

An agreement not to enforce a bond, which is conditional in its terms, depending for its operation upon the happening of a contingent event, by the happening of that event becomes absolute, and may be pleaded as release to an action on the bond.

[No. 112.]

Argued Mar. 10, 1870. Decided Apr. 18, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

This action was brought in the court below by the defendant in error, on a certain bond. The defendant interposed three pleas to the declaration. The plaintiff having demurred, the court sustained the demurrer, and entered judgment in his favor for \$7,615.41. Whereupon the defendant sued out this writ of error.

A very full statement of the case appears in the opinion of the court.

Messrs. M. H. Carpenter and J. P. Walker, for plaintiff in error:

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Bradley, a foreign administrator, cannot maintain this suit on the facts as stated. Without a statute giving that right in the State where suit is brought, no administrator or executor can sue out of the jurisdiction appointing him.

Story, *Conf. L.*, secs. 512, 513, 414; *Fenwick v. Sears*, 1 Cranch, 259; *Dixon v. Ramsay*, 3 Cranch, 323; *Doe v. McFarland*, 9 Cranch, 151; *Kerr v. Moon*, 9 Wheat., 565; *Clement Smith v. Bk.*, 5 Pet., 518.

To obviate this objection, it is claimed that Bradley has acquired some right to maintain this action from his substitution by the Supreme Court as a party to the appeal. To this we answer:

The Supreme Court neither did nor could appoint an administrator, nor enlarge or diminish the powers of one already appointed. He was allowed to be substituted in that record to prosecute that suit; which he did do, to its full and final termination—a sale and confirmation of the mortgaged premises.

The order of the Supreme Court related to that case only.

This action is not an execution of that decree in any sense; it is not even founded upon the decree, as a cause of action. This action is on the bond; and whether the plaintiff can maintain it or not, depends upon the general principles of law, which are clearly settled against such right by the decisions before quoted.

The preceding objection, if well taken, is fatal to this action.

The third plea, which is admitted by the demurrer to be true, sets out a full defense on the merits.

It is deemed both logical and legal to claim that, from the failure of Lee's title, his conditional covenant not to enforce the bond became an absolute, unconditional "covenant perpetual," not to sue or enforce it; and that Noonan might plead the covenant in bar as a release or estoppel to any action brought after the failure of title, and the consequent becoming absolute of the covenant not to sue.

1 T. R., 448; 1 Ld. Raym., 688; 8 T. R., 486; Cro. Eliz., 623; 2 Salk., 576; 12 Mod., 415, 548; 3 Salk., 299; *Hastings v. Dickinson*, 7 Mass., 153; *Upham v. Smith*, 7 Mass., 266; *Sevall v. Sparrow*, 16 Mass., 24; *Shed v. Pierce*, 17 Mass., 623.

Mr. James S. Brown, for defendants in error:

The third plea sets up the same defense of the stipulation on the bond, and the failure of title set up in the foreclosure suit. It also sets up Noonan's voluntary suit, commenced after the decree in the court below in favor of Lee, and after all the installments of purchase money were due by the terms of the bond, and a trial at a period shown by the record set forth in the declaration subsequent to the death of Lee. But it distinctly alleges that the cause of judgment against Noonan was the title precisely as it stood at the date of sale to Noonan in 1855. So that no failure of title had occurred after the decision of this court at the December Term, 1862, or after the commencement of the suit to foreclose the mortgage.

The identical question tried in that suit as a defense, and passed upon by this court in favor of the plaintiff as administrator, was (supposing

the allegation in the plea to be true) re-tried in the Circuit Court of Milwaukee County after the death of Lee, in a suit of which the plea does not allege even notice to the plaintiff.

The Supreme Court, in its opinion, after a full review of the entire title, both of Lee and Orton says: "We find that Noonan's title has not failed." And further, as to the breach of the stipulation in bringing a suit to enforce the bond as well as the mortgage, they say, on the same page: "There has been no breach of the agreement indorsed on the bond."

Noonan v. Lee, 2 Black, 507 (67 U. S., XII., 280).

We have already shown that the stipulation must be construed in connection with the bond upon which it is indorsed. The bond calls absolutely for payments in 1, 2, 3 and 4 years, of \$1,000 each. It could not have been the intention of the parties, by the stipulation, to set aside the obligation to pay at those times.

The stipulation, connecting it with the terms of the bond, was legally this: Noonan should pay at the several times mentioned in the bond; and if before such payment became due, the title should fail, nothing should be paid, or if incumbrances should be found, they should be deducted from the payment. When all the installments became due (Oct. 1, 1859), and no incumbrances "found," and no failure of title taking place, that is, all parties being just as they were at the date of the bond, then Noonan was to look to the covenant for his security from what should thereafter arise, but not refuse the payment of the bond.

It is evident that a failure of title in 1863 could not aid a default of payment in 1859.

The Legislature of Wisconsin authorizes a foreign administrator to sue in the state courts. He had sued and obtained a decree in his favor on the bond and mortgage; the subsequent appointment of Ogden could not divest his right so acquired.

Session Laws of Wisconsin of 1860, 25; *Kane v. Paul*, 14 Pet., 33; *Childress v. Emory*, 8 Wheat., 643.

This bond and the mortgage were in process of foreclosure in the United States Court on behalf of the present administrator, long before Ogden was appointed.

Peale v. Phipps, 14 How., 875.

A foreign administrator, having once obtained judgment against a debtor, can by virtue of that judgment sue anywhere.

Talmadge v. Chappel, 16 Mass., 71.

Mr. Justice Field delivered the opinion of the court:

The questions for our decision in the present case arise upon a demurrer to the pleas of the defendant; but it will tend to a better understanding of them if the statement of them is preceded by a brief outline of the facts disclosed by the record.

In October, 1855, Noonan, the defendant in the court below, purchased of one Lee, and received from him a warranty deed of certain real property situated in the State of Wisconsin, and for the purchase money gave his bond in the penal sum of \$8,000, conditioned to pay \$4,000 in four annual installments, with interest, secured by a mortgage on the property. At that time the premises were in the posses-

sion of one Orton, holding them adversely to Lee, and in consequence of this fact Noonan required from Lee, as a condition to the delivery of the bond, an agreement against its enforcement in case the title to the land should fail (except as against the United States for the portion of the river—Milwaukee—beyond a certain designated line), and to deduct from the sum stipulated the amount of any incumbrances which might be found on the property. Such an agreement was accordingly given, and was indorsed on the bond.

A clause in the mortgage provided that upon default of Noonan to pay any of the installments of the principal or the interest, or the taxes on the property as they became due, the entire principal of the bond, with interest, should, at the option of Lee, be immediately payable.

In March, 1859, default having been made in the payment of the several installments, Lee elected to claim the entire amount as due, and brought suit against Noonan and others in the District Court of the United States for the District of Wisconsin, then exercising circuit court powers, to foreclose the mortgage, praying in his bill for a sale of the mortgaged premises, the payment of the debt secured, and for general relief. Noonan answered the bill, setting up that Lee's title had failed before the commencement of the suit; but the court, by its decree made in January, 1860, found that there was due on the bond a sum exceeding \$5,000, and directed a sale of the mortgaged premises, and the application of the proceeds to the payment of the amount found due; and that if the proceeds were insufficient, the Marshal should report the deficiency, and Noonan should pay it, with interest, and in default of such payment the complainant should have execution therefor.

From this decree Noonan appealed to this court, and pending the appeal, for the purpose of trying his title to the land purchased, brought ejectment in one of the Circuit Courts of the State of Wisconsin, against Orton, the party in possession. He then gave notice to Lee of the action, and required him to undertake its management. Lee at once retained counsel, who for him assumed the conduct of the action.

Pending the appeal in this court, and the action of ejectment in the state court, Lee died, domiciled in New York, and Bradley, the plaintiff in this case, was appointed by the proper tribunal in that State, administrator of his estate. On his application, Bradley was then substituted as representative of his intestate on the record in the case on appeal in this court.

At the December Term, 1862, this court gave its decision in the case, adjudging that the district court erred in ordering the defendant, Noonan, to pay any deficiency which might remain, of the principal and interest of the mortgage debt, after applying the proceeds of the sale, and that complainant have execution therefor. To this extent the decree was reversed; on other particulars, it was affirmed.

In the opinion delivered on rendering the decision, the court observed, that upon the facts disclosed by the record, it found no defect in the title of Lee, and that Noonan's title had not failed. In this language reference

was, of course, had to the title as it appeared upon the evidence presented at the hearing in the district court in January, 1860.

Afterwards, in January, 1863, final judgment was rendered in the action of ejectment in the state court in favor of Orton, the party in possession, and against Noonan, upon the ground that the latter was not seised in fee of the premises, and acquired no title by his purchase from Lee, and that Orton was lessee.

When Lee died, there were effects of value belonging to him in Wisconsin, and in February, 1865, one Thomas L. Ogden was duly appointed administrator of those effects by a tribunal having jurisdiction of that matter in that State; and he qualified and entered upon the discharge of his duties as administrator, and when this action was commenced, had in his possession the bond, given by Noonan to Lee on the purchase of the premises.

In September, 1866, Bradley, as administrator of the estate of Lee under the appointment in the State of New York, brought the present action upon this bond of Noonan. The declaration sets forth his title as administrator under this appointment, and contains four counts.

The first count is on the penalty of the bond simply. The second sets forth the bond and its conditions. The third sets forth, besides the bond and its conditions, the agreement indorsed on the bond, and the proceedings in the foreclosure suit.

The fourth differs from the third count in the greater particularity with which it details the proceedings in the foreclosure suit.

Each of the several counts, except the fourth, concludes with the averment that the defendant has not paid the several sums mentioned in the bond, or any of them. The fourth count contains similar averments, with the exception of the statement that \$53.56, collected on the sale under the decree of foreclosure, had been applied on these sums.

To the declaration the defendant interposed three pleas:

1. That, as to the supposed causes of action mentioned therein, the plaintiff is not, and never has been, administrator of the effects of the deceased.

2. That Thomas L. Ogden was duly appointed, by a tribunal in Wisconsin, administrator of the effects of the intestate in that State, among which was the bond in suit, and had qualified when the present action was brought.

3. That the title of Lee to the premises sold had failed, the plea setting up the agreement indorsed on the bond, and the proceedings and judgment in the ejectment suit to bring the case within the agreement. The averments of the second and third pleas will be more fully stated as these pleas are hereafter considered.

To the pleas the plaintiff demurred; the circuit court sustained the demurrer, and the defendant brings the case to this court on writ of error.

The inquiry here is: what is the legal effect of the facts presented by these pleas?

The first plea puts in issue the representative character of the plaintiff in the State of Wisconsin. It denies that, as to the causes of action stated in the declaration, he is or ever has been

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administrator of the effects of the deceased, and thus raises the question, whether an administrator appointed in one State can, by virtue of such appointment, maintain an action in another State to enforce an obligation due his intestate. And upon this question the law is well settled. All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the State within which it was granted. All hold that, in the absence of such a statute, no suit can be maintained by an administrator in his official capacity, except within the limits of the State from which he derives his authority. If he desires to prosecute a suit in another State he must first obtain a grant of administration therein in accordance with its laws.

So far has this doctrine been extended that in *Fenwick v. Sear's Administrators*, 1 Cranch, 259, where the plaintiff had obtained letters of administration in Maryland, before the separation of the District of Columbia from the original States, it was held by this court that he could not, after the separation, maintain an action in that part of the district ceded by Maryland by virtue of these letters, but that he must take out new letters within the district.

The same doctrine is as applicable to the case of executors as to that of administrators; the right to sue in both instances depending upon the letters. *Dixon's Executors v. Ramsay's Executors*, 8 Cranch, 319.

Whether the objection to the character of the plaintiff as administrator or executor should be taken by a plea in abatement or a special plea in bar, would appear to have been, at one time, a matter upon which there was some diversity of opinion. In some of the cases the language used would indicate that a plea in abatement was the only appropriate form in which the objection could be presented, whilst in other cases the objection taken by a special plea in bar has been sustained. It was sustained by this court, when taken by a special plea in bar, in *Fenwick v. Sear's Administrators*, and in *Dixon's Executors v. Ramsay's Executors*, already cited. In the latter case a foreign executor brought an action in the District of Columbia. The defendant pleaded that he had not obtained letters in the District or in the United States, and, on demurrer, the plea was sustained.

There is no principle in pleading which should prevent the objection from being taken in this way. It is only in virtue of his representative character that the plaintiff is entitled to the matters in controversy, and a plea which denies to him that character is, in its nature, a plea in bar of the action.

In *Langdon v. Potter*, 11 Mass., 813, the Supreme Court of Massachusetts held directly that the objection taken in that case, that no letters of administration had been granted to the plaintiff except under the authority of another State, was pleadable in bar, and in referring to the diversity in the cases and opinions, as to the form of the plea by which the objection should be presented, observed that they might perhaps be "reconciled by considering the plea, that the plaintiff is not administrator, as one of those which may be pleaded in bar or in abatement." "There are

many such cases," said the court, "where the matter of the plea goes to preclude the plaintiff forever from maintaining the action, and it may therefore be pleaded in bar; yet, as in point of form it is in disability of the plaintiff, it may also be pleaded to the person." These observations are just, and explain much of the apparent conflict in the decisions of different courts, or of the same court at different times.

The language used by this court in *Childress v. Emory*, 8 Wheat., 642, and *Kane v. Paul*, 14 Pet., 88, cited by counsel, was not intended to deny that the objection to the authority of the plaintiff as administrator or executor could be taken by a plea in bar, but was only intended to indicate that the objection must be specially pleaded, and could not be urged on demurrer to the declaration for alleged insufficient exhibition of letters testamentary, when proof of the letters was made, or under a plea to the merits.

In the first case the court observed, that if the defendant desired to object to the letters as insufficient, he should have craved oyer of them, and had them brought before the court; that unless oyer was craved and granted, the letters could not be judicially examined; and then added that if the plaintiffs were not executors, that objection should have been taken by way of abatement, and did not arise upon a demurrer in bar. The point decided was that the objection could not be taken, when proof of letters was made, without oyer of them, and did not arise in such case upon demurrer. There was no question as to the form of the plea to be used, if the objection were presented in that way; and it is clear that no determination as to the form was intended.

In the second case the plea was *non assumptum*, which admitted plaintiff's right to sue. It was objected that the letters testamentary appeared on their face to have been granted in violation of the law of Maryland, but the court observed that the plea was the general issue, and that a judicial examination into their validity could only be gone into upon a plea in abatement, meaning evidently that such examination could not be had unless the objection were taken by special plea. There was no intention on the part of the court to determine as to the form of the special plea in such cases.

The objection to the character of the plaintiff as administrator in this case, is not waived by the third plea, which goes to the merits, as contended by counsel. One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent in their averments with each other. The remedy of the plaintiff in such case is not by demurrer, but by motion to strike out one of the pleas, or to compel the defendant to elect by which he will abide. But here there is no inconsistency in the pleas; the one denying any right in the plaintiff, in his capacity as administrator, to the subject of controversy, and the other the release of the defendant from liability on the bond in suit by failure of its consideration. The averments of both may be true.

The proposition of law which the counsel invokes, that a plea to the merits admits the representative character of the plaintiff, and his right to sue in that capacity, is only applicable where no other plea than one of that kind is

interposed; it does not apply where a special plea traverses that character. A plea denying that an intestate entered into the obligation upon which the action is brought, or averring that he was released therefrom, standing alone, is, undoubtedly, an admission of the representative character of the plaintiff to the extent stated in the declaration, and if that statement is consistent with the grant of letters within the State, is also an admission of his right to sue in that capacity. The execution or the release of the obligation is in such case the only matter in issue and of course is the only matter upon which evidence need be called or argument had. But, in the case at bar, had there been no other plea than the third plea, which goes to the merits, the character of the plaintiff, as administrator in Wisconsin, would not have been admitted, for the reason that the declaration states that the grant of administration to him was by letters issued in the State of New York, and the plea to the merits only admits the title as stated in the declaration.

This effect of a plea to the merits was decided as long ago at the time of Lord Holt, in the case of *Adams v. The Terre tenants of Savage*, 6 Modern, 134. In that case the plaintiff brought a *scire facias* against the defendants, reciting a judgment recovered by his intestate against Savage, and that administration was committed to him by the Archdeacon of Dorset, whose jurisdiction did not extend to the place where the judgment was rendered. The terre-tenants traversed the seisin of Savage, and the finding being against them, motion in arrest of judgment was made, on the ground that the administration committed to the plaintiff was void. It was urged for the judgment, that though the plaintiff had shown a bad title, the defendants not traversing it, or taking any advantage of the invalidity of the administration, but pleading to the merits, admitted that the plaintiff was entitled to sue, and should not be permitted, when the right was tried against them, to controvert what they had declined to insist upon; but Chief Justice Holt said: "If the plaintiff had not set forth what kind of administration he claimed by, but only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put you upon showing it by craving oyer of the letters of administration, as he might have done, but pleaded over; that had been an admission of the plaintiff's having a right of suing as administrator as he had alleged." And after stating that the plaintiff made title to himself by an administration which was invalid, the Chief Justice continued: "And when you yourself affirm this to be your title, how can we intend you have another; for of your own showing this is your title, which is manifestly bad? And there is a vast difference where a title does not appear fully for the plaintiff, and the party will not controvert with him about that, for then it may be well presumed if the party were not well satisfied of plaintiff's title he would have insisted on it in due time, and where the plaintiff himself shows he has no title, for then the court has no room for intendment." The authority of this case has not, so far as we are aware, ever been doubted, and were there no other ground against the position of the plaintiff, it would be decisive.

The substitution in this court of the plaintiff as administrator, in place of the intestate, in *Noonan v. Lee*, does not affect the present case, or give the plaintiff any greater right of action than if no such substitution had ever been made. It only authorized the further prosecution of that suit in his name, and gave no right, and could give no right, to prosecute any other suit in his name.

Nor is the position of the plaintiff aided by the Statute of Wisconsin, which enables foreign executors and administrators to sue, in certain cases, in the courts of that State. That statute only applies where no executor or administrator of the estate of the decedent has been appointed in the State, and then only in the counties where the foreign executor or administrator has filed in the Probate Court an authenticated copy of his appointment.

The second plea, like the first, puts in issue the representative character of the plaintiff in Wisconsin; not by direct denial, as in the first plea, but by averring that there were effects of the decedent in that State at the time of his death, among which was the bond in suit; that an administrator of those effects had been duly appointed and qualified, and had entered upon and was engaged in the discharge of his duties as such officer at the time the action was commenced, and that by reason of this appointment and qualification, the effects of the decedent, under the laws of Wisconsin, were vested in him, with all rights of action in relation thereto, and that as a consequence the letters issued to the plaintiff in the State of New York, with reference to the causes of action stated in the declaration, are void and of no effect.

This plea is a good plea in bar to the action. The bond in suit was *bona notabilia* in Wisconsin, and a plea—that the subject of action constituting such *bona notabilia* was, on the death of the decedent, in another jurisdiction than the one which appointed the administrator suing as plaintiff—has always been a good answer to the action. It is an averment of facts which in law excludes all right to, and control over, the property in that State by the foreign administrator. See, 1 Saund., 274, note 3; *Stokes v. Bate*, 5 Barn. & C., 491.

The third plea sets up a defense to the action on the merits, namely: that the title to the premises, for the consideration of which the bond in suit was given, has failed; and that, as a consequence, under the agreement of the intestate, the right to enforce the bond has ceased.

This plea alleges that the bond in suit was given only in consideration of the conveyance of a warranty deed by the intestate, and an agreement that in case his title failed he would not enforce the bond, and that by judicial proceedings, of which the intestate had notice and took charge, it was determined that the intestate was not seised at the time he executed the deed in fee of the premises, but that Orton, the party then in possession, was thus seised of them.

The effect of this plea depends upon the construction which is given to the agreement of the intestate not to enforce the bond in case his title failed. The plaintiff contends that this agreement ceased to have any operation after the maturity of the bond or the forfeiture of the penalty; and that if subsequently the title

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failed, that fact could not be pleaded with the agreement in bar to an action on the bond, either by way of release or estoppel.

The argument presented in support of this construction is founded mainly upon the improbability that the parties could have contemplated a postponement of payment beyond the period stipulated in the bond. They could not, says the counsel, have intended to set aside the obligation to pay at those times; and it would have been a violation of the spirit of the agreement for the vendee to have refused the payments as they became due, if the title had not then failed.

Undoubtedly, the parties contemplated that the payments would be made as they matured, but they also contemplated that payments should cease whenever the title of the grantor failed. They may have supposed that the validity of the title would be determined to their satisfaction before the maturity of any of the installments stipulated, but they have inserted no provision in the agreement which limits its operation to that or to any other period. It is a perpetual covenant not to enforce the bond upon the happening of a certain event. It matters not that the obligee or his representative might have compelled its payment before the happening of that event. What would have been the rights of the obligor in that case; whether he would have had any remedy to recover back the amount paid, or would have been compelled to look to the covenant of warranty in his deed, are questions not now before us for determination. It is sufficient for our present consideration that the bond has not as yet been enforced, and the title to the property which the intestate sold and undertook to convey to the defendant has failed. It would be against manifest justice if, under these circumstances, the representative of the vendor, notwithstanding the vendor had no title to convey, could recover of the defendant as though the vendor had transferred to him a good and perfect one.

If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right. *Mayer v. Isaac*, 6 Mees. & W., 612.

This agreement not to enforce the bond, which is conditional in its terms, depending for its operation upon the happening of a contingent event, has, by the happening of that event, become absolute, and may be pleaded as a release to the action. It constitutes, in fact, a part of the condition of the bond, qualifying its provisions for the payment of the installments of the principal and interest, and declaring, in effect, that the payments shall not be required, and the obligation of the bond shall cease, in case the event designated happens. *Burgh v. Preston*, 8 T. R., 483.

The decision in the foreclosure suit only determined that, at the time the hearing was had in that case in the District Court, in January, 1880, the title had not failed. The language of the court in rendering the decision shows this. It says: "As the facts are disclosed in the record, we find no defect in the title of Lee. We find that Noonan's title has not failed, and no incumbrance upon the property is shown. There has been, therefore, no breach of the agreement indorsed on the bond, nor has there been any breach of the covenant of general warranty in Lee's deed to Noonan." The case is entirely changed now; and facts not existing, or at least not established then, but since determined by judicial proceedings, present a case upon which this court has heretofore never passed.

We are of opinion that the pleas of the defendant constitute a bar to the action, and that the circuit court erred in sustaining the demurrer to them.

It follows that its judgment must be reversed, and the cause remanded for further proceedings.

Mr. Justice Clifford, dissenting:

I dissent from the opinion and judgment of the court in this case upon two grounds, which I will proceed to state without entering at all into the argument to support the respective propositions:

1. Because I think that the alleged disability to sue should have been pleaded in abatement and not in bar. Undoubtedly, a different rule of pleading prevailed at common law, but there are three reported decisions of this court in which it is held that such a plea, in a case like the present, must be in abatement; and in view of our complicated system of jurisprudence, I am not inclined to overrule those cases. They have been regarded as authorities for many years, and I am of the opinion that the rule which they establish is a better one as a rule of pleading in the Federal Courts than the rule which prevailed at common law. *Childress v. Emory*, 8 Wheat., 642; *Kane v. Paul*, 14 Pet., 83; *Ventress v. Smith*, 10 Pet., 161.

2. I am also of the opinion that the decree in the former suit is conclusive as to the rights of the parties, and that it constitutes a complete answer to the defense in the present suit. *Noonan v. Lee*, 2 Black, 499 [67 U. S., XVII., 278].

Mr. Justice Swayne and **Mr. Justice Davis** concur in this dissenting opinion.

Cited—12 Wall., 126; 23 Minn., 306; 102 Mass., 192; 39 Wis., 418.

DADE HOOEY ET AL., Complainants, *Appls.*,
v.

JESSE B. WILSON.

(See S. C., 9 Wall., 501-504, *Note*.)

Parties, who necessary—objection to want of.

In an action by an heir to avoid a judicial sale made to the receiver of the estate, the complainant

NOTE.—When parties interested are numerous, part may maintain a bill in equity for benefit of all. See note to *Smith v. Swornstedt*, 67 U. S. (16 How.), 288; and note to *Bacon v. Robertson*, 59 U. S. (XV., 499).

in the decree of sale, and the other heirs, are indispensable parties.

A decree rendered without their presence will be reversed, although the objection was not taken in the court below.

[No. 156.]

Argued Mar. 30, 1870. Decided Apr. 18, 1870.

APPEAL from the Supreme Court of the District of Columbia.

This case grew out of the case of *Ingle v. Jones*, *ante*, 621, recently decided in this court.

In that case a decree was entered for the sale of certain property in Washington. Jesse B. Wilson was the purchaser at the sale.

The complainants filed exceptions to the ratification of the sale, which were overruled. The sale was ratified, the purchase money paid, and a deed executed to the purchaser.

After this, the complainants filed a bill in the Supreme Court of the District of Columbia against Wilson, to set aside the sale.

After a hearing on its merits, the bill was dismissed, the present appeal taken from the decree of dismissal. The question of defect of parties was not raised in the court below. By agreement of counsel, certain additions were made to the record after the case was brought here, to have the same effect as if returned under a writ of diminution.

A further statement of the case appears in the opinion of the court.

Messrs. William A. Meloy and **R. J. Brent**, for appellants:

A receiver's incapacity to purchase at any sale of the trust property, is well settled on principle and authority.

Anderson v. Anderson, 9 Irish Eq., 24; *Ex parte James*, 5 Ves., 708; *Watson v. Birch*, 2 Ves., Jr., 53.

In *White*, Eq. Cas. (65 Law Lib., 128), it is stated that a trustee cannot purchase before the master, under a decree of sale.

An in page 42 of same book it is stated that the disability equally applies where the trustee buys at a sale under an adverse proceeding and at a judicial sale, as at his own sale under his powers as trustee.

To the same effect, see, *Chapin v. Weed*, Clark, Ch., 464; 4 Kent, Com., 517, n. c; *Campbell v. Johnson*, 1 Sandf. Ch., 148; *McGinn v. Shaffer*, 7 Watts., 412; *Callis v. Ridout*, 7 Gill & J., 2, 7; *Bell v. Webb*, 2 Gill., 164, 170; *Boertson v. Tappen*, 5 Johns. Ch., 498; *Davoue v. Fanning*, 2 Johns. Ch., 260; 65 Law Lib., 143; *DeCartes v. DeChaumont*, 3 Paige, 178; *Bothwell v. Devese*, 2 Black, 613 (67 U. S., XVII., 309); *Hopkins v. Lee*, 6 Wheat., 109.

These references show that the sale in American courts is even more stringent than in England.

Messrs. W. S. Cox and **W. D. Davidge**, for appellee:

The first objection to the final relief asked by the bill, is the want of proper parties.

The suit could not be instituted by some in the names of others. Those not joined are not stated to be unknown, and it is not a case recognized in the books for a suit for the benefit of parties not joined; as where parties are too numerous, or are members of a large association or of a large class.

See Story, Eq. Pl., ch. 4.

Even if the appellee had no absolute right to purchase, yet it can hardly be denied that in

the discretion of the court he might be admitted to bid and purchase. The court knew that he had been the receiver, and it was certainly at liberty, notwithstanding that, to allow him to purchase. It was a matter for its discretion, and its action could not be reviewed on appeal. The theory of a chancery sale is, that the bid at the public sale is merely an offer to the court, which is accepted by its order of ratification of the sale.

As the court is presumed to be competent to protect the interests of all parties it is certainly competent to accept an offer from anybody, no matter what his relations to the property.

See *Hill, Trust.*, 536, citing *Campbell v. Walker*, 5 Ves., 678.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the decree of the Supreme Court of the District of Columbia.

The case presented by the record, so far as it is necessary to state it, is as follows: the complainants represent themselves to be heirs at law of Ann R. Dermott, deceased, and allege that they bring their bill against the defendant "for themselves and the other heirs at law of the said Ann R. Dermott." The bill alleges that by virtue of a decree of sale in the case of *Zephaniah Jones v. Stringfellow and others*, wherein these complainants and others were defendants, Wilson, the defendant in this suit, became the purchaser of certain real estate of the said Ann R. Dermott, deceased, which is particularly described; that this purchase was made by Wilson on the 2d of January, 1867, from the trustees named in the decree; that long prior to the purchase, and prior to the rendition of the decree under which the sale was made, Wilson was, by order of the court in that case, appointed receiver of the estate of Ann R. Dermott, with authority to manage and rent the property; which appointment he accepted, and executed his bond as such receiver, which was accepted and approved; that he collected a large amount of rents as such receiver; that he was receiver down to the time of the purchase in question, and still continued to be such. It is averred that by reason of his fiduciary relation to the property in question he was incapacitated to purchase; that the sale is void at the election of the complainants; and that they elect to avoid it, and to have the property resold at the risk of Wilson. The bill prays for appropriate special, and for general relief. Wilson answered. The answer admits the decree of sale, the sale by the trustees appointed to make it, the purchase by Wilson, and that he was receiver as alleged in the bill. It denies that he was incapacitated to buy, and insists that the sale was valid. It avers that he has paid all the purchase money, and received a deed for the property.

We pass by the questions: whether the proper remedy of the complainants was not by appeal from the order of the court below confirming the sale; and whether the bill is not fatally defective on its face in not averring such confirmation before it was filed. These points have been fully argued, but the view which we take of the case renders it unnecessary to decide them. The defense that the validity of the sale is *res judicata* by reason of the proceedings of these complain-

ants, touching the order of confirmation, is not set up in the answer and cannot, therefore, be considered.

But Zephaniah Jones, the complainant in the suit in which the decree of sale was made, and the other heirs at law of Ann R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, *ex sponte*, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. This was a manifest error. The decree must, therefore, be reversed, and the cause remanded to the court below. In that court both parties can take leave to amend and can modify their pleadings so as to exhibit the case as they may desire respectively to present it. If testimony be necessary, that also can be taken. We do not consider the supplement to the record filed in this court as before us. It was not in the case in the court below. To recognize it here would involve the exercise of original instead of appellate jurisdiction. Whether it was competent for the receiver to buy at the sale made by the trustees is a point upon which we express no opinion. We have not reached it, and have not, therefore, had occasion to consider the subject.

It is ordered that the decrees of the court below be reversed, and that the cause be remanded, with directions to that court to proceed in conformity to this opinion.

THE MICHIGAN INSURANCE BANK, Plff. in Err.,

v.

ANSON ELDRED.

(See S. C., 9 Wall., 544-554.)

Effect of copartnership agreement on firm paper—authority to fill blanks—presumption of date—improper instruction.

A *bona fide* holder of negotiable paper indorsed by a firm, is not affected by a restriction in the copartnership agreement unknown to him, that neither of the partners shall engage the credits of the firm outside of the partnership business.

A party who is authorized by the course of business of a firm, may fill blanks in their negotiable paper.

The presumption of law is, that an indorsement, if without date, was made at the time the bill or note was executed, and before the same was negotiated to the holder.

When a prayer for instruction is presented to the court, and there is no evidence to support the theory of fact which it assumes, the prayer for instruction should be denied, and if given by the court it is error.

[No. 145.]

Argued Mar. 23, 1870. Decided Apr. 18, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

NOTE.—Negotiable paper executed in blank. Blanks filled in in negotiable paper; rights of *bona fide* holders. See note to *Bank of Pittsburgh v. Neal*, 68 U.S. XVI., 323.

This action was brought in the court below, by the plaintiff in error, against Anson Eldred, William Balcom and Elisha Eldred, composing the firm of Eldred & Balcom, as indorsers of a certain promissory note for \$4,000. Summons was served on Anson Eldred, the only defendant residing within the District of Wisconsin, and the only one who appeared in the cause.

The trial below having resulted in a verdict and judgment in favor of the defendant, the plaintiff sued out this writ of error.

The facts of the case are fully stated by the court.

Mr. Wm. P. Lynde, for plaintiff in error:

The plaintiff was the holder of negotiable paper received before due, for a valuable consideration. The court erred in allowing to be read in evidence a clause from the articles of copartnership of Eldred & Balcom, tending to impair the validity of the paper, without any proof of notice to plaintiff.

Goodman v. Simonds, 20 How., 848 (61 U. S., XV., 934); *Murray v. Lardner*, 2 Wall., 110 (69 U. S., XVII., 337).

This is a familiar principle, constantly referred to in the municipal and county bond cases so frequently before this court.

The Circuit Court in giving the instruction that "If the note in suit was never actually negotiated to the Bank, but got up by Eldred and accepted by the Bank in pursuance of a corrupt agreement between said Eldred and the Bank to defraud the defendant, then the plaintiff cannot recover," went entirely outside of the evidence in the cause, and the instruction tended to mislead the jury and was error.

Blackburn v. Crawford, 8 Wall., 194 (70 U. S., XVIII., 194); *Chandler v. Van Roeder*, 24 How., 227 (65 U. S., XVI., 634); *Jewell v. Parr*, 13 C. B., 909; *Caldwell v. U. S.*, 8 How., 366; *Goodman v. Simonds* (*supra*); *U. S. v. Breilking*, 20 How., 253 (61 U. S., XV., 900); *Moffitt v. Cressler*, 8 Clark, Ia., 123.

Mr. John W. Cary, for defendant in error:

The defense in this case was:

1. That the note was a fraud, and never, in fact, negotiated, but was made by F. E. Eldred and delivered to the Bank with a view of defrauding the defendant.

2. That if it ever was negotiated in the course of business, it was done by F. E. Eldred, the maker, after the Bank had actual notice that the partnership of Eldred & Balcom had ceased to do business or exist as a firm.

On the trial there was no pretense that this note had ever been discounted by the Bank, but it was claimed that it had been received by the Bank and was held as collateral security for other indebtedness of F. E. Eldred.

The note on its face showed either that it had been altered after it was given, or else that it was not given until sometime in the month of August, long after the partnership of Eldred & Balcom had ceased to exist.

The note showed on its face that the date was originally Aug. 12, 1861, and that date was altered to June, by writing June over August.

F. E. Eldred swears that he wrote June over August, but can give no explanation why or when it was done. He swears that it was

made before he used the note, but as to when the note was used, he can give no satisfactory account.

Eldred subsequently swears that note and chattel mortgage were delivered about the same time.

The chattel mortgage referred to, bears date July 24, and was recorded July 23, 1861.

The partnership of Eldred & Balcom expired by its term, July 1, 1861, and they ceased business at that time.

It does not appear when the Bank became possessed of the note. There was no record of its receipt nor the purpose for which it received it.

There was no satisfactory proof of its protest. All these matters were insisted upon as showing that the whole thing was a fraud and concocted after the partnership had ceased and notice thereof to the plaintiff. The trial lasted two days.

There was no error in admitting the articles of partnership. They were necessary to show when the partnership ceased, and, in connection with notice to plaintiff, fixed the time of its end.

It was also proper to show that by its terms said partnership name was not to be used outside of the business; but the judge charged that if it was so used with the knowledge and consent of defendant, Anson, the indorsement was valid, notwithstanding the agreement.

The agreement in the partnership articles would be the law of this case without the agreement. F. E. Eldred, the maker, it is claimed, negotiated this note to the Bank. The Bank is, therefore, chargeable with notice that Eldred & Balcom were accommodation indorsers, and in such case the defendant would not be liable on the indorsement, unless it were shown that he assented or was knowing to it, or that the articles of copartnership allowed it. The articles of partnership were, therefore, properly given in evidence for this purpose.

There was no error, and the judgment should be affirmed.

Mr. Justice Clifford delivered the opinion of the court:

Promissory notes, given for the payment of money, without any condition or contingency, and payable to order or bearer, are as much commercial instruments as bills of exchange, and the title to the same, and their transfer from one person to another, are governed and regulated by the same rules of commercial law.

Authorities may be found where it is held that it is not essential to the character of a promissory note or bill of exchange that it should be negotiable, and that that other words besides the words "or order," or the words "or bearer," may be employed to express the quality of negotiability; but it is not necessary to discuss those topics, as the inquiry before the court has respect to the execution, transfer, and title of a negotiable promissory note in the ordinary form. *Wells v. Brigham*, 6 Cush., 6; *Raymond v. Middleton*, 29 Pa. St., 530; Story, Bills, sec. 60.

Examined carefully, the pleadings and evidence exhibit the following facts, which are material to the present investigation: claiming title to the note in question, the plaintiffs instituted the present suit against the defendant and one Wm. Balcom and Elisha Eldred, alleg-

ing that they were copartners in trade under the firm name of Eldred & Balcom. They, the defendants, were engaged in business both in Chicago and Milwaukee, and the record shows that they were sued as indorsers of the note described in the declaration. Only one of their number, to wit: the defendant, resided in that State, and he only was served with process. Besides a special count against the defendants as the indorsers of the note, the declaration also contained the common counts, to which was annexed a copy of the notes and notice that the note would be offered in evidence under those counts. Process having been served, the present defendant appeared and pleaded the general issue, and the parties went to trial; and the verdict and judgment were for the defendant. Exceptions were duly taken by the plaintiffs to the rulings and instructions of the court, and they sued out this writ of error, and removed the cause here for re-examination.

Some further reference to the facts proved at the trial is necessary, in order that the precise nature of the questions presented in the bill of exceptions may be understood.

Founded as the declaration was upon a promissory note, it was only necessary for the plaintiffs, under the general issue, to prove the execution of the note, the signature of the indorsers, the demand of payment of the maker, the dishonor of the note, and notice of the dishonor, and non-payment to the indorsers. Having proved those facts, they introduced the note in evidence, of which the following is a copy:

DETROIT, June 12, 1861.

\$4,000. Sixty days after date I promise to pay to the order of Eldred & Balcom four thousand dollars at the Michigan Insurance Bank, value received. (Signed) F. E. ELDRÉD.

Indorsed on the back of the note is the name of the firm to which the defendant belongs, to wit: Eldred & Balcom, and the allegations of demand, protest and notice of dishonor and non-payment were fully proved.

Witnesses were examined upon both sides, from whose testimony, as reported in the bill of exceptions, it appears that the maker of the note was engaged in business at Detroit, in the State of Michigan; that he and the firm of which the defendant is a member entered into an arrangement to interchange accommodation indorsements for business purposes; that the understanding was that the firm should indorse whatever paper he, the maker of that note, should find it necessary to use in his business, and that he, in consideration thereof, should indorse their paper intended for discount, to such an extent as they might desire.

Pursuant to that arrangement the respective parties indorsed numerous blank notes for each other, and it appears that the senior partner of the firm indorsed at one time some fifty or fifty-five blank notes of the kind, and that the defendant knew what was done, and advised that the indorsements should be made. Packages of such blank notes, signed by the maker of the note in controversy, were sent by express to that firm for their indorsement, and when they were indorsed in blank they were returned through the same channel to the party by whom they were forwarded, and it appears that the note described in the declaration is one of the notes indorsed by the senior partner of the firm.

See 9 WALL.

Approved as the arrangement was by the defendant, he has no cause for complaint; and it also appears that the maker of the note borrowed money of the plaintiffs and that he indorsed the note to them as collateral security in the regular course of business.

Depositions were also introduced by the defendant, and he offered in evidence the third article in the copartnership agreement of the indorsers of the note, which reads as follows: "That neither of the parties shall employ any of the moneys, goods or effects belonging to the said copartnership or engage the credits thereof, except for the benefit of the said joint business."

Seasonable objection was taken by the plaintiffs to the introduction of that article as evidence, upon the ground that it was irrelevant and incompetent, but the court overruled the objection and the same was read to the jury, and the plaintiffs then and there excepted to the ruling of the court. Instructions, supposed to be pertinent to the issue, were then given by the court to the jury, to which no exceptions were taken, but the court also instructed the jury to the effect that if the note in suit was never actually negotiated to the Bank, but was got up by the maker of the note, and was accepted by the Bank, in pursuance of a corrupt agreement between the maker of the note and the Bank to defraud the defendant, then the plaintiffs cannot recover; to which instruction the plaintiffs then and there excepted.

Objection, in the first place, is taken by the plaintiffs in argument to the ruling of the court in admitting in evidence the third article of the copartnership agreement. Attempt is made to sustain that ruling, upon the ground that the evidence tended to show that the partner who indorsed the note with the firm name was unauthorized "to engage the credit" of the firm except for the joint business of the company; but there are two decisive answers to that suggestion: (1) That the indorsements were made in pursuance of a previous understanding and arrangement between the firm and the maker of the note, and the evidence reported in the bill of exceptions shows that the defendant advised his partner to indorse the parcel of notes which contained the one in controversy. (2) That the plaintiffs had no knowledge of the contents of the articles of copartnership, nor of any fact or circumstance showing or tending to show, that the indorsement was made without authority. On the contrary, the maker of the note, examined by the defendant, testified that the indorsement on the note described in the declaration was made by one of the partners of the defendant; that he, the witness, transferred the note to the plaintiffs as security for a loan made at the time the note bears date; that he had an arrangement with that firm that they should indorse his notes and that he would indorse their notes; that the indorsements were made in blank, and were filled up by the respective makers as they wanted to use the notes in their business, and that the note in controversy was indorsed in that way with the knowledge of the defendant as well as the other partners.

Unaccompanied by evidence showing or tending to show, that the plaintiffs had knowledge of the restriction contained in the copartnership agreement, or the subsequent introduc-

tion of such evidence, it is quite clear that the article of the copartnership agreement read to the jury was irrelevant and incompetent, as it clearly appeared that the plaintiffs were indorsers for value at the date of the note in the usual course of business, without notice of any equities between the antecedent parties.

Such a party is regarded, in the commercial law, as a *bona fide* holder of the negotiable instrument, and the rule is irrepealably established by the decisions of this court that the indorser under those circumstances takes the title unaffected by any equities between the antecedent parties to the instrument, and may recover thereon, although, as between the antecedent parties to the same, the transaction may be without any legal validity. *Goodman v. Simonds*, 20 How., 363 [61 U. S., XV., 940]; *Murray v. Lardner*, 2 Wall., 110 [69 U. S., XVII., 857]; *Bank of Pittsburgh v. Neal*, 22 How., 108 [63 U. S., XVI., 328]; *Swift v. Tyson*, 16 Pet., 15; *Goodman v. Harvey*, 4 Ad. & E., 870.

Bills of exchange or promissory notes may be transferred by indorsement, or, when indorsed in blank or made payable to bearer, they are transferable by delivery; and the settled rule of law is, that if such a bill or note, so indorsed or made payable to bearer, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen and is subsequently negotiated for a valuable consideration to a third person, who receives it in the usual course of business, without knowledge of the condition annexed to the possession of the instrument, or of the means by which the possession was acquired, his title is wholly unaffected by any such breach of trust, or by any such unauthorized or felonious acquisition or appropriation of the note, and may recover the amount against any of the prior parties to the instrument. Chit., Bills, ed. 1842, 257; *Belmont Br. Bank v. Hoge*, 35 N. Y., 65; *Hoge v. Lansing*, 85 N. Y., 136.

Nothing can be inferred adverse to the authority of the member of the firm to make the indorsement from the fact that the blanks in the note were not filled up when he received it from the maker, as it is fully proved that the maker of the note was authorized by the arrangement between him and the firm to fill up the blanks and insert the date and the amount of the notes as he found it necessary to use the same in his business, and that defendant, as one of the partners, had knowledge of that arrangement.

Suppose, however, there was no proof of such knowledge on the part of the defendant, still it is well settled law that where a party to a negotiable bill of exchange or promissory note containing blanks, intrusts it to the custody of another, whether the blanks are in the date or the amount of the note, and whether it be for the purpose of accommodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be indorsed in blank, or is made payable to bearer, carries on its face an implied authority, in the person to whom it is so intrusted, to fill up the blanks in his discretion; and, as between such party to the bill or note and innocent third parties, holding the bill or note as transferees for value, in the usual

course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody; and the legal conclusion is, that in filling up the blanks he acted under the authority of that party, and with his approbation and consent. *Mitchel v. Cuiwer*, 7 Cow., 336; *Goodman v. Simonds*, 20 How., 361 [61 U. S., XV., 939]; *Violet v. Patton*, 5 Cranch, 142; *Russel v. Langstaffe*, 2 Doug., 514.

So, where a party signs his name to a blank paper, as a means of accommodating another person, he thereby authorizes that person to whom he delivers the paper, and for whose accommodation he signed it, to fill up the instrument, and the conclusion of law is, that the filling up the instrument under those circumstances, inasmuch as it is done by the authority of the party who signed the paper, is his act, and that as between him and innocent holders of the instrument after it is filled up, he is bound by his signature, if the instrument was negotiated for value before it fell due, and in the usual course of business. *Bank v. Kimball*, 10 Cush., 373; *Collis v. Emmet*, 1 H. Bl., 318; *Montague v. Perkins*, 22 Eng. L. & E., 516.

Testimony was introduced by the plaintiff to show that the indorsement of the firm name on the back of the note was made before the same was negotiated to them as security for the discounts to the maker, but the introduction of such evidence was unnecessary, as the presumption of law, in the absence of opposing testimony, is that such an indorsement, if without date, was made at the time the bill or note was executed, and before the same was negotiated to the holder. *Ranger v. Cary*, 1 Met., 369; *Balch v. Union*, 4 Cush., 559; *Rice v. Isham*, 1 Keyes, 44.

II. Apart from that ruling of the court, the plaintiffs also contend that the instruction given to the jury, as recited in the bill of exceptions, is erroneous, and that the judgment should be reversed on that account, even if it be held that the ruling of the court in admitting in evidence the third article of the copartnership agreement is correct.

Contradicted as the first assumption of the instruction is by the testimony of the maker of the note, it does not seem to require any extended argument to show that it is unfounded, especially as it finds no support in any fact or circumstance introduced in evidence by either party.

Discounts were obtained of the plaintiffs by the maker of the note, and he negotiated the note in controversy to the plaintiffs as security for such loans, transferring the note to them at the time the loans were made.

Parties sometimes obtain discounts on such paper by indorsing their own name on the note, but it is a regular course of business frequently adopted and equally legitimate for a party, to give his own note for the amount of the loan, and to negotiate a note like the one in question to the lender as collateral security; and whether the business is transacted in the one way or the other, the title of the lender of the money to the note negotiated as security for the loan is equally valid to the amount of the money loaned. *Chicopee Bank v. Chapin*, 8 Met., 46; *Stoddard v. Kimball*, 6 Cush., 469; *Blanchard*

v. Stevens, 3 Cush., 162; *Atkinson v. Brooks*, 26 Vt., 569.

But the second assumption of the instruction is even more unjustifiable than the first, as it imputes concerted action, and a corrupt agreement between the maker of the note and the plaintiffs to defraud the defendant, when, in point of fact, there is not a particle of evidence in the record to sustain the charge, or which has any tendency to support any such theory. When a prayer for instruction is presented to the court, and there is no evidence in the case to support the theory of fact which it assumes, the prayer for instruction should be denied, and if given by the court it is error, as the tendency of such an instruction is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. *Goodman v. Simonds*, 20 How., 359 [61 U. S., XV., 989].

It is clearly error in a court, said Chief Justice Taney, in *United States v. Breitling*, 20 How., 252 [61 U. S., XV., 900], to charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered. Such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the charge of the court, and if there is no evidence which they have a right to consider then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead, and may induce them to indulge in conjectures instead of weighing the testimony.

Reference is made to the fact that the word "June" is written over the word "August" in the date of the note, showing that the date originally was August, instead of June, as it now is; but the conclusive answer to that suggestion is, that the maker of the note testifies that he wrote the word "June" as it now is in the date of the note before he negotiated the note to the plaintiffs, and as he was the agent of the firm in filling up the note, the defendant, as between him and the plaintiffs, has no cause of complaint.

Judgment reversed, and the cause remanded, with directions to issue a new venire.

Cited—66 U. S., 299; 101 U. S., 111; 5 Ben., 275; 2 Law., 549; 33 Wis., 591; 2 Am. Rep., 388 (32 Ind., 206).

THE STEAM TUG QUICKSTEP, ETC.,

ELLAS RUNYON ET AL., Claimants, Appts.,

v.

CHRISTOPHER BYRNE.

(See S. C., "The Quickstep," 9 Wall., 665-673.)

Finding of facts in collision cases, presumed correct—objection in this court—liability of tug for injury to tow—duty of tug.

In collision cases the finding of facts by the district court if concurred in by the circuit court, is entitled to so much weight in this court that it will be presumed correct.

Before such decision will be disturbed, it must manifestly appear that it was wrong. Every presumption is strongly in favor of its correctness.

The objection, that the libel is too general in its terms, cannot be taken for the first time after the cause has reached this court.

Canal-boats and barges in tow are considered as

being under the control of the tug, and the latter is liable for collision with one of them, unless she can show that it was not occasioned by her fault.

It was the duty of the tug to see that the tow was properly constructed, and that the lines were sufficient and securely fastened; if she failed in this duty, she was guilty of a maritime fault.

The tug was bound, in executing a maneuver to recover a detached boat, to look to it that no other boat in the fleet suffered in consequence of it.

[No. 157.]

Argued Mar. 31, 1870. Decided Apr. 18, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York

The libel in this case was filed by the owner of a canal-boat, to recover for injuries to his boat and loss of a cargo he was carrying, in consequence of the alleged negligence of the appellant's tug.

The libel sets out a contract to tow, and alleges as breaches of it, and on which the libellant is entitled to recover, that the contract was to tow to New Brunswick; but she did not, but deviated to Atlantic dock; that the tug attempted to tow too many loaded boats, and that while being towed, one of the boats broke loose, and that while backing, in attempting to pick her up, the injury happened to this boat.

On these grounds the answer takes issue that the boat was towed in the usual way—no contract to go direct; that the number of boats was not too many, and that the injury occurred by the breaking of the bridle line in a storm.

The district court held that the libelants and claimant were both in fault, and divided the damages.

This decree was affirmed, on appeal of the claimants, by the circuit court. Whereupon the claimants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. William J. Haskett and C. Donohue, for appellant:

The entire scope and object of an admiralty appeal is to bring up the facts in the cause and to have a rehearing on them; and while the court may, from time to time, speak of not reviewing the facts, it is submitted that on principle they are bound to do it, and on precedent they have done it.

The Catharine v. Dickinson, 17 How., 170 (58 U. S., XV., 283); *Sturges v. Clough*, 21 How., 451 (62 U. S., XVI., 188).

The court will rehear, review and examine the evidence; and only where the evidence is balanced, will they refuse to reverse. Where the facts on which a judgment below was founded are clearly found against the weight of evidence, the court will reverse. The rule is not the same with a jury's verdict.

On questions of fact, where the court below disposed of them as in equity cases, this court has, in most important cases, examined into and reversed on the facts. The various phases of the so called *Gaines* case, furnish a most pointed example.

But here, it is submitted, the case comes to this court free from all questions of the prior disposition of any fact. Litigants have the right to a fair hearing and disposition of all the facts of their case. The claimants here are engaged in a branch of business that it is important to them to know on what their rights depend, and

on what facts negligence is to be legally implied; what their duty is, and what is a performance of it.

As a matter of law on this contract, what were the duties and obligations of the claimant? That they were not, in law, carriers, is clear.

Alexander v. Green, 8 Hill, 9.

This case was afterwards reversed in the Court of Errors. See *Alexander v. Green*, 7 Hill., 533.

But the court in reversing did not lay down any principle, the original case having been heard before the Supreme Court, of which Judge Nelson was a member. The case and reversal afterwards came to be reviewed by the Court of Appeals, in the case of *Wells v. Nav. Co.*, 2 N. Y., 204, and the true doctrine will be found laid down in that case. The claimants were not even bailees. They had made a contract, and it is simply to see whether they used the diligence as a contractor which the law requires, that the court is called on to determine. See, also, 1 Benedict, 109.

The next thing to determine is: what are the issues before the court, and what evidence have we applicable to them? The sole object of pleading is, to have before the court on the one side, the grounds on which libelants seek to recover, and what the claimant takes issue on or sets up in his defense; and the libelant will not be permitted on the trial of the cause to set up a new cause of action. See *The Boston*, 1 Story, 331; *The North America*, 1 Swab., 358; 1 Swab., 518; *The Ann*, 1 Lush., 56; 11 N. Y. Leg. Obs., 267; *Iola and Samson*, 2 W. Rob., 193, 209.

Whatever view is to be taken of the case, the decree must be reversed; and if a decree which finds no fact or facts, but a simple legal conclusion, cannot be examined, then the decree must be reversed as finding the libelants in fault in a case where such fault prevents a recovery. If the evidence can be re-examined, then there is no negligence shown on our part. *Milton v. Steamboat Co.*, 37 N. Y., 210, and cases cited.

Messrs. James C. Carter and Townsend Scudder, for appellee:

The principles of law applicable to towing boats are analogous to those applicable to common carriers. The ground upon which common carriers are held to such strict accountability is: that if the obligation imposed upon them were one of care and diligence only, in every case of loss a difficult question would arise as to whether the requisite degree of care and diligence had been exhibited. The carrier would always have an advantage, for the reason that all the witnesses as a rule would be in his service. Hence, for the purpose of obtaining justice, the rule has been established that the *onus probandi* is on the carrier. The formula is clear: "Unless the carrier can show that the goods have been lost by act of God or the public enemies, he must be held responsible."

It is not necessary for the libelant to specify the particular act or acts of negligence. It was sufficient for him to allege negligence and unseamanlike conduct. *The Clement*, 2 Curt. (C. C.), 367.

Mr. Justice Davis delivered the opinion of the court:

The difficulty of discovering the truth in collision cases, which are mainly trials of fact,

grows out of the character of the evidence, which is always more or less conflicting. The court that can see the witnesses, hear their statements, observe their demeanor, and compare their degree of intelligence, is better able than an appellate tribunal to reconcile differences in testimony, or, if that be not possible, to ascertain the real nature of the transaction. The district court that tries the case in the first instance enjoys this advantage, and the finding of facts by it, if followed by the concurrent judgment of the circuit court, is entitled to so much weight in this court, that it will be presumed a correct conclusion was reached, and before the decision will be disturbed it must manifestly appear that it was wrong. The testimony in this case was heard by the district judge, who decided that the damages should be divided, and the circuit court, on appeal, affirmed his judgment, and the case, therefore, comes before us with every presumption strongly in favor of the correctness of the decision of the lower courts.

It is unnecessary to travel through the evidence, to a great extent contradictory, in order to vindicate our views concerning it. It would serve no useful purpose to do so, and we shall content ourselves with applying the law to a state of facts which we consider the evidence establishes, without any attempt to discuss it.

The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libelant in the destruction of his boat by the carelessness and mismanagement of the captain of *The Quickstep*. It is objected that the libel is too general in its terms, and is defective because it does not state the particular acts of negligence and misconduct on the part of the tug which produced the injury; but if this were necessary, the objection should have been interposed at an earlier stage of the proceedings, and cannot be taken, for the first time, after the cause has reached this court. It is always better to describe the particular circumstances attending the transaction; but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the court can see there was no design on his part in omitting to state them. *The Clement*, 2 Curtis (C. C.), 363.

The case as extracted from the record is this: The libelant, captain and owner of the canal boat "*Citizen*," with a cargo of wheat on board, contracted with the captain of the tug *Quickstep*, to tow his boat from New York to New Brunswick. He did not know how many boats the captain of the tug would take, and the tow, when completed, consisted of six boats—two abreast on each side of the tug, and one directly in the rear of each of the two boats. The *Citizen* was on the port side, and nearest the tug, and *The Wide World* was in the same position on the starboard side. The stern of the boats abreast of the tug, were about even with the stern of the tug, but their bows extended further than the bow of the tug and the bows of *The Citizen* and *Wide World* were coupled by what is called the bridle line. This fleet of boats

proceeded on their voyage with safety, till they approached Robbins' Reef Light House, a point in the harbor of New York, when the boat in the rear of the boats on the port side of the tug became detached, and in the effort to recover her the collision occurred, for which the libellant seeks to hold The Quickestep responsible. The tug stopped as soon as the boat broke loose, and then proceeded to back, and in backing the bridle line parted, she got into the trough of the sea, and collided with The Citizen, knocking two holes in her starboard side near the stern, from which injury she ultimately sunk.

The inquiry is: who is to blame for this? Clearly not The Citizen, for it does not appear that her conduct in any way contributed to the accident. If the tug, in constructing the tow, used the lines furnished by the different boats, yet as each boat was independent of the other, no responsibility can attach to either for the breaking of the line, which she did not provide, and had nothing to do with making fast. In this case neither the bridle line nor the line that first parted were supplied by The Citizen, and she ought not to suffer for their insufficiency. It is well settled that canal-boats and barges in tow are considered as being under the control of the tug, and the latter is liable for this collision, unless she can show it was not occasioned by her fault. *The Express*, 1 Blatchf., C. C., 865; *Steamboat New York v. Rea*, 18 How., 238 [9 U. S., XV., 859].

It was the duty of the tug, as the captains of the canal-boats had no voice in making up the tow, to see that it was properly constructed, and that the lines were sufficient and securely fastened. This was an equal duty, whether she furnished the lines to the boats, or the boats to her. In the nature of the employment, her officers could tell better than the men on the boats what sort of a line was required to secure the boats together, and to keep them in their positions. If she failed in this duty she was guilty of a maritime fault. The parting of the line connecting the boat in the rear on the port side with the fleet, was the commencement of the difficulty that led to this accident. In the effort to recover this boat, the consequences followed which produced the collision. If it was good seamanship on the part of the captain of the tug to back in such an emergency, he was required, before undertaking it, at least to know that his bridle line would hold. And if the sea was in the condition the captain of the tug says it was, it was bad management to back at all. Whether this be so or not, he was bound, in executing a maneuver to recover the detached boat, to look to it that no other boat in the fleet suffered in consequence of it.

But the claimants of the tug deny that their vessel was in fault, and insist that the disaster occurred by the violence of the storm and gale of wind which prevailed at the time. If this be so, how did it happen that two of the canal-boats that got loose from the fleet survived the perils of that night? One of these boats anchored, and was saved without difficulty; the other, loaded with iron, drifted about and was picked up the next morning without having sustained any damage. The fact that these boats did not experience any bad effects from the severity of this storm, explodes the theory advanced by the claimants on the subject.

See 9 WALL.

In our opinion the tug was clearly in fault, and the courts below, in dividing the damages, doubtless came to the conclusion that the men on board The Citizen were also to blame for deserting their boat sooner than good seamanship under the circumstances required. As the libellant did not appeal, and can, therefore, only be heard in support of the decree, we are not required to consider whether the evidence convicts the canal-boat of fault. *The William Bagaley*, 5 Wall., 412 [72 U. S., XVIII., 591]. The appellants have no right to complain, for in any aspect of the case they cannot escape without paying at least half the loss.

The judgment of the Circuit Court is affirmed.

Cited—12 Wall., 41, 173; 13 Wall., 479; 14 Wall., 201; 94 U. S., 497, 604; 1 Bro., 266, 461, 514; 2 Hughes, 14.

THE CITY OF CHICAGO, *Plff. in Err.*,

v.

SAMUEL W. GREER.

(See S. C., 9 Wall., 726-735.)

Evidence of damages—admissions of agent, when evidence—evidence of expert—of other officer—immaterial error—copy of letter not evidence without notice to produce original—inadmissible evidence—proposals accepted constitute contract.

Evidence of loss of material provided by one to fulfill a contract, where the other party refuses to carry out the contract, is proper, on the question of damages.

Admission of a fact made by an authorized agent of a city, one who had participated in making a contract, is proper evidence to prove the contract. There was, therefore, no error in receiving it.

An expert may give evidence as to what is, and what is not, a proper mode of testing the strength of leather fire hose.

A party who refuses to fulfill a contract, cannot show at what rates he had contracted with another party for the same article, or what offers he had received.

Evidence which cannot prejudice a party is no ground for reversal.

A copy of a letter to the opposite party cannot be given in evidence, when no notice has been given to produce the original.

Evidence, that the article contracted to be furnished could not be used by defendant, is not admissible in an action for its price, if he had contracted to purchase it.

Evidence of how the article contracted to be furnished, compared with a similar article made by another person, is also inadmissible in such a case.

Where the advertisement for proposals and the proposals are clear, and they are accepted, they contain the contract.

[No. 170.]

Submitted Apr. 8, 1870. Decided Apr. 18, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of *assumpsit* brought in the court below by the defendant in error, against the plaintiff in error, to recover damages for a breach of contract, in refusing to receive a large quantity of leather fire hose, for the manufacture and delivery of which by the defendant to the plaintiff, a contract had been made between the parties. The declaration contains three special counts upon the contract, and the money counts for goods sold and delivered. The defendant below pleaded the general issue. A

trial was had, which resulted in a verdict for the plaintiff below, for the sum of \$11,093.50. A motion for a new trial was made and overruled, and judgment entered on the verdict, from which judgment the City prosecutes a writ of error to this court.

A further statement of the case appears in the opinion of the court.

No counsel appeared for plaintiff in error.

Mr. W. C. Goudy, for defendant in error:

1. By the strictest construction of the contract in question, Greer had the whole of the day, September 2, 1867, in which to perform his contract. Sep. 1st, was Sunday, and when the time for the fulfillment of a contract in which no days of grace are allowed, falls on Sunday, performance on the next day is a legal compliance with the contract.

Salter v. Burt, 20 Wend., 205; *Barrett v. Allen*, 10 Ohio, 426; *Chit. Cont.*, 627, n. 1.

2. The commissioners, Aug. 30, 1867, expressly requested Greer by telegram to send no more hose; that it did not stand the contract test, and would not be accepted.

3. The commissioners, Sep. 2, 1867, before the time had elapsed for the performance of the contract by Greer, absolutely refused, individually and as a Board, to accept the hose or allow a public test of it.

4. The commissioners had, by their action, incapacitated themselves and the plaintiff in error to perform their part of the contract with Greer. The terms were cash, upon the hose being tested satisfactorily. There is only one appropriation yearly by the plaintiff in error for hose, and this appropriation the commissioners had exhausted by contracting with Graves & Son, prior to the expiration of the time for the performance of Greer's contract, thus leaving no funds to pay Greer, even though his hose, "tested in a fair and impartial manner," should stand the required pressure.

5. The time of performance of the contract, to wit: Sep. 1, as limited in the advertised proposal for bids, was waived, by the Board, at the time Greer's bid was put in and before it was accepted, and Mr. Brown, one of the commissioners, expressly informed Greer, Sep. 2, that the Board was satisfied with his performance in regard to time, but rejected the hose on account of its not coming up to the test. Under these circumstances, the defendant in error had, without any farther steps on his part toward performance of the contract, an immediate right of action.

Fox v. Kitton, 19 Ill., 519; *Hochster v. De Latour*, 20 Eng. L. & E., 157; *Cort v. Ambergate R. Co.*, 6 Eng. L. & E., 280.

Mr. Justice Strong delivered the opinion of the court:

This was an action brought by Samuel W. Greer against the City of Chicago, to recover damages for the breach of an alleged contract, by which the defendant had undertaken to receive and pay for thirteen thousand feet of leather fire hose that the plaintiff had agreed to manufacture and deliver. The principal questions mooted at the trial were, whether the contract set forth in the declaration was proved, whether the plaintiff had complied with the obligations assumed by him, so far as he had not been relieved by the defendant, and what dam-

ages, if any, had been sustained by the plaintiff in consequence of the refusal of the City to receive the hose and pay for it according to the contract. The jury found a verdict for the plaintiff for \$11,093.50, upon which judgment was entered, and the defendant has sued out this writ of error.

Precisely what questions are intended to be raised here we are not informed. No oral argument has been submitted on behalf of the plaintiff in error. No brief of points has been filed, nor has any assignment of errors been made. We are left to search the entire record to discover, if possible, some fault in the pleadings, or in the rulings of the circuit court, and this without any intimation that any error is alleged to have been committed, other than is given by the fact that a writ of error has been sued out. We find, indeed, that ten exceptions were taken at the trial to the admission or rejection of evidence, the effects of which were to bring upon the record the rulings of the court, but we are not informed that it is even claimed those rulings were erroneous. Three exceptions, most indefinite, were also taken to the charge of the court delivered to the jury, but it is not now alleged that any portion of the charge was not in strict accordance with the law. In view of this state of facts, the judgment might, with great propriety, be affirmed without further remarks. We have, however, examined all the exceptions taken in the court below, and discovered nothing of which the plaintiff in error has any right to complain.

The first exception was to the admission of evidence tending to show what progress the plaintiff had made toward the performance of his part of the contract when the City gave him notice that the hose would not be received. Subject to the exception it was proved that the plaintiff then had on hand a large quantity of leather, which he had cut down for seven thousand feet of ten and a half inch hose, such as was required by the contract; that there was no sale in the market for such hose; that consequently, on the refusal of the defendant to take it, he was compelled to cut it down again for nine inch hose, which could be sold, and that this involved a large loss of leather, as well as of labor. It is plain the evidence has a direct bearing upon the question what amount of damages the plaintiff was entitled to recover, if entitled to recover at all. The loss resulting from the waste of leather and of labor was an immediate and necessary consequence of the refusal of the City to comply with its contract. The evidence was, therefore, properly received.

The second exception was, that the court permitted the plaintiff to give in evidence the declaration of one of the Board of Fire Commissioners of the City, who were authorized to purchase hose, to the effect that he thought the City was liable on the contract, to a certain extent, on account of its having used the hose for fires. It may be admitted that the witness' expression of opinion, had it stood alone, would not have been admissible; but it was connected with the admission of the fact that the City had used a portion of the hose, not simply in testing it, but for the extinguishment of fires. The fact was a material one, bearing upon the questions whether there had been a contract, and whether the hose delivered was such as the con-

tract demanded. The admission of the fact was by an authorized agent of the City, one who had participated in making the contract. There was, therefore, no error in receiving the evidence.

We discover no error in admitting the testimony of Edward Smidt, to which exception was taken. He was proved to have been an expert, sufficiently to justify his being permitted to state what is and what is not a proper mode of testing the strength of leather fire hose. He was a manufacturer of steam gauges, and he had repeatedly tested hose. It having been claimed by the defendant that the hose offered would not bear the required test, it was certainly competent for the plaintiff to prove that the *ex parte* test applied by the City was not a fair one and, of course, to prove what constitutes "a fair and satisfactory test," such as was provided for in the contract.

The fourth and fifth exceptions present the question: whether the defendant should have been permitted to prove at what rates it had made a contract for hose with another party, and what bids were offered when the other contract was made. It is impossible to see how this could have had any legitimate bearing upon the questions presented by the case. If the City was liable at all to the plaintiff, clearly its liability can be measured only by the contract made with him. The extent of its obligation is not to be found in another contract made with another party. The evidence offered was, therefore, rightly excluded.

The sixth exception is to an answer given by one of the defendant's witnesses to a question propounded to him on cross-examination. He was asked, "What is the best leather for making leather fire hose?" to which he answered, "Leather made from slaughtered hides." To this the defendant objected, and took an exception because the court admitted it. We are not informed, and we do not perceive how he could have been prejudiced by the answer. Let it be that it was immaterial; still it was not hurtful. It was, however, admissible, if for no other reason, because it tended to furnish a test of the value of the opinions the witness had expressed in his testimony in chief.

The next exception is that the court refused to permit a copy of a letter to the plaintiff to be given in evidence, when no notice had been given to produce the original. It needs no argument to show that the decision of the court was correct.

The eighth and ninth exceptions are that the court would not allow a witness, not an expert, to give his opinion that the plaintiff's hose would not answer the purpose of the City, that it could not be safely used at fires, and that it was of no value to the City. We see no error in this. To say nothing of the medium of proof (the opinion of a witness not an expert), the subject was objectionable. It is obviously quite immaterial whether the expectations of the City from the contract were realized, or whether it had made an injudicious bargain. The real question was, whether the plaintiff had fulfilled or offered to fulfill his part of the contract. It is observable, however, that the witness did afterwards substantially answer the questions proposed, and that the defendant had the benefit of his answers.

See 9 WALL.

The tenth exception is, that a witness, after having testified he had not examined the quality of the plaintiff's hose at all, was not permitted to answer the question how it compared with hose the City had bought from another person. How he could have answered the question it is not easy to see, but, if he could, the hose purchased from that other person was not the standard by which that of the plaintiff was agreed to be measured. The parties had fixed their own standard. The only legitimate rule was that which the contract provided.

We pass now to the exceptions taken to the charge of the court. They are to so much of the charge as relates to the time within which the contract was to be performed, and also to so much as relates to the testing of the hose, and also to so much as relates to the failure to put the contract in writing. In regard to these it may be observed that they are not taken conformably with the fourth rule of the court, which requires an exceptant to state distinctly the several matters of law in the charge to which he excepts, and declares that such matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court. But we have examined the entire charge and found nothing of which the plaintiff in error has any just reason to complain. It was fairly submitted to the jury to find what the contract was; whether it had been concluded; what the parties had agreed respecting the time for performance by the plaintiff; whether the plaintiff was in any default; whether the hose offered came up to the required standard, and whether the tests applied had been made, as the contract required, "in a fair and impartial manner." In regard to the failure to put the contract in writing the court said little more than to express regret that the City usually made such contracts (as it had been proved) without reducing them to a written form, adding only, "that if the advertisement (for proposals) is clear and distinct, and if the proposals are also clear, and they are accepted in the terms in which they are made, simply and absolutely, that contains the contract between the parties." Surely this was unexceptionable. We add only, that a motion for a new trial, being an appeal to the discretion of the court in which the trial has taken place, the action of that court in overruling it is not reviewable in error.

The judgment of the Circuit Court is affirmed, with costs.

O. B. LATHAM ET AL., *Appts.*

v.

UNITED STATES.

(See 9 WALL., 145, 146.)

If the prayer for allowance of appeal is in time, the appeal will not be dismissed for delay in the allowance.

An appeal will not be dismissed on the ground that it was not allowed within the ninety days allowed by statute, where the prayer for allowance was within that time.

The allowance has relation back to the date of prayer for allowance, and must be considered as made on that day.

[No. 6.]

Argued Apr. 20, 1870. Decided Apr. 20, 1870.

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A PPEAL from the Court of Claims.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion to dismiss the appeal from the judgment of the Court of Claims, on the ground that it was not allowed within the ninety days fixed by the statute.

And it appears that the order of allowance was not made within the statutory time. But it also appears, on examination, that the prayer for allowance was within the time, and we have heretofore held that the order allowing the appeal must have relation back to the date of the prayer for allowance, and be considered as made on that day.

The motion must, therefore, be denied.

Cited—24 U. S., 259; 15 Blatchf., 318.

O. B. LATHAM ET AL., *Appts.*,

v.

UNITED STATES.

(See S. C., 9 Wall., 145, 146.)

Appeal dismissed on appellants' motion.

Appellants have a right to have their appeal dismissed on their own motion.

[No. 6.]

Argued Apr. 20, 1870. Decided Apr. 20, 1870.

A PPEAL from the Court of Claims.

On motion to dismiss.

The petition in this case was filed in the court below by the appellants to recover a balance alleged to be due on a certain contract, being the difference in value between a certain sum in coin and in legal tender notes. The petition having been dismissed by the court below, the claimants took an appeal to this court. A motion to dismiss the appeal, made by the Attorney General, was denied early in the present term. The counsel for the appellants now, on their part, move to have their appeal dismissed.

Messrs. J. M. Carlisle, J. D. McPherson and L. S. Chatfield, for appellants, in support of motion.

Messrs. E. R. Hoar, Atty. Gen., E. P. Norton and J. J. Weed, for appellees, opposed.

Mr. Chief Justice Chase announced the following order of the court:

The cause came on to be heard on the transcript of the record from the Court of Claims, and on motion of Mr. L. S. Chatfield, of counsel for appellants, it is now here ordered, *adjudged and decreed by this court, that this appeal be, and the same is hereby dismissed.*

ISRAEL DEMING, *Appt.*,

v.

UNITED STATES.

Argued Apr. 20, 1870. Decided Apr. 20, 1870.

A PPEAL from the Court of Claims.

This case was in substance like the preceding. It was argued at the same time, and the

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same order was made as in that case, allowing the appeal to be dismissed.

For the decision of this court upon a motion subsequently made to vacate this order of dismissal, and to re-instate said case upon the calendar, see *Deming's Appeal*, post.

THE SHIP MAGGIE HAMMOND, etc.,

AMASA DURKEE, Claimant, *Appt.*,

v.

THOMAS MORLAND, CHARLES STANHOPE WATSON AND JAMES ROSE.

(See S. C., "*The Maggie Hammond*," 9 Wall., 435-461.)

Lien of shipper upon the ship—lien on the cargo—foreign law of lien, when administered—duty of master—transshipment by.

The owner of the cargo has a lien upon the ship for the safe custody, due transport and right delivery of the same.

The cargo is also pledged to the ship; these obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement.

The admiralty courts here administer the foreign law, and the filing of the libel in the district court here secures the same lien on the ship as if the libel had been filed in the foreign jurisdiction.

Our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature; but the question is one of discretion in every case.

The master is bound to carry the goods to their place of destination in his own ship, unless he is prevented by the act of God, the public enemy, or by the act of the shipper, or by some peril expressly excepted in the contract of shipment.

It is his duty, in case his ship is disabled, to transship the goods and send them forward, and he can charge the goods with any increased freight arising from the hire of another vessel.

If he could repair his own vessel in season to complete the voyage before navigation closed, the master must transport the goods in his own vessel.

[No. 107.]

Argued Mar. 8, 1870. Decided Apr. 25, 1870.

A PPEAL from the Circuit Court of the United States for the District of Maryland.

A libel was filed in this case by the appellees in the District Court of the United States for the District of Maryland, and a decree entered in said court in favor of the libelants. An appeal was thereupon taken by the respondent to the circuit court, by which court the said decree was affirmed. Whereupon the said respondent took a further appeal to this court.

The case is fully stated by the court.

Messrs. F. W. Brune and Arthur Geo. Brown, for appellant:

1. By the law of Scotland the libelants had no lien cognizable by courts of admiralty.

By Stat. 1 Wm. IV., ch. 69, the Scotch admiralty courts, which up to that time had possessed very limited powers, were abolished and their jurisdiction was vested in the Court of Session, the ordinary municipal court of the country.

The jurisdiction of the Court of Sessions is *in personam* in all cases, and summons in admiralty cases does not differ from summons in ordinary cases.

NOTE.—*Lien of the contract of affreightment on the vessel.* See note to *The Freeman v. Buckingham*, 59 U. S. XV., 341.

Bell, Dic. Law of Scot., tit. Court of Admiralty, p. 29; 1 Shand, Pr. Court of Sessions, 413.

The maritime *hypothec* doubtfully spoken of by Mr. Bell in the second volume of his Commentaries on the Law of Scotland, 5th ed., 39, does not apply to this case. Mr. Bell was very doubtful about his *hypothec*; and if enforceable at all, he thought it would be recognized only by the Scotch Court of Admiralty. As we have said, that court has, since 1826, been entirely abolished (July 28, 1880).

So the *hypothec*, if it ever existed, is extinct, and no Scotch court has power to recognize or enforce it. It could hardly, therefore, be recognized or enforced by an American court.

See, also, upon this point, *The St. Lawrence*, 1 Black, 529 (66 U. S., XVII., 188).

The existing Scotch law on these points may be satisfactorily ascertained from a decision by the Privy Council, in the case of *The Bold Buccleugh*, 7 Moore, P. C., 267.

By the law of Canada, they had no lien.

The Code Maritime of France has now no force in Canada. For that Code was a part of the *droit public* and, consequently, was superseded by the effect of the conquest, and if it was law in the admiralty jurisdiction of that time, whether it was a part of the public law or of the common law, it was abolished by the marine law of England.

Baldwin v. Gibbon, K. B., Quebec, 1815; Robertson, Dig., Lower Canada, 361.

The jurisdiction of the Vice-Admiralty Court of Lower Canada is very much limited, and similar to that of the English Court of Admiralty before the power of the latter court was enlarged by Acts of Parliament.

See 2 Wm. IV., ch. 51.

The admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas. The commission of the judge of that court, dated 1841, runs as follows: "To hear and determine according to the civil and maritime laws and customs of our High Court of Admiralty in England."

6 Low. Can. Jur., 296; *The Friends*, Stew. Vice-Admiralty Cas., L. C., p. 115, Pref. to Stewart's Vice-Admiralty Cases.

Prior to the passage of the English Admiralty Court Act, 1861, 24 Vict., ch. 10, the powers thereby conferred did not belong to, and were never exercised by, the English High Court of Admiralty (Williams & Bruce, Adm. Prac., 85), and said Act does not extend to Canada. The British Colonies are not bound by any Acts of Parliament, unless particularly named therein.

1 Broom, Com., 121; 1 Steph. Com. (6th ed.), 109.

An examination of the Acts of Parliament relating to Canada, cited in 1 Steph. Com. (6th ed.), pp. 110, 112, *n.*, will show that the jurisdiction of the Vice-Admiralty Court of Lower Canada, has not been materially changed since that court was first established, and that it has no powers similar to those conferred on English admiralty courts by 24 Vict., ch. 10.

So there was no lien by the Canadian admiralty law, nor by the municipal law of Lower Canada.

The *Saisie-arrets* provided for by Const. Stat. Lower Canada, ch. 88, secs. 46 and 47, is merely a right of summary attachment based upon an

affidavit that the debtor is about to secrete his property or abscond with contempt to the court, etc. It is essentially a personal action.

The fact that The Maggie Hammond was driven *in invito* into Cardiff, as a mere harbor of refuge, made change in the original contract or the law by which it was governed.

Did the act of the master in landing and storing the goods, and accepting new employment for the ship when the repairs were completed, create a lien upon the ship in favor of the libellants at the place, Cardiff, Wales, where the cargo was landed, stored and left?

Not unless it was created by 24 Vict., ch. 10, sec. 6, 85. For prior thereto no jurisdiction existed over cases like the present, and no lien was given for breaches of contracts of affreightment.

See, Williams & Bruce Adm. Br., 85; *The Ironsides*, 1 Lush., 458; *The Casan*, Brown, & Lush., 1; *Morewood v. Enequist*, 28 How., 494 (64 U. S., XVI., 517).

But the Act 24 Vict., ch. 10, does not create a maritime lien nor profess to do so.

The Act, by its terms, is confined to England. 20 Geo. II., c. 42, sec. 8; 1 Broom, Com., 109.

The power to exercise a limited jurisdiction conferred upon a local court by proceedings *in rem*, *i. e.*, by an attachment of the property is not a creation of a maritime lien. *The Belfast* (ante, 286).

No sort of *ius in re* results, until process of the court has been served in strict conformity with the requirements of the Act.

But in the case of The Maggie Hammond, the jurisdiction conferred upon the High Court of Admiralty has not been exercised or even invoked either by proceedings *in rem* or *in personam*.

A true maritime lien was not created by the Act in question.

The Pacific, Brown, & Lush., 243; see, also, *The Troubadour*, 1 Ec. & Ad. (L. R.), 304; *The Scio*, *ib.*, 355; *The Mary Ann*, *ib.*, 8; *The Bold Buccleugh*, 7 Moore P. C., 267; *The Europa*, 2 Moore P. C. (N. S.), 20; *The Rock Island Bridge*, 6 Wall., 213 (78 U. S., XVIII., 753); *Vandewater v. Mills*, 19 How., 89 (60 U. S., XV., 556); Williams & Br. Adm. Pr., 65.

The contract was a British contract as to all the parties connected with it; mode of performance; place where made; place where it was to be completed and performed; and the ship itself. In such cases our courts are in no wise bound to assume jurisdiction.

2 Pars. Ship. & Adm., 223, and authorities cited.

But if they do, *lex loci contractus*, or *lex loci delicti commissi* must govern.

In the case of *The Halley*, 37 Law J. Eq. (N. S.), Adm. 1, Sir Robert Phillimore reviews the authorities, English, Continental and American, at great length.

Appellant contends that an admiralty court is peculiarly bound to refuse to set up and enforce a lien recognized by the *lex fori*, where such a lien is denied by the *lex loci contractus*, and even where *lex loci* gives a lien, an admiralty court will not enforce it when the lien is accompanied with conditions and limitations inconsistent with the rules and principles which govern maritime liens.

The St. Lawrence, 1 Black, 580 (66 U. S. XVII., 184); *Maguire v. Card*, 21 How., 251 (62 U. S., XVI., 118).

By the law of the place where the contract is made, no such lien is given. It is necessarily excluded from the contract, and to give such a lien would violate it.

Bronson v. Kinzie, 1 How., 311.

The same principle is strongly stated in *The Rock Island Bridge*, 6 Wall., 315 (78 U. S. XVIII., 754).

Pages 267 and 268 Abb. Adm., *Judge Betts* continues: "The Admiralty Courts of the United States will not entertain jurisdiction *in rem* over cases which, in the place of their origin, would not be entitled to that relief."

To the same effect, see *The Belfast* (ante, 266, 645); *The Gen. Smith*, 4 Wheat., 438; *Peyroux v. Howard*, 7 Pet., 324; *The Marion*, 1 Story, 68; *Read v. The Hull of a new Brig*, 1 Story, 244; *The Nestor*, 1 Sumn., 73.

It was practically impossible to send forward the iron after Oct. 9, and any such attempt on the part of the master of The Maggie Hammond, would have been rash and foolhardy in the extreme. The principal insurance companies of Great Britain, in their time policies, absolutely prohibit vessels from sailing to any port or place in British North America, after July 25, to Aug. 7, and first class companies refuse to insure to those ports after about Sep. 10, on any terms.

Voyages to the River St. Lawrence are considered even more perilous than to other parts of British North America.

The freezing of a river is such an act of God as excuses performance of the contract to transport thereon.

Story, Bail., sec. 511, 545 a; *Redf. Car.*, sec. 27; *Worth v. Edmonds*, 52 Barb., 40; *Parsons v. Hardy*, 14 Wend., 215; *Bowman v. Teall*, 23 Wend., 307; *The Flash*, Abb. Adm., 119; *Hand v. Baynes*, 4 Whart., 204; *Briddon v. R'way*, 28 L. J. (N. S.) Exch., 51; *Hudson v. Ede*, L. R., 2 Q. B., 566; S. C., 8 Ib., 412.

But such dangers when foreseen are to be avoided.

Well founded apprehension of dangerous obstacles justifies delay in the performance of a contract, as fully as would the actual encountering of the obstacles themselves; and a shipmaster is as much bound to avoid them in the one case, as to try to escape from them in the other.

The contract in the bill of lading made so late in the season, must be taken as made with full knowledge of this custom of trade and the delay which might result from it.

Bradstreet v. Haron, Abb. Adm., 209; *Gracie v. Ins. Co.*, 8 Cranch, 75; *Broadwell v. Butler*, 6 McLean, 296.

Appellant does not, however, admit, that even if it had been possible for the master of The Maggie Hammond to procure a suitable vessel, it would have been his duty, under the circumstances, to tranship his cargo and attempt to send it forward to Montreal during the autumn of 1866, because the relations of the ship and cargo being reciprocal, the master had a right to retain the cargo until such time as his own ship might be repaired and in a condition to carry it forward.

1 Para. Mar. L., 158, and notes; *Fland. Ship.*,

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sec. 244; *Ins. Co. v. Butler*, 20 Md., 41; 2 Am. Lead. Cas., 472, et seq. No man of ordinary prudence would have exposed valuable property to such perils as are shown by the record to beset the navigation of the St. Lawrence at that late season of the year. Even if it had been possible to find a vessel to undertake such a venture, the underwriters could not have been held responsible for loss or damage of the cargo incurred in so perilous a voyage, and one so essentially different from that originally contemplated.

Hand v. Baynes, 4 Whart., 204.

Their contract was simply on an ordinary bill of lading.

Supposing it had been possible to hire another vessel to take forward the iron that autumn, it could only have been at ruinous rates of freight and insurance. To import into the contract the duty and obligation to resort to such extraordinary means, would destroy its mutuality, and make the owner of The Maggie Hammond responsible as an insurer of time, with only the compensation of an ordinary carrier.

Briddon v. Railway, 28 L. J. (N. S.), Exch., 51; *Morrison v. Davis*, 20 Pa., 171; *Reed v. Dick*, 8 Watts, 479; *Chit. Car.*, Am. ed., 114, notes.

Appellees had no right to complain of this intermediate voyage, unless it was in some respects an infraction of appellant's contract to transport their iron. Appellant's obligation was to be ready at Cardiff early in April 1867, to resume the cargo.

Under ordinary circumstances, The Maggie Hammond had abundant time to return to Cardiff in good season to transport the iron in the spring; but having encountered unusual storms and perils of the sea, she reached Baltimore Feb. 17, 1867, after a voyage of eighty-seven days.

Messrs. S. T. Wallis and J. H. Thomas, for appellees:

The shipment was made and the bill of lading executed in Scotland. The cargo was to be delivered in Canada, and was landed and left in Wales. Each of these three localities has its separate system of jurisprudence, Wales being governed by the English law; the Scotch and colonial laws are held by the English courts to be foreign laws, and are required to be proven as matters of fact, precisely as the laws of foreign nations.

See 1 Phil. Ev., 4 Am. ed., 623; 2 Phil. Ev., 4 Am. ed., 427, and cases there cited.

They require it to be proven in each particular case, like any other matter of fact.

McCormick v. Garnett, 27 Eng. L. & E., 339.

In the absence of proof, the foreign law and our own are presumed to be the same, and in the case at bar there is no proof of any of the foreign laws under discussion.

Chase v. Alliance Ins. Co., 9 Allen, 311.

The question of lien under the law of the place where the cargo was landed and left, involves as well the Scottish as the English law; for if the ship was subject to a lien in favor of the shipper under the law of the place of contract, certainly that lien must have been fixed upon her by the violation of the contract, and at the time and place where it was violated; and this without reference to the jurisdiction of the English Admiralty Court to enforce the lien by

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process *in rem*. This latter jurisdiction, it must be conceded, did not exist before the recent Statute of Victoria; but the lien, though not enforceable, nevertheless existed as a part of the English Admiralty law. The elementary writers are believed to be unanimous upon this point. *Abb. Ship.*, marg. pp. 126, 285; 8 Kent, Com., 8th ed., 261 n. a.; Conkl., Adm., ch. 4, p. 128; *The Rebecca*, 1 Ware, 192; *The Phoebe*, 1 Ware, 270.

But whatever difficulty may have formerly existed as to jurisdiction in England, has been entirely removed by legislation during the present reign.

Act, 1824, 1825, Victoria, called the Admiralty Court Act, 1861, ch. 10, p. 182.

In the cases of *The Bahia*, Brown. & L., 61, and *The Ironsides*, Lush., 458, the words "carried into England or Wales" are decided to have been purposely employed in their widest signification, and the statute, it is said, was not intended to be restricted to cases of importation. The iron, then, in this case was carried into a port of Wales.

The Privy Council laid down the doctrine of maritime lien definitely and exactly, in the language of *Mr. Justice Story*, in the case of *The Nestor*, 1 Sumn., 78.

On page 72 of the English Reports, will be found the express determination "That in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be enforced by legal process." This doctrine is re-affirmed by Sir Robert Phillimore in the case of *The Feronia*, L. R., 2 Adm. & Eccl., 78, decided in 1868. Doctor Lushington himself appears to have recognized it.

See, also, the case of *The Isabella A. Clarke*, Brown. & L., 82; *The Bold Buccleugh*, 8 Wm. Rob., 220.

The proceeding *in rem* after all, is but a "mode of proceeding and process," as defined by this honorable court in the case of *The St. Lawrence*, 1 Black, 526 (66 U. S., XVII., 182), and *The Potomac*, 2 Black, 581 (67 U. S., XVII., 268), and its allowance or refusal constitutes no "question of jurisdiction." In determining this, the court did but re-affirm what it had held after great consideration in the case of *The Steam Nav. Co. v. Bank*, 6 How., 392, viz.: that "If the cause is a maritime cause subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it must in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the other is within its cognizance."

If the subject-matter of the controversy be within the admiralty jurisdiction of the district courts, they may apply any of the remedies appropriate here to cases where the contract was made abroad.

Story, Confli. L., sec. 558; *The Zollverein*, Swab., 96; *The Milford*, Swab., 362; *The Jonathan Goodhue*, Swab., 526; *Bk. of the U. S. v. Donnelly*, 8 Pet., 872, followed by *Wilcox v. Hunt*, 18 Pet., 378.

See, also, *The Young Mechanic*, 2 Curt., 405, in which it is determined that a maritime lien is a right in itself, which may exist independently of the process used to enforce it, just as a personal obligation may arise from a contract, though the law of the place may not afford a personal remedy.

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Talleyrand v. Boulanger, 8 Ves., jr., 447; *Flack v. Holm*, 1 Jac. & W., 405.

Mr. Justice Beets has demonstrated in an elaborate and able opinion, *Davis v. Leslie*, Abb. Adm., 181, that jurisdiction as between foreigners is complete, though the exercise of it is discretionary, and that the same rule is adopted in England as in this country.

The Jerusalem, 2 Gall., 191; Conkl. Adm., 38, 35; 1 Abb. Pr., U. S. Court, 855; *The Bee*, 1 Ware, 332; *The Havana*, 1 Spr., 402; *The Ada*, Davis, 409.

It has been assumed as clear law in England as well as here, that it was a breach of contract and duty for the ship to desert her cargo at Cardiff, and sail on another voyage.

Abb. Ship., marg. p. 364; 8 Kent, 210, *et seq.*

If she had begun loading the day after her repairs were completed, allowing her two days to load, she could have started Nov. 5, and if she had made a voyage in thirty-five days, she would have arrived Dec. 10. Supposing she made neither the longest nor the shortest average voyage, but one of intermediate length, she would have reached Montreal in thirty-seven days from Cardiff (or thirty-seven and a half from Liverpool), that is, by Dec. 12. During the five preceding years, the navigation to Montreal had only twice closed earlier than that, and on one of those two occasions, only one day earlier. The chances were, therefore, as three to two, or it may be said four to one, that she would meet no obstruction. Those chances the libelants were entitled to.

At all events, by proceeding on her voyage as soon as she was ready for sea, The Maggie Hammond would have had the reasonable chance of reaching her port of destination that season, and the certainty of her arriving as near there as possible, so as to be ready to proceed to it with all dispatch at the first opening of navigation in the spring. This was her clear duty under the circumstances.

8 Kent, Com., 210; *Schilizzi v. Derry*, 82 E. C. Law., 872; *Oliver v. Ins. Co.*, 7 Cranch, 493.

There was no reason to apprehend ice, or any other unusual danger or detention before reaching the St. Lawrence. If she had encountered ice dangerously in the Gulf of St. Lawrence, or the river, or had learned on arriving in the vicinity that it was dangerous to go further, she might have put into the nearest port.

3 Pars. Mar. L., 299.

And she could have sent on her cargo by land if necessary, which, in such case, it would have been her duty to do.

1 Pars. Mar. L., 161; *Bryant v. Ins. Co.*, 6 Pick., 181.

She was bound, under the circumstances, to meet the difficulties of the navigation, even if they did expose her to the risk of being ice-bound in the St. Lawrence until spring, which was the only unusual peril she would have encountered. None of the evidence in regard to the difficulty of procuring insurance at the ordinary rate for late voyages, is applicable to the case of a voyage already begun, and which the ship was bound to prosecute, whether insured or uninsured.

The restrictions shown to be usual in the policies for such voyages, are only applicable to them as extra hazardous and, therefore, not insurable at the usual rates. Extra premiums would, of course, have removed that dif-

ficulty, if, indeed, it existed at all under the circumstances in controversy. If it was ascertained that her repairs could not be completed in time to make the voyage during the season it was her duty to send on the cargo by another vessel.

1 Pars. Mar. L., 161; *Hugg v. Augusta Bkg. Co.*, 7 How., 604; *The Niagara v. Cordes*, 21 How., 24 (82 U. S., XVI., 46); 1 Pars. Ship. & Adm., 284, n.; 834, n.

If, as is now sought to be proven, it was Sep. 18, when she anchored at Milford, notoriously too late for her to resume, or hope to resume her voyage, or procure another vessel for the special purpose, she might and ought to have forwarded, or to have attempted to forward, her cargo by the ship which left London Oct. 17, a month later, and which appears to have had a regular day or time of sailing, that must have been generally known; and this even if it involved land carriage.

Bryant v. Ins. Co., 6 Pick., 181; Pars. Mar. L., 161.

At all events, she ought not to have deserted the cargo, leaving it subject to storage and other charges, but to have started with it as soon as possible in the spring.

If she had started with the first spring fleet, she would have had the cargo in Montreal April 22. It reached there on *The Royal Charlie*, July 28. If not liable for the damages decreed against her, she is liable for the difference in the value of the iron at the opening of navigation in the spring, and at the time when it did arrive.

Mr. Justice Clifford delivered the opinion of the court:

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are insurers of goods shipped, and are liable in all events and for every loss and damage, however occasioned, unless it happens from the act of God or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

Whenever the goods intended for transportation are shipped on board, or delivered to the carrier or his agent for that purpose, it is the duty of the master, in the absence of any stipulation as to the period of sailing, to commence the voyage within a reasonable time and he must proceed on the voyage in the direct and usual route to the port of delivery without any unnecessary deviation. Unless it becomes necessary to deviate for the purpose of making repairs or to avoid a storm, or an enemy or pirates, or to obtain necessary supplies, or for the purpose of assisting another vessel in distress, no deviation from the direct and usual route can in general be justified, nor will any other cause be admitted, except under very special circumstances, as a valid defense for any such delay in the transportation of the goods shipped under the bill of lading or other legal contract of shipment.

I. Certain parcels of pig iron, amounting in the whole to three hundred tons, consigned to the libelants, were, by their agents, resident in England, shipped August 28, 1866, on board *The Maggie Hammond*, then lying at Ardrossan, Scotland, and bound on a voyage from that

port to the Port of Montreal, where the libelants reside. By the bill of lading, it appears that the iron constituting the consignment was shipped in good order and condition, and that the contract of shipment was that it should be delivered to the consignees at the port of destination in like good order and condition, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, excepted."

Subject to the terms of that contract the merchandise in question was delivered to the carrier; and having been duly laden on board the ship sailed on the following day for the port of delivery, and until the 7th of September she proceeded on her voyage in perfect safety, when she encountered heavy gales which continued through the night, causing the ship to leak, and doing great damage to the sails; and it appears that the master, at six o'clock in the afternoon of that day, finding that the weather exhibited no appearance of improvement, and having consulted with the other officers of the vessel, and the crew, decided to bear away for some port of refuge, and that "they wore ship with her head to the eastward."

Prior to that change of course they had accomplished half the contemplated voyage, as it appears from the evidence that the ship, at noon of that day, was in latitude forty-nine degrees one minute north, and in longitude thirty degrees sixteen minutes west. Precisely what change was immediately made in the course of the ship does not appear; but it does appear that the master, on the following day, called the crew aft, and submitted the question to them whether they would go to the westward, or continue to go to the eastward, and that they decided to proceed to the eastward, which was equivalent to a decision to return. Much injury had, doubtless, been done to the sails, but they had spare sails, and it appears that the crew, before they were called aft, had bent and set the foresail, the maintopsail, the jib, the foretopmast staysail, the maintopmast staysail, the mizzen staysail, and the spanker, and the protest shows that the wind had subsided, and that the weather was more moderate.

Principal reason given by the crew for refusing to go westward, as reported in the protest, was that they had not sufficient sails, that the ship was leaking badly, and that they were not able to do any more work until they had some rest.

Midway between western and eastern ports, and with a ship as seaworthy to go forward as to go back, the master nevertheless yielded readily to the suggestions of the crew, and decided to proceed to the eastward, and on the 17th of September the ship came to anchor, without any further damage, in the port of Milford, in Wales. Immediate steps were taken for a survey, which was held on the following day, but some of the recommendations of the surveyors were not satisfactory to the master, and he declined to carry them into effect. Dissatisfied with the results of that survey he called another, which was not held until the twenty-fifth of the same month, when it was recommended that the ship should proceed to Cardiff, where there were greater facilities for landing

and storing the cargo and for repairing the vessel. Influenced by that recommendation the master, two days afterwards, weighed anchor, and the ship having been taken in tow by a steam tug, arrived at Cardiff on the next day and was safely moored for repairs in the dry dock at that port. Subsequent surveys were also held, confirming the prior conclusion that the ship was in need of repairs, and thereupon the cargo was landed and stored. Expenses were incurred in executing the repairs to the amount of one hundred and eighty-five pounds and seventeen shillings, but the mechanics in accomplishing the work, stripped the vessel of her yellow metal, valued at one hundred and thirty pounds, which was allowed as a credit to the owner of the ship.

On the 9th of October the master made a formal protest, that the repairs recommended could not be completed until the season would be too far advanced for the ship to complete the voyage before winter. Her repairs were finished prior to the 3d of November, and on that day the surveyors certified that the ship was in a "seaworthy state to proceed on her intended voyage." Although the ship was ready for sea, still the master refused to reload the cargo and proceed to fulfill his contract, alleging that the season was too far advanced. Negotiations were instituted between the consignees and the owner of the ship for a compromise of the controversy, but before any conclusion was reached, the ship, on the 21st of November, took on board another cargo and sailed for Baltimore, leaving the merchandise constituting the consignment of the libelants in store at the port where the repairs were made.

Left in store the merchandise remained there until the 29th of May of the next year, when the agents of the ship forwarded the same in another vessel, but the vessel with the goods did not arrive at the port of delivery until the 23d of July, eleven months after the iron was shipped on board the vessel of the respondent. Aggrieved by such unusual delay and learning that the ship had arrived at her port of destination, under the new contract of affreightment, the shippers and consignees of the iron stored and left at Cardiff, filed their libel in the district court for the district where the ship then was, alleging a breach of the contract set forth in the bill of lading. Process of attachment was issued and the ship was seized on the 26th of February, 1867, the day before she finished discharging her cargo at Baltimore. Hearing was had and a decree was entered in favor of the libelants in the district court for \$3,092.30, together with costs of the proceedings. Determined to contest the matter further the claimant appealed to the circuit court, and the appeal to this court is from the decree of the circuit court affirming the decree of the district court.

II. Several questions of importance and of no inconsiderable difficulty are presented for decision in this case. Most of the material facts are exhibited in the preceding statement, and in view of that state of facts the libelants submit the following propositions:

1. That it was the duty of the master, as the agent of the ship-owner, to transport the merchandise to the port of destination and deliver
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the same to the consignees without unnecessary delay, unless he was prevented from so doing by the act of God, the public enemy, or some one of the perils expressly excepted in the bill of lading; and that the evidence in the case does not show that the failure to transport and deliver the consignment was occasioned by any such causes.

2. That the ship, when she sprung a leak, and when her sails were injured, inasmuch as she was as near to western ports as to those situated to the eastward, should have proceeded to some one of the former for repairs, and that the circumstances did not justify the master in putting back to an eastern port for that purpose.

3. That if he was justified in putting back to the port selected as a port of refuge, that his subsequent conduct, in respect to the merchandise shipped by the libelants, was wholly indefensible, that he had no right to leave the merchandise in store, enter into a new contract of affreightment, and sail with a new cargo for a distant port; that he was bound, as a carrier for hire, either to repair his own vessel, reload the cargo and resume and complete the voyage, as stipulated in the bill of lading; or, if the necessary repairs could not be made in season to enable him to fulfill his contract to transport and deliver the consignment before the fall navigation would close, then it was his duty to procure another vessel and to tranship the merchandise and send it forward to the port of delivery without unnecessary delay.

All of these propositions are controverted by the appellants, and they contend that the conduct of the master was in all respects justifiable; that he did everything which he, as such carrier, was required to do under the contract as expressed in the bill of lading, and that the libelants have no just cause of complaint.

Aside from the merits of the controversy, they also contend that the district court had no jurisdiction of the case; and as that is a preliminary question it will be first considered before examining the questions more immediately involved in the pleadings. No such question is directly presented in the pleadings, and none such was raised in the court below, still the better opinion is that the question is open to the appellants, as it substantially appears that the home port of the ship is Yarmouth, Nova Scotia, and that both the libelants and claimant are foreigners. By the answer it appears that the claimant is a resident of the place where the ship belongs, and the libel describes the consignees as residents of Montreal, in Canada, and that the iron was shipped at Ardrossan, in Scotland.

Undoubtedly, the owner of the cargo has a lien, by the maritime law, upon the ship for the safe custody, due transport, and right delivery of the same, as much as the ship-owner has upon the cargo for the freight, as expressed in the maxim, *Le batel est obligé à la marchandise et la marchandise au batel*. Subject to the exception that the lien of the ship-owner may be displaced by an unconditional delivery of the goods before the consignee is required to pay the freight, or by an inconsistent and irreconcilable provision in the charter-party or bill of lading, the rule is universal as understood in the decisions of the Federal Courts, that the ship is bound to the merchandise and the mer-

chandise to the ship for the performance on the part of the shipper and ship owner of their respective contracts.

Ship-owners contract for the safe custody, due transport and right delivery of the cargo, and for the performance of their contract the ship, her apparel and furniture, are pledged in each particular case, and the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfillment of their contract the cargo is pledged to the ship, and those obligations are reciprocal, and the maritime law creates reciprocal liens for their enforcement. *The Eddy*, 5 Wall., 498 [72 U. S., XVIII., 488]; *Dupont v. Vance*, 19 How., 168 [60 U. S., XV., 585]; *The Bird of Paradise*, 5 Wall., 554 [72 U. S., XVIII., 664]; *Alsager v. Dock Co.*, 14 Mees. & W., 798; *Forster v. Colby*, 8 Hurl. & Nor., 715.

Consequently, where the lien or privilege is created by the *lex loci contractus*, says Judge Story, it will generally, although not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the *lex fori*. Story, Conf. Laws (6th ed.), 428; 3 Burge, Com., 770, 779.

Such a lien is regarded as being in effect an element of the original contract, but in controversies wholly of foreign origin, and between citizens and subjects of the same foreign country, the Admiralty Courts of the United States will not, in general, entertain jurisdiction to enforce the maritime lien or privilege in favor of shipper or ship-owner, in a case where the libellant would not be entitled to such a remedy in the place where the contract was made or where the cause of action set forth in the libel accrued. *The Infanta*, Abb. Adm., 267; *Whiston v. Stodder*, 8 Mart. (La.), 134; *The Havana*, 1 Sprague, 402; *The Jerusalem*, 2 Gal., 191; *The Kenneway*, Abb. Adm., 321; *Brig Napoleon*, Olcott, Adm., 215; *Brig Nestor*, 1 Sumn., 73; *Read v. New Brig*, 1 Story, 244; *Pope v. Nickerson*, 3 Story, 465-476.

Where the lien exists only by some local statute, and is not given by the maritime law, admiralty courts in another jurisdiction can no more take jurisdiction of a case not within the local statute than the courts of the country could do where the cause of action arose, but where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the Federal Courts by the Judiciary Act.

Courts of justice, and text writers, everywhere concede that the ship, under the maritime law, is bound to the merchandise and the merchandise to the ship, independent of any local usage or statute; but it is true, as suggested by the appellant, that such a lien cannot be enforced in some countries, because the courts of admiralty, which alone are competent to give effect to the same by a proceeding *in rem*, are not, as now constituted, invested with any authority, except to a very limited extent, to exercise such a jurisdiction.

Maritime liens are of little or no value, in a country where there are no appropriate tribunals

for their enforcement, as they must remain dormant and unavailable, but the denial of such jurisdiction to her admiralty courts, by one country, whether it be by legislation or by the prohibitions of her common law courts, cannot have the effect to impair or diminish the jurisdiction in such cases of the admiralty courts of any other country, if they are legally clothed with the power and authority to enforce such remedies for the breach of a maritime contract. *The Rebecca*, Ware, Adm., 190; *The Phoebe*, Ware, 270; Abb., Ship. (ed. 1854), 167.

Such a remedy will not in general be accorded, in our courts of admiralty, to the citizens or subjects of a foreign country whose courts are not clothed with the power to give the same remedy in similar controversies to the citizens of the United States, but the question whether they will do so or not, is not a question of jurisdiction in any case, as it is clear they may do so if they see fit, and in some cases they will take jurisdiction to prevent loss and injustice, especially if no objection is made by the consul of the nation to which the vessel belongs. *The Havana*, 1 Sprague, 402; *The Volunteer*, 1 Sumn., 555; *Poland v. The Spartan*, Ware, Adm., 145; *Harmer v. Bell*, 22 Eng. L. & E., 72.

Viewed in the light of these suggestions the case seems to be one where the jurisdiction may be sustained without difficulty, even though it be true that the shipper had no lien upon the ship by the law of the place where the contract of shipment was made. Appellants contend that the law of the place where the contract was made gives no such lien to the shipper in any case, but there is very respectable authority for a different opinion, independent of the usual presumption that the law of the place where the contract was made is the same as that of the forum where the remedy for the breach of it is sought. *Chase v. Ins. Co.*, 9 Allen, 311; *Leavenworth v. Brockway*, 2 Hill, 201; Story, Conf. L., sec. 637.

Maritime law, says a learned commentator upon the law of Scotland, partakes more of the character of international law than any other branch of jurisprudence; and he adds, what is more material to the present inquiry, that in all the discussions respecting the same in the courts of that country the continental collections and treatises on the subject are received as authority by their judges where not unfitted for adoption there by any peculiarity which their practice does not recognize. Reference is then made to the principal continental treatises, usually referred to here, and frequently recognized by this court as the sources from which the rules of the maritime law were drawn. *Vanderwater v. Mills*, 19 How., 89 [60 U. S., XV., 556]; 1 Bell, Com. (6th ed.), 364; *Dupont v. Vance*, 19 How., 168 [60 U. S., XV., 585].

Speaking of the power and authority of the master of the ship, the same commentator says that he may hypothecate the ship for the supply of necessities and, as a last resort, he may sell the ship and cargo for that purpose. Abroad he has full authority to enter into a charter binding the owners and the ship, and he cites in support of that proposition the continental writers usually referred to as authority for that well known rule of maritime law. *Dupont v.*

Vanco, 19 How., 163 [60 U. S., XV., 585]; 1 Bell, Com., 884, 886.

Ship owners, the author says, have a lien as carriers for the security of the freight, and that the shipper, where the goods have been sold, lost or injured, during the voyage, may have recourse upon the property of the vessel as a guaranty for the personal obligation of the ship-owner. He admits that the rule last mentioned is not generally followed in England, and that there is no adjudged case to that effect in the courts of Scotland, but he insists there is in their jurisprudence no reason for denying the privilege given in such cases by the maritime law, and he expresses the opinion that such a remedy would be sustained in their courts. *Ibid.*, 440 [60 U. S., XV., 715].

Suppose, however, that neither of the preceding propositions are correct, still it is clear that the jurisdiction in this case may be sustained upon another ground. Two causes of action are set forth in the libel, and before entering further into the discussion of the question of jurisdiction, it becomes necessary to ascertain what they are and where they respectively arose, as alleged in the libel and as shown in the evidence. Obviously the first cause of action is founded solely on the alleged failure of the ship-owner to fulfill the contract of affreightment to transport the iron from the place of shipment to the port of destination, and to deliver the same to the consignees.

Non-delivery of the merchandise is the *gravamen* of the charges set forth in both articles of the libel, but the libelants also allege that the master, after the ship departed on her voyage, abandoned the same, and made some improper disposition of the shipment; that he neglected to transport and deliver the same, and that he entered into a new contract of affreightment with another party; and that the ship subsequently sailed for the Port of Baltimore, in charge of another master, not having the iron of the libelants on board.

Subsequent to the landing and storing of the goods, the ship-owner discharged the master and appointed another in his place, and the ship took another cargo on board and sailed for the port where the process was served in this case, the ship-owner claiming the right to do so upon the ground that the season was too far advanced for the ship to proceed to her port of destination, and insisting that he might lawfully detain the shipment until spring, in order that the ship might complete the voyage and earn full freight.

In determining the question of jurisdiction, the court must assume that the several propositions submitted by the libelants in respect to the merits of the controversy are correct. Assume that to be so, then it follows that the master improperly put back for repairs; that he abandoned the voyage without any lawful excuse; that he improperly entered into a new contract of affreightment, subjecting the ship to new perils and to a new lien, and that she had proceeded on a distant voyage, leaving the consignment of the libelants at the port where the same was stored at the time the iron was landed from the ship.

Landed and stored as the merchandise was in Wales, the question is: whether the refusal of the master either to transport the goods in

his own ship or to tranship the same and send the shipment forward in another vessel, and the subsequent abandonment of the voyage, gave the shippers and consignees any lien on the ship by the law of the country where those wrongful acts of the master took place.

Jurisdiction is possessed by the Admiralty Court of England "over any claim by the owner or consignee, or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." 24 and 25 Vic., Pub. Gen. Stat., 1861. ch. 10, sec. 6, p. 132; Williams & Bruce, Adm. Prac., 85.

Prior to that enactment the jurisdiction thereby conferred could not have been exercised by that court and, consequently, the extent of the jurisdiction depends entirely upon the meaning of that provision. By the words of the Act the jurisdiction conferred is confined to the case of goods carried into England or Wales, and it is equally clear that the claim must be made by the owner or consignee, or by the assignee of the bill of lading, but it cannot be denied that the case before the court in all those respects comes within the very words of the enactment.

As construed by the courts of that country, the intent of the Act is to give a remedy to the owner or consignee whenever the ship arrives in a British port and the cargo is not duly delivered in consequence of a breach of contract or duty on the part of the owner, master or crew of the ship; and the meaning has been so extended by construction that the admiralty court will entertain a claim for short delivery of the cargo, or a case where the goods are only incidentally brought into a port in England or Wales, the court holding that the word "carried" is not used in the sense of imported, but that it includes every case of a breach of contract or duty by the carrier whenever the ship arrives in a British port. *The Danzig*, Br. & Lush., 102; *The St. Cloud*, Br. & Lush., 14.

Where the master of a ship, on a voyage from New York with cargo consigned to Dunkirk, put into a port in England in consequence of an accident, and there landed the cargo and refused either to give delivery of it there or to carry it on to its destination, the court held that there was a clear breach of duty over which it had jurisdiction. *The Bahia*, Br. & Lush., 61; *The Norway*, Br. & Lush., 227; *The Ironsides*, Lush. Admr., 458.

Special reference is made by the appellants to the case of *The Pacific*, Br. & Lush., 243, as showing that the 6th section of the Admiralty Court Act gives merely a conditional right to sue the ship, that it does not create a maritime lien; but the decision in that case is not an authority for the proposition as applied to the case before the court, as the conclusion would be inconsistent with what the same learned judge decided in the case of *The St. Cloud*, Br. & Lush., 14, where he said the Act was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the ab-

sence of the ship-owner in foreign parts, the common law tribunals could not afford effectual redress.

Effectual redress in such a case cannot be afforded, even in an admiralty court, without authority to arrest the ship; and wherever that authority exists the proceeding may be *in rem*, which is an admiralty proceeding, founded upon a lien; and it makes no difference whether it is held in the courts of the particular jurisdiction, that it exists by maritime usage, or that it was created by statute, if it be of such a character that it is recognized in our courts as a maritime lien. Extended argument upon the subject, however, seems to be unnecessary, as the later decisions in the admiralty courts of that country have disapproved of the prior decisions, and adopted a more liberal construction of the 6th section of the Act. *The Nepoter*, Law Rep., 2 Adm. & Eccl., 376; *The Beta*, Law Rep., 2 Priv. C. C., 447.

Tested by these suggestions, the better opinion is, that the 6th section of that Act does give a maritime lien in a case like the present; but suppose it is otherwise, that it merely gives the right to sue the ship, still the concession cannot benefit the appellants, as the admiralty courts here administer the foreign law, and the consequence is that the filing of the libel in the district court here secures to the libellant the same lien in the ship as if the libel had been filed in his behalf in the jurisdiction where the wrongful acts set forth in the libel were committed.

Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it. Unless, therefore, the suit *in rem* can be prosecuted in the jurisdiction where the property is found it cannot be prosecuted at all, as the suit cannot be maintained without service of process upon the property described in the libel. *The Commerce*, 1 Black, 581 [66 U. S., XVII., 110]; *The Reindeer*, 2 Wall., 408; [69 U. S., XVII., 915]; *Nelson v. Leland*, 22 How., 48 [63 U. S., XVI., 269].

Process having been duly served in the district where the ship was found and where the libel was filed, the jurisdiction of the district court is without any well founded legal objection. In this country, says Mr. Parsons, it seems to be settled that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, but the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum. 2 Pars., Ship., 226; *The Johannes Christoph*, 3 Spink. Adm., 98; *The Jerusalem*, 2 Gall., 191; *The Aurora*, 1 Wheat., 96; *Taylor v. Carryl*, 20 How., 611 [61 U. S., XV., 1038]; *The Gazelle*, 1 Sprague, 378.

Jurisdiction being established it becomes necessary to examine the merits and to state our conclusions whether the decree from which the appeal was taken should be reversed or affirmed.

Grave doubts are entertained whether the master was justified in putting back for repairs, as he was quite as near to western ports as to those situated to the eastward, and the

record furnishes no reason to conclude that he would have encountered any greater perils or difficulties in proceeding to the westward than he did in putting back to the port selected as the port of refuge; but it is not necessary to pursue that inquiry, as it is not the intention of the court to rest the decision upon that ground.

Ships, to be seaworthy, ought in general to have spare sails where the voyage is a long one, and if the ship in this case was properly furnished in that behalf the conduct of the master in putting back for the reasons assigned in the protest is quite indefensible, as it is clear that he might have gone forward just as safely, and if he had done so it cannot be doubted that he might have gone to any one of a half dozen western ports where he could have repaired his ship in ample season to have enabled him to complete the voyage, deliver the cargo and return to the open sea without the least danger of any obstruction from ice in the river navigation. None of these matters, however, were much urged by the appellees at the argument, and they are accordingly passed over without further remark.

Grant that the conduct of the master in putting back is without objection, and that he was justified in landing and storing the goods with a view to a survey, and for the purpose of repairing the ship, the question then is: whether his subsequent conduct in refusing, after the repairs were finished, to complete the voyage or to procure another vessel, tranship the goods, and send them forward, and in sailing for another and a distant port under a new contract of affreightment, leaving the goods of the libellants in store, without making any provision for their transportation and delivery, constitutes a breach of the contract of affreightment made with the shippers of the goods, as set forth in the bill of lading.

As agent of the owners the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some one of the perils expressly excepted in the contract of shipment. When the vessel is wrecked, or otherwise disabled in the course of the voyage, and cannot be seasonably repaired to perform the voyage, or cannot be repaired without too great delay and expense, the master is at liberty to tranship the goods and send them forward in another vessel, so as to earn the whole freight, but he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time and carries them on to the place of delivery.

He is not only at liberty, in case of such a disaster, to tranship the goods and send them forward, but it is his duty to do so, if he cannot repair his own vessel in a reasonable time, and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance; and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. *The Niagara v. Cordes*, 21 How., 24 [63 U. S., XVI., 46].

Shipments are made that the goods may be transported to the place of delivery, and the master should always bear in mind that it is

his duty to accomplish that object. Inexcusable delay occurred before it was ascertained what repairs were necessary, and before the work was actually commenced. They came to anchor in Milford Haven on the 17th of September, and a survey was called on the following day, but the master was dissatisfied with the result, and on the twenty-fifth of the same month he called another, so that the ship did not arrive at the port where the repairs were made until the twenty-eighth of the month, ten days after her arrival at Milford.

Duties remain to be performed by the master or the owner, after the vessel is disabled. His obligation of safe custody, due transport, and right delivery still continues and is by no means discharged or lessened while it appears that the goods have not perished in the disaster. *King v. Shepherd*, 8 Story, 358; *Elliott v. Russell*, 10 Johns., 7.

Nothing will excuse the carrier under such circumstances but the causes stipulated in the bill of lading, and he is still bound, by virtue of his original contract, to use his utmost exertions to transport or send forward the goods to the port of delivery. Such carriers may be answerable for the goods in case of loss or injury, even though no actual blame can be imputed to them; and after the loss or injury is established the burden lies upon the respondent to show that it was occasioned by one of the perils excepted in the contract of shipment or bill of lading. *Clark v. Barnwell*, 12 How., 272; *Rich v. Lambert*, *Ibid.*, 347; *Chitty, Carriers*, 242; *Story, Bailm.*, secs. 528, 529; 8 Kent, Com., 213; 1 Smith, Lead. Cas., 313; *Smith, Merc. Law*, 348.

Diligence and promptitude were due in this case from the master, especially if he believed that there was any danger that the time which would be occupied in making the repairs would render it impracticable to carry forward the goods before the close of the fall navigation; and if he was of the opinion, in view of all the circumstances, that the repairs could not be completed in season to transport the goods to the port of delivery, he was bound to procure another vessel, tranship the goods, and forward them to the consignees.

Much testimony was introduced by the appellants to show that another vessel could not have been procured, but most of it is not of a character to apply to the case before the court. Bound to keep safely, duly transport and rightly deliver the goods, it is no defense for the carrier to allege that the price of freight at that time was higher than it would have been earlier in the season, as the charge for the increased price would have fallen upon the goods and not upon the appellants. They had contracted to transport the goods, and it is no defense to a suit for the breach of the contract that the rate of the insurance at that time was higher than it was earlier in the season. Excuses of the kind constitute no defense to such an action, as the carrier is bound to perform his contract unless he is prevented from so doing by the act of God, the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading or contract of shipment.

Under the circumstances of this case the appellants were bound to transport the goods in

their own vessel or to procure another and send them forward to the port of delivery. Opposed to this view is the suggestion that they were not bound to tranship immediately, as they had the right to detain the goods and repair their own vessel for that purpose; but the decisive answer to that suggestion is, that they had no right to detain the goods for any such purpose, unless the repairs could be made in time to enable the ship to transport the goods to the port of delivery before navigation closed.

Without entering into the details of the evidence, suffice it to say, the court is of the opinion that another vessel might have been procured for that purpose, and that it was the duty of the master to have transhipped the goods unless he could have repaired his own vessel in season to complete the voyage. *Canan v. Meaburn*, 8 Moore, 141.

Aside from that proposition, however, the court is of the opinion that the repairs were finished in season to have enabled the master to transport the goods in his own vessel, and it is clear that he was bound to do so unless he was prevented by some one of the causes expressed in the bill of lading. Mere fear that he might encounter ice in the voyage, or that he might not be able to return till spring, if he transported the goods to the port of delivery, constitutes no defense, as he was bound by his contract to complete the voyage without unnecessary delay, unless, as before explained, he was prevented by some one of the causes expressed in the bill of lading. His ship was fully repaired on the 3d of November, and the navigation did not close until the 15th of December following, which would have given ample time to deliver the cargo and complete the voyage. Forty days would have been a long voyage, and probably it might have been accomplished in thirty-five.

Viewed in any light, as shown by the evidence, the decree of the Circuit Court is correct.

Decree affirmed.

Cited—20 Wall., 163; 95 U. S., 76; 5 Ben., 64, 66; 9 Ben., 116; 1 Low., 570; 2 Low., 148, 150; 1 Bro., 184, 532, 533, 543.

PERRY HANNAH, ALBERT T. DAY,
JAMES MORGAN AND WILLIAM MORGAN,
Claimants of the Propeller ALLEGHENY,
AND HARRISON DUDINGTON
AND CHARLES J. KERSHAW, Stipulators,
Appts.,

v.

SARAH S. WOLVERTON AND JAMES E.
PITTMAN.

(See S. C., "*The Allegheny*," 9 Wall., 522-526.)

Duty of steamer in crowded harbor.

It is the duty of a steamer in the narrow entrance of a harbor, to move with great caution and moderate speed, to avoid the risk of encountering other vessels, or she will be liable if a collision occurs.

[No. 147.]

Argued Mar. 24, 1870. Decided Apr. 25, 1870.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The libel in this case was filed in the District Court of the United States for the District of Wisconsin, by the appellees, to recover damages sustained by a collision. The said court entered a decree in favor of the libelants, for \$7,237.17, with costs.

The court below having affirmed this decree, on appeal, the respondents took an appeal to this court.

The facts of the case are fully stated by the court.

Messrs. E. Mariner and Beckwith, Ayre & Kales, for appellants.

Messrs. N. J. Emmons and J. H. Van Dyck, for appellees:

We are unaware of any complaint or allegation that misapplication has been made of the law to the facts. The case resolved itself wholly into a question of fact, and the propeller was found solely in the wrong. Both judges below having agreed in this conclusion and having given us the benefit in their opinions of their reasoning, it is deemed unnecessary to attempt a further review of the evidence; at least until we hear alleged some affirmative error.

The Marcellus, 1 Black, 414 (66 U. S., XVII., 217); *The Water Witch*, 1 Black, 494 (66 U. S., XVII., 155); *The Potomac*, 2 Black, 581 (67 U. S., XVII., 263); *Newell v. Norton*, 8 Wall., 258 (70 U. S., XVIII., 271); *The Grace Girdler* (*ante*, 113).

It is confidently submitted that the decree of the circuit court should be affirmed.

Mr. Justice Strong delivered the opinion of the court:

This is an appeal from the decree of the Circuit Court of the United States for the District of Wisconsin. In the court below, the case was a proceeding by the owners of the schooner *Henry C. Winslow*, against the propeller *Allegheny*, to recover compensation for a collision by which the schooner had been greatly injured and sunk. In both the district and the circuit courts the decree was against the propeller. As is not unusual in cases of collision, the testimony is, in some particulars, very conflicting. But the controlling facts are either admitted in the answer of the appellants, or they are so satisfactorily proved that we have no difficulty in determining what the merits of the controversy are, or in coming to the conclusion reached in the court below, that the collision was caused solely by the fault of the propeller. It occurred in the day-time, when there was nothing to obstruct the vision of those who had charge of the propeller, and then there was nothing to excuse it. It took place in the "straight cut," from Lake Michigan into the river and harbor of Milwaukee, near the point where the cut opens into the harbor. The cut is 1,150 feet in length, and about 260 feet in width, between its piers. Its course is from east to west, and it enters the river nearly at right angles. At its west end, though between the piers, there is a bar extending inward from the north pier toward the middle of the cut and, of course, reducing the depth of the water. The schooner had left her dock in the river, and she was proceeding out of the cut into the lake in tow of the steam tug *W. K. Muir*, and about twenty-five feet astern of the tug. Shortly after leaving the dock, the propeller was seen entering the eastern end of the cut

from the lake, and the tug signaled to her by one whistle to keep to the starboard, or north side. To this signal the propeller responded by a similar signal, thus announcing an intention to pass the tug and the schooner on their port side. A second signal to the same effect was given by the tug, when the vessels were near each other; but to this no answer was returned. The collision took place shortly after, soon after the tug had entered the cut, when she was still headed toward the south pier, and before she had been able to straighten out her tow. The exact place of the collision is not certainly established, but it is clearly south of the middle of the cut, and not far from its western entrance. Its effect was to break in the bow of the schooner and sink her in fifteen minutes. The propeller entered the cut at a high rate of speed. She had been racing on the lake to reach the entrance in advance of another vessel, and according to the answer made to the libel, she was running eight miles an hour when she entered. She did not shut off her steam at all until within half her length of the piers, and then only partially. Her steam was not entirely shut off until she had proceeded a considerable distance within the cut. She steered wildly, not obeying her helm. Her speed was too great for proper steering in shallow water, considering her draft; she kept on, however, in the middle between the piers, instead of stopping or moving to the North side of the cut, as she had signified her intention to move, by her answer to the tug's signal.

If now these facts, about which there is little if any dispute, be considered, there is no difficulty in determining where the fault of the collision rests. The tug, though a steamer, was incumbered with a tow. She was, therefore, not as manageable as the propeller. She could not back, or even stop, without danger of collision with the schooner. It was necessary in entering the cut from the river that both the tug and her tow should cross the bow of the propeller heading toward the south pier; and as the cut entered the river at right angles, it was also necessary for her to increase her speed at the entrance in order to bring the schooner into line and prevent her running against the south pier. The course of both the tug and the schooner required to be changed not less than ninety degrees within a distance not much exceeding two hundred feet. All this was known to the master of the propeller. His steamer was entering the harbor. It was, of course, his duty to move with great caution. He knew that the entrance was narrow and difficult, especially if other vessels were to be passed. He knew that near the west end of the cut the water on the north side was shoal, and he knew how much water the propeller needed. He knew, also, that at the west end a tug passing out to the lake, with a tow in charge, must change her course to the east, and keep up her speed in order to straighten out the tow. What, then, was his duty? Appraised, as he was in season, of the approach of the tug and schooner, and planning, as the answer to the libel avers he did, to meet them, not in the river, but between the harbor piers, it was obviously his duty to avoid the meeting in that part of the cut where the propeller could not go to the north side, and to make no attempt

to pass until the tug could straighten out her tow. He had it his power to select the place for passing. If it be, as is now contended, that the propeller could not at that part of the cut go nearer the north pier, in consequence of the bar, she was not the less in fault. She ought not to have been there. She ought to have foreseen the difficulty and guarded against it. And this fault is closely connected with another. The propeller entered the cut at too great a rate of speed. This increased the danger. It brought her to the place of greatest difficulty at the most unfavorable time for passing it, besides making her unmanageable. It is true her engines were reversed when she was in close proximity to the schooner, but not soon enough to stop her forward movement before she reached the most dangerous point in the channel, not soon enough to prevent her running into the schooner before she could be straightened out of her course through the cut. It is thus manifest that the collision was caused by the misconduct of those in charge of the propeller.

We do not perceive that the tug was at all in fault. It was not in her power to stop without either colliding with the schooner or permitting the schooner to run upon the south pier. At the time of the collision both the tug and the schooner were on the south side of the channel, where they had a right to be.

The decree of the Circuit Court is affirmed, with interest and costs.

Cited—13 Blatchf., 583.

JOSEPH W. HANCOX, *Appt.*,

v.

THE STEAMBOAT SYRACUSE, THE ALBANY AND CANAL LINE, Owners of the said Boat.

(See S. C., "*The Syracuse*," 9 Wall., 672-677.)

Duty of tug to see to safety of vessels in tow—negligence of steamer.

A tug, with vessels in tow, is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril.

The attempt of a steamer to pass a fleet of tugs in close proximity, at a speed of seventeen miles an hour, was gross and wanton recklessness.

[No. 168.]

Argued Apr. 7, 1870. Decided Apr. 25, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, to recover for damages arising from a collision. The decree of the district court in favor of the libellant having been reversed, on appeal, by the circuit court, the libellant appealed to this court.

A further statement of the case appears in the opinion of the court.

Moore Hoar, Atty. Gen., and *D. McMahon*, for appellant.

Mr. R. D. Benedict, for appellees.

See 9 WALL.

(The case was very fully argued, but no abstract of the argument is here given, as it was confined very closely to the facts involved).

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in admiralty from the decree of the Circuit Court of the United States for the Southern District of New York.

The Steamer, *Rip Van Winkle*, a freight and passenger boat, left New York for Troy, heavily laden, on the evening of the 15th of May, 1866. About 2 o'clock the next morning she reached a point in the river opposite to Brantford's Hollow. There, three boats above were plainly in view to her, and she was as plainly in view to them. They were all tow-boats with barges attached, and were *The Joe Johnson*, *The Arnold* and *The Syracuse*. The *Arnold* was on the east side of the river, and going up. The *Johnson* was on the west side, going down, and was as near to the flats as it was safe for her to go. The *Syracuse* was on the west side, and also descending. She had in tow, lashed to her, on the port side, the heavy ice-barge, *Colgate*. The *Roberts*, a light barge, was attached to her in like manner on the starboard side. The speed of *The Johnson* was less than that of *The Syracuse*. The *Johnson* had nine tows, attached by a hawser about four hundred and fifty feet long. The *Syracuse* made a sheer and passed the hawser tier of *The Johnson*, and lapped her about fifteen feet on the east side. About this time *The Rip Van Winkle* blew a long whistle as a signal that she intended to pass them to the eastward. They blew their whistles in response and assent. The speed of the steamer was seventeen miles an hour. The distance of *The Syracuse* and the steamer from each other when their whistles blew was probably about half a mile. The usual course of ascending steamers at that point, and the one which *The Rip Van Winkle* proposed to pursue, was diagonally across the river from the west to the east side. Teason was the pilot in charge of the steamer, and we give the occurrences which grew out of the movement as he states them. He says:

"We passed *The Johnson*, and on her starboard side was *The Oliver A. Arnold*, bound up with a tow. I went close to his hawser tier and, probably, within fifty or seventy-five feet. The tide being flood tide, and the wind southeast, he was working to the windward, and the tier tailed off from him, so that I did not go as close to *The Arnold* as I did to his hawser tier. I went off from *The Arnold* probably one hundred and fifty feet, may be not as far as that, and just as I got abreast, or just before I got abreast of *The Arnold*, the steamer *Syracuse*, bound down, on our larboard hand, altered her course before I got to *The Arnold*, and came right head towards us. I didn't slow the boat nor I didn't stop her. * * * I let her keep her regular gait. * * * I thought I could outrun her when I saw her coming. I thought, in the position she was, I could get by her, and I hove my wheel over aport, and that took us hard off more to the eastward. I thought I would let her get as far to the eastward as I could, and did so. Then *The Syracuse* hit us

* * * on the starboard side, just aft of

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the forward gangway. * * * It was the barge that she had alongside that hit us—hit us with the bluff of her bow, right on the turn of her bow. We were heading to the east, and she struck us right aft of the forward gangway, and forward of the paddle box, and after she struck us it carried away our deck beams, and side house, and water wheel, and the like of that; that disabled our engine, and then we drifted, till in time we drifted ashore, or we let our anchor go before we got ashore, but our anchor would not hold us, and we drifted ashore; we drifted about twenty minutes or half an hour after she struck us before we went ashore."

This witness further states that the width of the channel between The Arnold and The Johnson was at least 500 feet; that there was a space between The Johnson and the steamer for The Syracuse to pass of 350 feet; that the steamer had passed The Johnson and The Arnold, and that just as she passed the latter the disaster occurred. The length of the steamer was about 275 feet. The combined speed of the steamer and The Syracuse was over twenty miles an hour. It was not less than half a mile in a minute and a half. Teason says:

"Further, that The Syracuse could have kept her course and followed down the same course that The Joe Johnson was going, and would have given us plenty of room to have gone by. All that was necessary for her to clear us would have been to have kept her course. * * * She sheered right off—took a very sudden sheer right off towards us."

This witness is mainly relied upon by the libellant. Conceding his testimony to be correct it inculcates the tug, but by no means exonerates the steamer. The channel was narrow and crowded. The Johnson, Arnold and Syracuse, with their tows, made a fleet of eighteen vessels of different kinds. Witherwax, another pilot on the steamer, says:

"We seen the river full of lights; it looked to be all light away across the river."

He warned Teason several times that the steamer would approach The Syracuse. His warnings show that he was alarmed. They produced no effect. A tug with vessels in tow is in a very different condition from one unincumbered. She is not mistress of her motions. She cannot advance, recede or turn either way at discretion. She is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For many purposes they may be regarded as a part of herself. They have the benefit of her traction and she the burden of their inertia. The character of the fleet could not be mistaken. The attempt of the steamer, under such circumstances, to pass the other vessels, and in such close proximity to the Syracuse, at a speed of seventeen miles an hour, was gross and wanton recklessness. Before turning her head to the eastward she should have slowed her engine. If the prospect of danger darkened she should have stopped, and, if need be, have reversed it. She had no right thus to hurl herself like a projectile into the midst of the vessels before her, taking the hazard of the consequences and thus imperiling herself and them with all the lives and property on board. "The

Rule of the Road" gives no warrant for such conduct. The maxim applies, "*Sic utere tuo ut alienum non ledas.*" The steamer is condemnable alike upon reason and authority. *The New Jersey*, Olcott, 444; *The Rose*, 3 Wm. Rob., 3; Holt's Rule of the Road, 227, 247.

The alleged fault of The Syracuse lies in the sudden sheer to the eastward which is imputed to her. As soon as her whistle was blown she stopped her engine, and did not put it in motion again until after the collision occurred. This is conclusively proven, and is not denied. It is an important fact in her favor. That she voluntarily and unnecessarily sheered, and put herself in the way of the steamer, as charged, is very improbable. The fact is proven by no one but Teason. It was several times denied expressly by Witherwax when his deposition was first taken. He was recalled the next day, and then stated that he saw the sheer and supposed it was to enable The Syracuse to pass the tow of the Johnson, and that she kept her course afterwards until she struck the steamer. The denials in his former examination detract from the weight of his testimony. The captain and pilot of The Syracuse contradict positively the statement of Teason. The pilot thinks she did not sheer either way after the steamer came in sight. He says she might have headed a little to the westward. The captain of The Colgate saw her sheer to the westward as soon as her engine was stopped. He says The Colgate had a tendency to pull her in that direction. The wind and tide both contributed to that result. The testimony of these officers outweighs that of Teason, which has no support from any other witness. The stem of The Colgate was twenty feet aft of the stem of The Syracuse. The steamer in crossing headed to the eastward. If, as is alleged, the sudden sheer of The Syracuse brought her into the track of the steamer, and thus produced the collision, the blow must necessarily have been given by the stem of one steamer or the other. Such was not the result. The stem of neither touched the other. The steamer struck her port forward gangway against the bluff of the bow of The Colgate, ten feet aft of the stem of the latter. This is entirely irreconcilable with the testimony of Teason, and is fatal to the theory which it is relied upon to support. That theory is the sole ground of imputation against The Syracuse. Other views vindicating The Syracuse, with more or less cogency, might be presented, but we deem it unnecessary to pursue the subject further. In our judgment The Syracuse is not shown to have been in fault.

The decree of the Circuit Court is affirmed.

Cited—13 Blatchf., 533; 59 N. Y., 299; 32 Ohio St., 149.

HENRY WISE, JR., use of HORACE H. DARST and WARREN J. NACE, *Plffs.*

v.

EDWARD P. ALLIS.

(See S. C., 9 Wall., 737-740.)

Sufficiency of notice in patent cases.

A plea or notice should apprise the opposite party fairly of what he may expect to meet under the plea or notice.

In an action for infringement of a patent, a notice by defendant of the particular town or city in which a millstone is used, is sufficiently precise under the Patent Act of July 4, 1836.

[No. 150.]

Argued Mar. 24, 1870. Decided Apr. 25, 1870.

ON CERTIFICATE of division of opinion between the Judges of the Circuit Court of the United States for the District of Wisconsin.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. J. P. Walker and H. L. Palmer, for plaintiff:

It is insisted and urged here, as it was in the court below, that the notice of defendant is too vague, indefinite and uncertain, to entitle him to give evidence of the alleged prior use of the invention, while it names or designates cities merely, and not the mills where the supposed prior use was made.

In the Act of Feb. 21, 1793, there is no requirement that the notice shall specify any place whatever where the invention had previously been used. Notwithstanding this, however, the profession seems to have deemed it proper and fair, if not necessary, in practice or pleading, to name the particular mills where mill machinery was in controversy. This was done in 1816, in *Evans v. Kremer*, Pet. (C. C.), 215, and in 1818, in *Evans v. Eaton*, 3 Wheat., 454.

The circuit court in the first, and the Supreme Court of the second of these cases, held the specification of place, that is the mills, to be unnecessary, on the ground alleged by the courts that the Act of '93 did not require it.

These rulings, with the consequences, pointed out what was afterwards deemed by Congress a defect in the law. By the year 1836, experience and practice had shown that, without a specification of the place of alleged prior use, patentees were continually surprised by testimony vamped at the trial which it was impossible to anticipate or prepare to meet.

Therefore, in that year, Congress amended the law in this respect by providing, in the 15th section of the Act (July 4th) as follows:

"And whenever the defendant relies in his defense on the fact of a previous invention, knowledge or use of the thing patented, he shall state, in his notice of special matter, the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

Mr. Curtis says: "This provision was added in consequence of the construction given to the former Act (in *Evans v. Eaton*, 3 Wheat., 454), to the effect that notice of the places was not necessary to be given."

Curt. Pat., sec. 272; *R. R. Co. v. Stimpson*, 14 Pet., 448.

In that case, after quoting the provisions of the Act of 1836, the court says:

"The object of this most salutary provision is to prevent patentees being surprised at the trial of the cause by evidence of a nature which they could not be presumed to know or be prepared to meet; and thereby subject them either to most expensive delays, or to a loss of their cause."

But it is claimed for defendant in this case,

that the notice does specify place; that Utica, Rochester, Buffalo, Albany, New York City or Brooklyn, is a place. So is England, India, France, Spain or Wisconsin, a place. To refer the plaintiff to New York City, with her population of 1,800,000, and her mills numbering 916, at the place where prior use was made of his invention, is sheer mockery. Reference to the whole State of Wisconsin, Iowa, Minnesota or Kansas, had been to a less number of people or mills, and to a place where search could have been made with far less danger. Under this notice, after plaintiff had traveled from Wisconsin to New York City; had gone the round of 915 of her mills and returned, after incurring onerous expenses, and finding nothing like his invention—all this within thirty days; he might still be defeated on the trial by having the fact sprung upon him in evidence that it was the very 916th mill in which his cherished invention was used. Then why not have told him so in the first notice? He could then have gone to that mill at once. If he had found the notice true, he could have abandoned an unjust suit; if false, could have prepared to repel a pirate's unjust defense. Yet New York is but one of six large cities named in the notice, to be searched by the plaintiff within thirty days, and a thousand miles away.

The Act requires the defendant to state in his notice where the alleged invention had been used; meaning, by the term "where," the mill or mills where or in which it was "used."

Mr. Matt. H. Carpenter, for defendant.

Mr. Justice Miller delivered the opinion of the court:

This is an action for infringement of a patent for an improvement in balancing millstones. The defendant pleaded the general issue, and also gave notice that the invention claimed was well known and in general use before the patentee claims to have invented it, and he specified Utica, Rochester, Buffalo, Albany, New York City and Brooklyn, in the State of New York, as the places where it had been so used, and gave the names of witnesses in each of those places by whom he expected to prove that fact.

On the trial the judges of the circuit court differed in opinion as to whether the notice was sufficiently specific in its reference to the places where the prior use was had, and have certified that difference to us in the shape of two questions, which are really but one, and that is, whether the evidence of use, taken under that notice, was admissible.

The degree of particularity or certainty necessary in pleas and notices is an ever recurring question in judicial proceedings, and can never be effectually disposed of so long as new and varying circumstances may present the question in new aspects.

The object of the rule is, undoubtedly, to enable the other party to make such answer or response to the matter set up in the plea or notice, either by way of pleading or of evidence, or such cross-examination of the witness of the party setting up the plea or notice as the facts of his case may enable him to do. In other words, to apprise him fairly of what he may expect to meet under the plea or notice.

Teess v. Huntingdon, 23 How., 10 [64 U. S., XVI., 482].

In the case before us, in addition to the common law rules on this subject, Congress has, for the protection of patentees, enacted that whenever the defendant shall rely on the want of novelty in the invention, he shall give special notice at least thirty days before the trial, in which he shall state the names and places of residence of those by whom he intends to prove a previous use or knowledge of the thing and where the same had been used. With the requirements of this statute the defendant has complied so far as the names and residence of the witnesses are concerned; but it is denied that he has been sufficiently specific as to the places where the use was to be shown. It is said that it is not sufficient to name the city, but that the particular mill in which the invention had been used must be pointed out. But we cannot take judicial notice how many or how few mills using stones may be in any particular locality. In some town there may be but one. Nor do we think that the party giving notice is bound to be so specific as to relieve the other from all inquiry or effort to investigate the facts. If he fairly puts his adversary in the way that he may ascertain all that is necessary to his defense or answer, it is all that can be required, and he is not bound by his notice to impose an unnecessary and embarrassing restriction on his own right of producing proof of what he asserts. We are all, therefore, of opinion that when, in addition to the particular town or city in which such large objects as millstones are used, the name and residence of the witness by whom that use is to be proved is also given, there is sufficient precision and certainty in the notice. *Phillips v. Page*, 24 How., 164 [65 U. S., XVI., 639].

The questions propounded are accordingly answered: the first in the affirmative, and the second in the negative.

Which is ordered to be certified to the Circuit Court.

ELIZABETH S. PIERCE, *Appt.*,

v.

WALTER S. COX, Trustee and Administrator
of JAMES P. YOUNG, Deceased.

(See S. C., 9 Wall., 786, 787.)

Dismissal, when appellant cannot move for—appeals from court of District of Columbia—jurisdictional amount—allowance of appeal necessary.

The appellant cannot move to dismiss the appeal, on the ground that no citation was issued.

A citation is waived by an appearance, and the appellant cannot object the want of citation occasioned by his own negligence and cured by voluntary appearance.

The law does not give to this court jurisdiction of appeals from the Supreme Court of the District of Columbia when the amount in controversy is less than \$1,000.

Without an allowance of appeal this court cannot acquire jurisdiction.

[No. 158.]

Argued Mar. 31, 1870. Decided Apr. 25, 1870.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the Supreme

Court of the District of Columbia, to compel the investment of \$1,200 in the purchase of a dwelling house for the appellant, under a certain will. The said court having entered a decree dismissing the bill, the complainant took an appeal to this court.

Two motions were made to dismiss the appeal; one by the appellant, on the ground that no citation was issued according to law, the other by the appellee, for want of jurisdiction.

Mr. R. J. Brent, for appellant.

Mr. W. D. Davidge, for appellee.

Mr. Chief Justice Chase delivered the opinion of the court:

A motion to dismiss this appeal has been made on the part of the appellant on the ground that no citation was issued according to law.

This motion cannot be sustained. The appellee is in court represented by counsel and makes no objection to the want of citation. By this appearance the citation is waived so far as the appellee is concerned, and the appellant cannot be heard to object the want of citation occasioned by our want of negligence and cured by voluntary appearance.

On the other hand, the counsel for the appellee moves to dismiss the appeal for want of jurisdiction. The subject of controversy was a life interest in \$1,200, of six per cent. stock of the Corporation of Washington, and it appears that this life interest is not worth \$1,000. But the law does not give to this court jurisdiction of appeal from the Supreme Court of the District of Columbia, when the amount in controversy is less than that sum.

There is, moreover, no evidence in the record of any allowance of appeal; and without an allowance, this court cannot acquire jurisdiction.

Upon both grounds, therefore, the motion of the appellee must be allowed.

Cited—1 Sawy., 715; 5 Sawy., 82.

UNITED STATES, *ex rel.* AUGUSTUS O.
BOURNE, *Appt.*,

v.

CHARLES GOODYEAR, JR., Executor of
CHARLES GOODYEAR, Deceased.

(See S. C., 9 Wall., 811.)

Expiration of patent, defeats suit to set it aside.

Where the extension of a patent has expired before the bill to set it aside was filed, there remains nothing which can be the subject of a suit.

[No. 167.]

Argued Apr. 6, 1870. Decided Apr. 25, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The bill in this case was filed in the Circuit Court of the United States for the Southern District of New York, to vacate the extension of a certain patent. The extension sought to be vacated expired June 14, 1865. This suit was commenced June 15, 1865. The defendant demurred on the ground, among others, that the extension having expired before the bill was filed, there is no equity to support the bill.

The court below having sustained the demurrer and dismissed the appeal, the case is now here on appeal.

Messrs. J. H. Parsons, A. Payne and C. Cushing, for appellant:

The patent was outstanding and unexpired at the date of the suit commenced in New York, as well as at that of the suit commenced in Connecticut.

In computing time from a date or from the day of a date, the day of the date is to be excluded.

Ang. Lim., 63, and *note*; 4 Kent, Com., 10th ed., 107, n. 2; *Henry v. Jones*, 8 Mass., 455; *Sheets v. Selden*, 2 Wall., 190 (69 U. S., XVII., 826).

Further: if the extension of this patent was fraudulent, it was void *ab initio*, and all that grew out of it or came from it, is tainted with the fraud.

The expiration of the term of a grant which is fraudulent, is no bar to relief against claims arising by virtue of that grant. Such claims are as unfounded as the grant itself. They are part of the fraud; they are its direct results. In them the fraud continues to exist. It is against a plain, palpable, existing fraud, that this bill asks relief.

Messrs. E. W. Stoughton and William E. Curtis, for defendant:

A present interest commenced June 15, 1858, and consequently June 15, 1865, when this suit was commenced, was excluded from the term of seven years. The law recognizes no parts of a day; and June 15, 1858, being a part of the term of seven years, the extension could not extend to June 15, 1865.

Pearpoint v. Graham, 4 Wall. (C. C.), 382.

Hence, the extension having expired before the bill was filed, there is no equity to support the bill.

Mr. Chief Justice Chase delivered the opinion of the court:

The extension of the patent sought to be vacated by the proceeding in the record, expired June 14, 1865. The suit was commenced on the 15th of June, 1865.

Hence, the extension having expired before the bill was filed, there is no equity to support the application to set it aside. The extension has ceased to be of any effect, and there remains nothing which can be the subject of a suit.

The demurrer to the bill, therefore, must be sustained, and the decrees of Circuit Court, by which the bill was dismissed must be affirmed.

THE STEAMBOAT GEORGE WASHINGTON, JACOB MYERS, EGBERT MYERS, and MICHAEL SHERMAN, Claimants, *Appts.*,

ANN CAVAN,

AND

THE STEAM FERRY-BOAT D. S. GREGORY, THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY, Claimant, *Appt.*,

ANN CAVAN.

(See B.C., "*The Washington and The Gregory*," 9 Wall., 518-516.)

Two vessels in fault, joint libel—apportionment of damages..

See 9 WALL.

Where both vessels are in fault, both are liable to a passenger for damages by a collision, and both can be proceeded against in the same libel.

The damages may be apportioned equally between the two vessels, the right being reserved to the libellant to collect the entire amount of either of them, in case of the inability of the other to respond for her portion.

[Nos. 169, 256].

Argued Apr. 8, 1870. Decided Apr. 30, 1870.

A PPEALS from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York, to recover damages for injuries sustained by the libellant, while a passenger on board the ferry-boat, D. S. Gregory, from a collision between that boat and the steamboat George Washington. The decree of the district court in favor of the libellants, holding the vessels together liable for \$10,000 damages, with costs, having been affirmed, on appeal, by the circuit court, the case is now here on appeal.

A further statement of the case appears in the opinion of the court.

Mr. Charles Donohue, for the claimants of The George Washington.

Mr. Sidney Webster, for the claimants of The D. S. Gregory.

Messrs. Thatcher, M. Adams and C. Van Santvoord, for the appellee.

As to the joint liability of the two steamboats, see *The New Philadelphia*, 1 Black, 62 (66 U. S., XVII., 84); *The James Gray v. The John Fraser*, 21 How., 184 (62 U. S., XVI., 106); *Colegrove v. R. R. Co.*, 20 N. Y., 492.

In the first case *Judge Wayne*, delivering the opinion of this court, says:

"The rule of law is, that when a third party has sustained an injury from the co-operating consequences of two causes, though the persons producing them may not be in intentional concert to occasion such result, the injured person is entitled to compensation for his loss from either one or both of them, according to the circumstances of the accident.

In addition to the actual outlay, the libellant is entitled to recover for bodily pain and anguish, and for mental suffering as well.

Sedgw. Dam., 109, and cases cited there; *Morse v. R. R. Co.*, 10 Barb., 623; *Ransom v. R. R. Co.*, 15 N. Y., 415; *Curtis v. R. R. Co.*, 18 N. Y., 534; *Segor v. Bark Hamsted*, 22 Conn., 298; *Linsley v. Bushnell*, 15 Conn., 225.

This would seem to be a case for exemplary or punitive damages, because of the gross and wanton negligence, without which this collision could not have occurred.

R. R. v. Derby, 14 Howard, 486; *The New World v. King*, 16 How., 474; *Whipple v. Walpole*, 10 N. H., 180; *Linsley v. Bushnell*, 15 Conn., 225.

The power of courts of law to inflict punitive damages in cases where gross negligence has caused injury, is definitely settled.

Day v. Woodworth, 13 How., 363.

And the power of courts of admiralty to award similar damages in cases of marine torts and personal wrongs, is as fully settled and defined as that of courts of law.

Chamberlain v. Chandler, 3 Mas., 242; *Boston Mfg. Co. v. Fiske*, 2 Mas., 120.

Mr. Justice Field delivered the opinion of the court:

This is a suit in admiralty to recover damages for injuries sustained by the libelant whilst a passenger on board the ferry-boat *D. S. Gregory*, crossing the Hudson River, from a collision between that boat and the steamboat, *George Washington*. The ferry-boat at the time was making one of her regular trips from her slip at the foot of Montgomery Street, in Jersey City, to her slip at the foot of Desbrosses Street, in the City of New York. The *Washington* was an excursion boat, and was bound from the pier at the foot of Christopher Street to Barclay Street, in New York, intending to proceed thence down the bay.

The extent and character of the injuries sustained by the libelant are not disputed; and we do not think the amount at which her damages were assessed by the district court, and which was approved by the circuit court, at all excessive. At the time the collision occurred the libelant was on her way to the City of New York to attend public worship, and was seated in the ladies' cabin, a few feet from the forward end. The bow of *The Washington* struck the ferry-boat near where she was seated, and passed through the cabin, tearing up the planks and timbers, and the inner partition separating it from the track of the wagonway, carrying the libelant through on to the track, and hurling upon her the loosened planks and timbers. Her left leg was broken, and the ankle sprained, both bones of the right leg received three distinct fractures between the ankle and knee, and the lower part of the leg bone was crushed. Her right cheek and ear and the back of her head were cut, and severe bruises were inflicted upon her body. From the injuries received she was unable for several weeks to assist herself, and required constant attention, suffering all the time intense pain. At the trial in the district court, more than a year after the accident occurred, she could not move without pain, and it is the opinion of the surgeon who attended her that she is permanently disabled. We do not think, therefore, that any just objection can be made to the amount found.

The principal question made in the courts below was, whether the libelant was entitled to recover against both of the vessels, or only against one of them; and if only against one of them, which one; and this question depends for its solution upon the further question, whether the collision resulted from the fault of only one of the vessels, or from the fault of both of them.

The libelant alleges that the collision was caused by the negligence, want of skill, and improper conduct of the persons navigating both of the vessels.

The claimants of *The Gregory* contend that the collision was caused by the attempt of *The Washington* to continue her course and cross the bow of *The Gregory* after the latter, as they allege, had ported her helm so as to head to the New York shore and pass to the right of *The Washington*, and had blown two blasts of her whistle, at short intervals between them, as signals to *The Washington* of the course she intended to take.

The claimants of *The Washington*, on the other hand, impute the collision to the deviation of *The Gregory* from her usual course,

which they contend would have taken her under the stern of *The Washington*, and her attempt to cross the bow of *The Washington* after the latter had indicated, as they allege, by two blasts of her whistle, that she was going ahead of *The Gregory*.

We have looked into the evidence presented by the parties with much care. As in nearly all collision cases, it is, in some respects, conflicting, but, in our judgment, shows that both vessels were in fault. The collision occurred in open day, between the hours of ten and eleven in the morning. The weather at the time was clear, and the vessels were in full sight of each other from a distance of several hundred yards until they collided. The *Washington* was moving at the rate of twelve miles an hour, going down the river, about two hundred yards from the piers on the New York side. The *Gregory* was moving at the rate of between nine and ten miles an hour, crossing the river diagonally. Neither of the vessels paid any attention to the signals given by the other, but each continued on her course without waiting for a response, or coming to an understanding with the other vessel as to her course, and neither attempted to slacken her speed until too late to prevent the collision. We agree with the circuit court that neither pilot nor master of either vessel could have been taken by surprise at the meeting of the vessels, as each must have seen that the courses adopted and pursued necessarily led to it; and also that those courses were deliberately pursued by the pilot and master of each with the purpose of compelling the other vessel to change her course.

We do not feel called upon to vindicate our conclusions by citations from the evidence, which fills over one hundred and thirty printed pages of the record. The citations would illustrate no principle, and serve no useful purpose.

Both vessels being in fault, both were liable to the libelant, and both could be proceeded against in the same libel. The damages were properly apportioned equally between the two vessels, the right being reserved to the libelant to collect the entire amount of either of them, in case of the inability of the other to respond for her portion. *The New Philadelphia*, 1 Black, 62 [66 U. S., XVII., 84].

Decree affirmed.

Cited—32 U. S., 608; 93 U. S., 318; 97 U. S., 317, 320; 106 U. S., 22, 647; 10 Blatchf., 467; 11 Blatchf., 304; 6 Ben., 371.

UNITED STATES, *Appt.*,

v.

EDWARD PADELFORD.

(See S. C., 9 Wall., 531-543.)

Captured and Abandoned Property Act—construction of—captured property, what is—President's Proclamation—effect of pardon—proof of.

Claimants are not deprived of the benefits given by the Captured and Abandoned Property Act of Mar. 12, 1863, because of aid and comfort to the rebellion not voluntarily given.

Captured property under such Act is property "which has been seized or taken from hostile pos-

NOTE.—Effect of pardons. See note to *Armstrong's Foundry v. U. S.*, 73 U. S. XVIII., 882.

session by the military and naval forces of the United States."

The right of possession in private property is not changed by capture of the place where it happens to be.

The President's Proclamation of pardon to insurgents was fully warranted by the Act of July 17, 1862.

This pardon included restoration of all rights of property except as to slaves, and as against the intervening rights of third persons.

The right derived from capture, does not accrue to the Government until actual seizure.

By complying with the conditions of the President's Proclamation, one was purged of offense against the United States, and his property was not liable to seizure and confiscation.

After the pardon, no offense connected with the rebellion can be imputed to him.

The proof of pardon is a complete substitute for proof that he gave no aid or comfort to the rebellion.

[No. 438.]

Argued Apr. 21, 1870. Decided Apr. 30, 1870.

APPEAL from the Court of Claims.

The claimant and Randolph L. Mott jointly brought suit in the Court of Claims, under the Abandoned and Captured Property Act of Mar. 12, 1863, 12 Stat. at L., 820, claiming the proceeds of 1,298 bales of cotton, alleged to have been owned by the claimants jointly, and to have been captured by the Union Army at Savannah, turned over to a Treasury agent and sold and the proceeds paid into the Treasury of the United States.

On the trial of the cause at December Term, 1867, the claimants were allowed to sever in their claims, and each to claim judgment for half of such proceeds, and thereupon judgment passed in favor of Mott for his half, and the cause was continued as to Padelford.

In December Term, 1868, judgment was rendered in favor of Padelford, the claimant here, for his half of the net proceeds, amounting, as found by the court, to \$123,188.85, and from this last judgment this appeal is taken.

The ownership by the claimant, the capture by the United States and the receipt of the proceeds into the Treasury are fully proven, and the questions raised on this appeal are mainly those relating to the loyalty of the claimant, or his relations to the late rebellion and to the Government of the United States during the same.

The court below found that, in April, 1861, after the breaking out of the rebellion, the claimant, under threats and the pressure of public excitement in Savannah, his place of residence, subscribed \$5,000 to a loan to the Confederate Government, and sold out the stock so obtained two weeks later, that the Marine Bank of the City of Savannah was, in 1861, under the direction of Northern men, and Mr. Padelford was one of its most influential directors and largest stockholders: and when the other Banks of Savannah increased their capital stock, and lent their funds to the aid of the Confederacy, by exchanging them for Confederate notes and securities, the Marine Bank objected to doing so, and instead contracted its business for its own security. The conduct and the known loyalty of many of the directors of the bank, subjected it to public odium, and it was nicknamed the Yankee Bank. At the time the subscription to the loan was opened in Savannah, the political excitement was at its highest point, and it was publicly threatened,

See 9 WALL

that if the bank did not subscribe liberally, it should be pulled down. Under these threats and the pressure of the circumstances stated, the bank subscribed \$100,000 to the Confederate loan, and this was the least it could subscribe according to its capital; and its refusal to subscribe would have endangered the bank and its directors; but Mr. Padelford opposed the loan made, and from that time absented himself, for the most part, from the meetings of the directors, on the ground that the course of the bank was controlled by outside pressure; that said claimant voluntarily became surety on the official bonds of several of his intimate friends, as officers under the Confederate Government.

And the court found on these facts, as a conclusion of law, that they did not constitute the giving of aid or comfort to the rebellion, or to persons engaged in the rebellion, by said claimant, within the provisions of the Acts of Mar. 12, 1863, and June 25, 1868.

It further appears that the claimant, Jan. 18, 1865, after the capture of Savannah, in which city the cotton in question was stored, but before any actual seizure or taking possession of such cotton by the officers or forces of the United States, other than by the capture of the city, took and subscribed the amnesty oath prescribed by the President's Proclamation of Dec. 8, 1863 (12 Stat. at L., 737), issued in pursuance of the Act of July 17, 1862 (12 Stat. at L., 592, sec. 13); that he was not within the exceptions named in said Proclamation, and that thenceforth he complied with all the requirements and conditions named in said Act and Proclamation, and kept and maintained the said oath of allegiance inviolate.

Some additional facts appear in the opinion of the court.

Messrs. E. R. Hoar, Atty-Gen., and Robert S. Hale, special counsel, for appellant:

The findings of fact by the court below are in the nature of a special verdict.

Rule 1 of this court, regulating appeals from the Court of Claims.

As such, the findings must cover the whole case, and where the judgment is in favor of the claimant, must show him to have fulfilled every requirement of the Statute under which he claims.

Co. Litt., 227, A; *Patterson v. U. S.*, 2 Wheat., 221; *Prentice v. Zane*, 8 How., 479, and cases there cited.

Of this the findings, as returned here, come short. They find that the claimant, "Never gave any voluntary aid or comfort to the late rebellion, or to persons engaged therein, but did, during said rebellion, consistently adhere to the United States," etc.

The general "Court of Claims Act" of Mar. 8, 1863 (12 Stat. at L., 767, sec. 12), the provisions of which were held by this court in *Ex parte Zellner* [ante, 665] decided at the present term to apply to the abandoned and captured property cases, provides that the claimant, a citizen, shall allege and prove "That he has at all times borne true allegiance to the Government of the United States * * * that he has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

The "Abandoned and Captured Property Act" of Mar. 12, 1863 (12 Stat. at L., 820, sec. 3), provides that the claimant under that Act

shall prove, to the satisfaction of the court, "that he has never given any aid or comfort to the present rebellion."

And the Act of June, 25, 1868 (15 Stat. at L., 75, sec. 3), provides that the claimant shall "prove affirmatively that he did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion."

The findings of the court below cover the provisions of either of these statutes.

The special findings of fact do constitute direct and specific aid and comfort, abetting and giving encouragement to the rebellion, within the meaning of all the statutes above cited. Such acts can only be excused on the ground of fear, proceeding from an immediate and actual danger threatening the very life of the party.

U. S. v. Worrall, 2 Dall., 386; *U. S. v. Haskell*, 4 Wash. (C. C.), 402.

No threat of destruction of property will excuse the act; nothing but a threat of life and that likely to be put in execution.

U. S. v. Hodges, 2 Wheel. Cr. Cas., 485, by Duvall, *Justice*; *U. S. v. Geiner*, 24 Law Rep., 91, 98, by Cadwallader, *Dist. Judge*, *Justice* Grier approving, 101; and see 1 Hale's P. C. pp. 50, 165; 1 Am. Ed.; *Rea v. Gregg*, 10 St. Tr. App., 77; 14 How. St. Tr., 1873; Faust, 14, 198, 216-218; 4 Steph. Com., 3884; *Rea v. McGrouther*, 1 East, P. C., 71.

The finding of the court of the taking of the Amnesty Oath by the claimant in January, 1865, after the capture of Savannah, does not relieve him from any disability affected by the Statutes above cited.

The oath was taken after capture of the property in question, in and with the City of Savannah, Dec. 21, 1864.

The exclusion of the claimant from the Court of Claims by reason of acts of disloyalty under the statute cited, is not in the nature of a penalty which could be remitted by the executive power of pardon and amnesty. The statutes in question are not penal statutes. They do not purport to inflict a penalty or punishment for a crime.

The cases of *Armstrong's Foundry*, 6 Wall., 766 (78 U. S., XVIII., 882), and *The St. Louis Foundry*, 6 Wall., 770 (78 U. S., XVIII., 884), have no application to the question as involved in this case; while the doctrines maintained by this court in *Ex parte Garland*, 4 Wall., 333 (71 U. S., XVIII., 366), fully vindicate the position of the appellants here.

Messrs. J. M. Carlisle, J. D. McPherson and T. W. Bartley, for appellee:

The question presented is: whether certain facts constitute in law aid and comfort to rebellion. Those facts are of two kinds: 1. Lending money to the so called Confederate States. 2. Becoming surety on the official bonds of officers of said States.

It is not found that the acts so done were done with any intent to aid the rebellion. Without such intent, the act is not one of aid and comfort.

The property was seized after the amnesty or pardon by Proclamation.

The capture of the city was not the capture of the property in question.

All offenses committed by the claimant be-

fore the amnesty, are thereby obliterated to every legal intent.

Armstrong's Foundry (supra); *St. Louis St. Foundry (supra)*.

If not, the Proclamation was a promise by the President, that the property of such persons should not be seized, and it ought to be respected. *The Venice*, 2 Wall., 259 (69 U. S., XVII., 866).

Mr. Chief Justice Chase delivered the opinion of the court:

This appeal brings before us a claim under the Captured and Abandoned Property Act of March 12, 1863. This Act has been frequently under the consideration of the court. In the several cases decided during this term, and especially in the case of *United States v. Anderson (ante, 615)*, it has been held to be remedial in its nature, requiring such a liberal construction as will give effect to the beneficent intention of Congress. That intention was, that all property captured or found abandoned during the war, after the date of the law, should be turned into money under the direction of the Treasury Department; and that the proceeds should be placed in the Treasury, subject to the right of any person preferring a claim against any portion of the property, to have the net proceeds restored to him on proof of his ownership, of his right to the proceeds, and that he never gave any aid or comfort to the rebellion.

A later Act, passed since the petition of Padelford was filed in the Court of Claims, requires every claimant under the original Act to prove affirmatively that he constantly adhered to the United States during the rebellion, and gave no aid or comfort to persons engaged in it. We do not think that this Act changed essentially the nature of the proof required of claimants by the former Act. The particular description of proof required by the later Act seems to be included in the more general description of the earlier. Questions arising under the Act of 1863, therefore, need not be further considered in this connection.

The claim in this case was originally preferred in the Court of Claims by Padelford, the appellee, and one Randolph E. Mott, jointly, on the 7th of March, 1866. Subsequently the petitioners were permitted to sever in their claim, and to sue severally for their respective interests. In the suit of Mott, judgment was rendered in his favor on the 13th of April, 1868. The suit of Padelford was continued, and on the 29th of March, 1869, judgment was rendered in his favor, and from this judgment the United States have appealed.

The record exhibits the findings of fact by the Court of Claims and its conclusions of law. Among these findings is one that the petitioner "never gave any voluntary aid or comfort to the late rebellion." * * * unless certain facts, also found, constitute in law such aid and comfort. On the part of the Government it is objected to this finding that it is insufficient, because the statute authorizes relief only on proof that no aid or comfort was given. But we think otherwise. It would violate the soundest maxims of interpretation if we were to construe the Act, so as to deprive claimants of the benefits intended to be given by it be-

cause of aid and comfort to the rebellion not voluntarily given.

But the court also find that the petitioner executed as surety three official bonds, two of commissaries and one of a quartermaster in the military service of the so called Confederate States, from motives of personal friendship to the principals. No compulsion is alleged. On the contrary, these acts are found to have been voluntary. We cannot doubt that these facts did constitute aid and comfort to the rebellion within the meaning of the Act. The finding of the court, qualified as it was, is a virtual finding that the petitioner did give such aid and comfort. The general facts found, of opposition to the rebellion, so far as opposition would be tolerated, and of earnest good will to the national cause, establish, doubtless, a strong claim upon the favorable consideration of Congress, but do not warrant the courts in relaxing, by a forced interpretation, a rule which Congress has established for the guidance of the Court of Claims in passing upon claims to the proceeds of abandoned or captured property.

But, in our judgment, it was not necessary to determine this point in this case.

The Court of Claims, in addition to the facts already referred to, found that the cotton was stored in Savannah at the time of its capture, on the 21st of December, 1864; that one half belonged to the claimant; and that ' afterwards, on the 18th of January, 1865, before any actual seizure or taking possession of the property in question by the military authorities, otherwise than by the capture of the city, the claimant did, in due form of law, take and subscribe the oath of amnesty and allegiance to the United States Government prescribed by the President's Proclamation of December 8, 1863, issued in pursuance of the 18th section of the Act of Congress, approved July 17, 1862; that he was not, as to his person or property, within the exceptions of the said Proclamation; and that he thenceforth complied with all the requirements and conditions named in the said Act and Proclamation, and kept and maintained said oath of allegiance and amnesty inviolate." Upon this finding several questions arise.

And, first: was the property of the petitioner captured within the meaning of the Act before it was actually seized and taken into military possession?

As early as the 3d July, 1863, the Secretary of the Treasury, in a circular letter of instruction, Acts, etc., concerning Commercial Inter-course, etc., p. 33, addressed to the supervising special agents of the department, charged with the duty of collecting abandoned and captured property under the Act of March 12th, 1863, defined captured property as property " which had been seized or taken from hostile possession by the military and naval forces of the United States." This definition must be taken as the interpretation practically given to the Act by the Department of the Government charged with its execution; and we think it correct. In the case of *Mrs. Alexander's Cotton*, 2 Wall., 404 [69 U. S., XVII., 915], it was determined that cotton, though private property, was a proper subject of capture by the national forces, during the recent civil war. The court regarded this particular species of property as excepted, by its peculiar character and by cir-

cumstances, from the general rule of international law which condemns the seizure of the property of private persons not engaged in actual hostilities, though residing in a hostile territory or region. But the case contains no intimation that such property can be considered as captured before actual seizure. The rule, we think, is otherwise. Rights of possession in private property are not disturbed by the capture of a district of country, or of a city or town, until the captor signifies by some declaration or act, and, generally, by actual seizure, his determination to regard a particular description of property as not entitled to the immunity usually conceded in conformity with the humane maxims of public law.

Rights of possession in public property belonging to the hostile organization, or used in actual hostilities, depend on different principles. Such rights are transferred at once to the captor, upon the capture of the place in which the property may be.

The principles just stated in respect to private property may be further illustrated by reference to the case of *The Venice*. 2 Wall., 278 (69 U. S., XVII., 868). That vessel, with a cargo of cotton, was lying in Lake Ponchartrain at the time of the capture of New Orleans, and was, doubtless, within the discretion of the captors, subject to seizure, though private property. But Flag Officer Farragut and Major General Butler, commanding respectively the naval and military forces of the Union, thought proper to give distinct assurances, before and after surrender, of safety and protection to the rights of persons and property. And this court held that these assurances expressed the general policy of the Government, to respect and enforce those rights, whenever, in any part of the insurgent country, the authority of the National Government should be fully re established. In accordance with these principles, *The Venice* and her cargo, which were seized, some days after the capture of the city, by a ship of war of the United States, were restored, by the decree of this court, to their private owner.

Applying the principles above stated to the case before us, three propositions seem to be established: (1) That the cotton of the petitioner was, by the general policy of the Government, exempt from capture after the national forces took possession of Savannah. (2) That this policy was subject to modification by the Government, or by the commanding general, in the exercise of his military discretion. (3) That the right of possession in private property is not changed, in general, by capture of the place where it happens to be, except upon actual seizure in obedience to the orders of the commanding general.

It appears as matter of fact that the property of the petitioner was not seized until after the 18th of January, 1865. Whether it was then seized in pursuance of any order, either particular or general, emanating from competent military authority, does not appear. But we may assume that it was.

And, then, the next question in this case is to be considered, namely: what was the condition or status of the petitioner at that time; and how far was the liability of his property to seizure affected by that status or condition?

The findings of the court show clearly enough that the petitioner disapproved of the rebellion; opposed it as far as he thought opposition prudent or safe; and was gratified by the restoration of the national authority. It appears further, that on the 18th of January, 1865, he testified his adhesion to the constitutional Government of the Union by taking the oath prescribed by the Proclamation of pardon issued by President Lincoln on the 8th of December, 1863 (13 Stat at L., 787); that he was not within any of the exceptions of the Proclamation; and that he has faithfully kept his oath.

This Proclamation, if it needed legislative sanction, was fully warranted by the Act of July 17, 1862 (12 Stat at L., 592, sec. 13), which authorized the President, at any time thereafter, to extend pardon and amnesty to persons who had participated in the rebellion, with such exceptions as he might see fit to make. That the President had power, if not otherwise yet with the sanction of Congress, to grant a general conditional pardon, has not been seriously questioned. And this pardon, by its terms, included restoration of all rights of property except as to slaves and as against the intervening rights of third persons.

Now, we have already seen that at the time when the petitioner took the prescribed oath no right of any third party had intervened; for even if it could be admitted that a right of the Government derived from capture is an intervening right of a third person within the meaning of the proclamation, it is certain that no such right accrued to the Government until actual seizure, which was after the pardon had taken full effect. In the case of *Garland*, 4 Wall., 380 [71 U. S., XVIII., 870], this court held the effect of a pardon to be such "that in the eye of the law the offender is as innocent as if he had never committed the offense;" and in the case of *Armstrong's Foundry*, 6 Wall., 769 [78 U. S., XVIII., 884], we held that the general pardon granted to him relieved him from a penalty which he had incurred to the United States. It follows that at the time of the seizure of the petitioner's property he was purged of whatever offense against the laws of the United States he had committed by the acts mentioned in the findings, and relieved from any penalty which he might have incurred. It follows further, that if the property had been seized before the oath was taken, the faith of the Government was pledged to its restoration upon the taking of the oath in good faith. We cannot doubt that the petitioner's right to the property in question, at the time of the seizure, was perfect, and that it remains perfect, notwithstanding the seizure.

But it has been suggested that the property was captured in fact if not lawfully; and that the proceeds having been paid into the Treasury of the United States, the petitioner is without remedy in the Court of Claims unless proof is made that he gave no aid or comfort to the rebellion. The suggestion is ingenious, but we do not think it sound. The sufficient answer to it is that after the pardon no offense connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proof which, under the Act, entitled him to a decree for the proceeds of his property, the law makes the proof of pardon a complete

substitute for proof that he gave no aid or comfort to the rebellion. A different construction would, as it seems to us, defeat the manifest intent of the Proclamation and of the Act of Congress which authorized it. Under the Proclamation and the Act, the Government is a trustee, holding the proceeds of the petitioner's property for his benefit; and having been fully re-imbursed for all expenses incurred in that character, loses nothing by the judgment, which simply awards to the petitioner what is his own.

These views require the affirmance of the judgment of the Court of Claims, and it is accordingly affirmed.

Cited—15 Wall., 142, 150; 16 Wall., 151; 23 Wall., 98; 22 U. S., 193, 194; 95 U. S., 153; 97 U. S., 58, 66; 106 U. S., 318; 7 Am. Rep., 604 (26 Ark., 74); 31 Am. Rep., 386 (56 Miss., 766).

JOHN EDGAR THOMSON ET AL., Complainants,

THE UNION PACIFIC RAILROAD COMPANY, EASTERN DIVISION, JOHN M. FUNK, JAMES BLOOD AND WILLIAM A. COY, Defts.

(See S. C., "*Thomson v. Pacific Railroad*," 9 Wall., 579-592.)

Railroad, not exempt from taxation, although constructed under authority of Congress.

A railroad constructed under the direction and authority of Congress for the uses and purposes of the United States, is not exempt from taxation under state authority in the absence of any legislation by Congress to that effect.

A state corporation has no right to hold its property exempt from state taxation.

[No. 151.]

Argued Mar. 24, 1870. Decided Apr. 30, 1870.

CERTIFICATE of division in opinion between the judges of the Circuit Court of the United States for the District of Kansas.

The bill in this case was filed in the Circuit Court of the United States for the District of Kansas, to restrain the payment and collection of certain taxes, levied under the laws of that State, on the property of the Union Pacific Railroad Company, Eastern Division.

Upon the hearing under the pleadings and agreed statement of facts, the judges were divided in opinion as to whether the said Company was liable for the taxes in question, and the question has been certified here for decision.

The case is fully stated by the court.

Messrs. E. R. Hoar, Atty-Gen., and J. P. Usher, for complainants:

By permission of the court a brief was also submitted by Mr. James H. Storrs, counsel for the Central Pacific and W. P. Railway Companies, in favor of the claim of the complainants.

1. The Territorial Legislature of Kansas had the power to grant the charter to the Leavenworth, Pawnee and Western Railroad Companies.

Sec. 24 of Kansas-Nebraska Act, 10 Stat., 285, 286; 11 Mart. La., 809; *Williams v. Bank*, 7 Wend., 539.

In the case last cited Senator Sherman, speaking of the powers of the Governor and Council of Michigan Territory to grant the charter to the Bank, said: "It may be considered the Act of Congress declared by its agent." The Territorial Legislature of Kansas was the agent of Congress.

2. The Railroad Company did not receive any of its powers from the State. When Kansas was admitted into the Union the Corporation was an artificial body, possessing franchises bestowed by Congress through its agent to be exercised within the limits of that State, and in Colorado.

This Corporation owed no allegiance to the State and the conferring upon it of additional powers by Congress was not a violation of any of the rights of the State.

First. Because the powers conferred were to carry out the constitutional powers of Congress, and Congress could as well employ a Corporation as an individual to carry out those powers.

Second. Because the State of Kansas, by its repeated resolves, waived all right of objection, if any existed, to the adoption of the Corporation by Congress to carry out those powers.

3. The United States has a property interest in the road, in the following particulars:

First. The two hundred feet occupied by the Company for the right of way, which it can only occupy so long as it complies with the conditions of the law.

The Company's right is the right to use in a specified manner, failing in which its right to possession is forfeited. The fee is not granted to the Company.

Second. The United States has \$16,000 per mile money interest in the road. Failure in the payment in the manner prescribed by the Act of Congress also vests by law all the property sought to be taxed in the United States.

(Note. It is to be remembered that when the United States adopted this Corporation, it did not possess any tangible property whatever. It was a mere naked Corporation. The only valuable thing which it possessed was the franchise to be a Corporation, which was conferred through the power of Congress.)

4. Kansas, by compact, cannot tax the property of the United States. See, Acts of Congress for the admission of Kansas, Approved Jan. 29, 1861 (12 Stat. at L., 126). The words are: "And that the said State shall never tax the lands or the property of the United States in said State."

This Act for the admission of Kansas, was approved by Joint Resolution of the Legislature of the State, Jan. 20, 1862. Kan. Laws, 1862.

5. Section 20 of the Tax Laws of Kansas, contains the following proviso: "That nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the State."

Now, by the charter (sec. 16), the State has an interest in the road in this, to wit: the right to purchase said road at the end of fifty years, upon a valuation. 4 Met., 564.

6. But independent, of these considerations, Congress undertook in the passage of the Act of 1862, and subsequent Acts relative to this road, to exercise the powers delegated to it un-

See 9 WALL,

U. S., Book 19.

der the 8th section of the 1st article of the Constitution, and under the authority of that section, as a regulation of commerce, it has been decided that the power to regulate commerce is as extensive upon land as upon water.

The Genesee Chief v. Fitzhugh, 12 How., 452.

It will be observed that *Justice Daniel* dissented from the decision of the court in this and the following cases, in which the same principle was involved: *Steam Nav. Co. v. Bank*, 6 How., 344; *Waring v. Clarke*, 5 How., 441; *Newton v. Stebbins*, 10 How., 586; *Allen v. Newberry*, 21 How., 248 (62 U. S., XVI., 113).

And in *Searight v. Stokes*, 3 How., 180, he said: "Congress does not possess the power, under the Constitution, to construct roads or any internal improvements in the States." This idea, so often enunciated by a minority of the court, and adhered to and maintained by the politicians in one section of the State, led to and caused the late civil war, in the midst of which this system of roads was provided to be built for the overthrow of those doctrines, the declared purpose of which was to regulate commerce among the several States, to establish post-roads, and to provide for the moving of the armies of the United States, and transporting the supplies and munitions of war of such army; and if Congress had the right, for either or any of those purposes, to provide for the construction of this road, by devoting to its use the right of way, its lands or its money, and has done it, by means whereof the road has been built and made subject to the use of the United States, the property of the Corporation is beyond the power of Kansas or any other State to lay any burden upon it, by taxation or otherwise.

Society for Savings v. Coile, 6 Wall., 605 (78 U. S., XVIII., 902), and cases cited.

7. All other questions aside, it cannot be denied that this is a post-road established by Congress. Its courses are designated by law, all the way from the mouth of the Kansas River to Denver in Colorado. These courses were not designated in the charter of the Company, and Congress possessed the undoubted power to establish post-roads.

See, 3 Story, Com. Const., 149, 150.

This road is built upon the lands of the government, passing in its course over divers Indian and military reserves. The Company having no right thereto except the use, which will be forfeited the moment it fails to comply with the conditions of the grant. The rolling stock appertains to the whole line, the government lands as well as the reserves, and how can the roadway and rolling stock be seized and sold by the authorities of any State?

8. It is true the United States might elect to consider the Company its debtor for the money advanced in aid of building the road, and it is not improbable that it will do so, when the money is due at the end of thirty years; but if so, the obligations of the Company to the United States will not be ended. The property in the right of way will still remain in the United States, and the possession of the road in the Company will forever remain, upon condition of performing its express obligations to the government.

But, it is said that—because Congress, in de-

vising the means by which it should execute the powers conferred by the Constitution, has availed itself of corporations created for the purpose, in part by it and in part by other authority, and because the normal condition of these corporations was such as would make them liable to taxation—the fact that Congress has created the one and adapted the other to its use, does not affect the right of the State to tax and subvert all this property and to put an end to the scheme devised by Congress for the use and preservation of the government.

The Congress of the United States, in the exercise of its constitutional power, has adapted this artificial body to its use; has made it its agent; has clothed it with new and additional powers; to enable it to execute the lawful will of Congress; and the State cannot in any manner retard, impede, burden or control the operations of this agent, the Company, in the discharge of its duties and obligations to the Federal Government. If a question could be made, that the Corporation had no authority under the charter to enter into the compact with the United States, it would be answered that this Kansas Corporation derived all its powers from the Territorial Legislature, and nothing from the State of Kansas. It was created under the authority of Congress, and owes no special duty to the State; and if this is not enough, the resolves of the Legislature found on pp. 38-41, in the transcript made year after year, urging this action on the part of Congress, affords a complete answer to the question, and completely estops the State from alleging any want of authority in the Company to accept its present position. *People v. R. R. Co.*, 15 Wend., 180, 181.

It was done, it will be seen, by authority and at the instance of the State, and it cannot now complain that it occupies a position exempting it from the operation of its tax laws. But we go further; it is not for any State to prescribe nor question the means, whether by natural persons or artificial bodies employed by Congress, to carry its powers into effect. And now, because Congress created and availed itself of corporations already created to carry out its purposes, and invested the public money with the capital of individuals in the building of roads, and committed the operation and management of such roads to their experience and care, rather than to military and civil officers of the United States; it is claimed by the State that the relation of debtor and creditor simply exists between these corporations and the United States; that the security for the bonds and lands and right of way, etc., granted upon condition by the United States, is a Kansas, a Nebraska, a Wyoming, a Utah, a Nevada, a Colorado and a California mortgage; and that all this roadway with the tracts and equipments upon it, representing nearly \$200,000,000, more than half of which is in bonds, lands, right of way, etc., and has been advanced by, and is the property of, the United States, is subject to be seized and sold by the States and Territories through which this vast system of roads is constructed.

Consider, then, the effect of these Kansas tax laws upon this property. If sold by virtue of them for non payment of taxes, the purchaser is to have a deed in fee simple of the premises,

or parcel of land that he purchased; not a deed that constitutes him a corporation, or that establishes any relation between him and the Company or the United States.

But what becomes of the personality, the "movable property" as it is called, rolling stock, we suppose? That is to be seized by the sheriff and sold; and being personality and necessarily in the possession of the sheriff, it shall come to pass that the locomotive and train transporting the mail, troops, and war materials of the United States over this road through Kansas, destined for New Mexico, Colorado, or elsewhere beyond, to protect the inhabitants, shall be seized by the Kansas sheriff for the non-payment of taxes upon this property, put there and kept there by Congress, for the often declared purpose of executing the powers delegated to Congress by the Federal Constitution.

It is no answer to say, that the Company has or ought to have, the means to pay the taxes, or that the sheriff will not seize property in use or required for the immediate use of the government. All of these suggestions were answered by Chief Justice Marshall in the case of *McCulloch v. Md.*, 4 Wheat., 316, and the legality or propriety of his answer has never been questioned. It is a question involving a conflict of right and power, and confidence has nothing to do with it. If the State can lawfully assess a tax upon the road, it can enforce the payment of the tax by seizure and sale and dispossession of the Company, which is the chosen and authorized agent of Congress and, in an enlarged sense, the bailee of this property and franchises, to hold and control the same upon condition and until default.

A tax cannot be assessed and enforced without an interference with the property; and the slightest interference will obstruct, retard, burden and prevent the Company from the performance of its obligations to the extent of the interference. It will destroy the security, provided and set apart by Congress for the payment of the government bonds, and deprive the government of the use of the road for all purposes declared in the Acts of Congress, and of the five per cent. of the net earnings to be annually set apart for the payment of the bonds. In short, all the means contrived and created by Congress with so much care and caution through successive years of legislation, for the construction of the complete and comprehensive system of railroads for the use and benefit of the public and of the government, in peace and in war, in which the United States has invested millions upon millions of dollars, may be brought to naught by taxation, by the States and Territories through which these roads pass. The will of Congress may be frustrated and its powers set at defiance.

Messrs. Banks and S. O. Thatcher, for defendants, Blood, Funk and Coy, Treasurers of Douglas, Wyandotte and Jefferson Counties:

Most of the general principles applicable to this case have often been determined in this court, and in the recent cases they have received renewed affirmation. *Soc. for Savings v. Coite*, 6 Wall., 594 (78 U. S., XVIII., 897); *Prov. Inst. v. Mass.*, 6 Wall., 611 (78 U. S., XVIII., 907); *Hamilton Co. v. Mass.*, 6 Wall., 683 (78 U. S., XVIII., 904).

Nearly all these principles flow from there—

soning of *Chief Justice Marshall*, in *McCulloch v. Md.*, 4 Wheat., 429.

We merely place in order these primary rules, resting, as we believe they do, on undebatable ground:

1. The right of the State to tax property, trades, avocations and franchises within its bounds, is a sovereign right, and not at all derived from the Federal Government.

2. This power of the State to tax, extends to all objects except the means and instruments of the General Government, within the sovereign power of the State.

3. Unless exempted in terms which amount to a contract, the privileges and franchises of a private corporation are as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State.

4. When the State creates a corporation and authorizes it to hold and use property, its rights to tax the corporate property need not be reserved; it inheres and remains in the State.

These are the great lights which must guide the inquiry. It may be as well to note, in passing, that it is admitted, both by bill and answer, that the Railroad Company defendant herein, is a Corporation created by the laws of Kansas, and deriving its corporate powers from the sovereignty of Kansas.

It devolves, then, upon the complainants to show that the property of this Corporation is relieved from bearing its proportion of the public burden.

That the Corporation was once subject to the State that gave it life and being, and still protects it, is clear. By what process it now becomes independent of the State, so far as bearing its proper share of taxation is involved, must be affirmatively and clearly shown. *R. R. Co. v. Md.*, 10 How., 393.

The taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms.

To maintain their position the complainants who, considering the large amount of their stock, as shown in the bill to all intents and purposes, must be considered as acting for the Railroad Company, rely upon two propositions: 1. That Kansas by its resolve, as shown in the agreed statement of facts, has relinquished its right to tax the property of the Corporation. 2. That, in fact, the Railroad Corporation, with its franchises and property, is a "means or instrument" of the General Government, whereby it carries on its operations.

1. The first proposition is untenable. Not one of the resolves relied on had any reference to the matter of taxation. From the principles already cited, it is certain that a release from taxation must have been in contemplation when the resolve relied on was made. These resolves had relation to an entirely different subject. It is, indeed, true, that Kansas was desirous that railroads should be built within its borders, else the Act of incorporating the Railroad Company would never have been granted. It is also equally true, that these resolves were the expression of the legislative sentiment on the subject of grants of land and other subsidies to the roads therein named. But they will be searched in vain for those "clear and unambiguous terms"

releasing the right of the State to tax the property of railway corporations which are held to be so requisite by *Chief Justice Taney* in *R. R. Co. v. Md.* (*supra*).

To ask Congress to assist in the building of railroads in Kansas by grants of lands and loans of credit of the General Government is one thing; to release its right of taxing these railroads is quite another. The two subjects have no legal relation to each other, and legislative action on the one cannot be said to involve a consideration of the other.

These resolves do not purport to make a contract. They do not, in terms nor by implication, propose either to the Railroad Company nor to the General Government that the State will, in consideration of the loans of Railroad Company, relinquish its undoubted right to tax the property of the Company.

But even were the element of the contract found, yet it would not bind the State, since the Legislature has not the power to make such a contract. It is true that there are cases which seem to hold that the power of exempting certain property from taxation is one vested in the State Legislature.

Bank v. Knoop, 16 How., 389.

Yet the case of *L. I. & T. Co. v. De Bolt*, 16 How., 416, as emphatically holds that this power is not possessed by the Legislature, unless it has been conferred upon it by the Constitution of the State.

2. We are now prepared to consider the proposition that, by virtue of certain loans made by the United States to the Union Pacific Railroad Company, Eastern Division, its property has become a means used by the General Government to carry on its operations, and hence exempt from state taxation.

It is to be observed that this is not a claim at all set up by the United States. The General Government is not in court offering any complaint of the state action; but certain of the large stockholders of the Railroad Company, defendants, bring this suit claiming that, by virtue of the relations between the Railroad Company and the General Government, a right has arisen in behalf of the complainants, exempting their property from taxation.

It would seem that the actions touching this question of taxation already alluded to, would at once decide the case against the complainants. Their claim rests, not on compact or agreement, but "an inference"; they draw their asserted right from "an implication," and screen their property from its share of the public burden, under the shield of a "deduction."

A right so essential to the State, a privilege so valuable to the complainants, cannot be gained or lost in that manner.

The property in question does not belong to the United States. The agreed statement in the case admits it to be the property of the defendants, the Union Pacific Railroad Company, Eastern Division. It is described in the complaint and admitted in the answers, as the property of the Railroad Company; and the very point certified to this court is: whether the "property" of this Railroad Company is liable to taxation.

It will not be claimed that the United States, in its contracts, is to be considered or deemed to have any rights or privileges superior to any other person. The usual principles that govern

the relations of mortgagor, mortgagee and the state authority, govern in this case as in any other.

Dugan v. U. S., 3 Wheat., 173; *U. S. v. Tingey*, 5 Pet., 115.

The title of the defendant Railroad Company, to the property in question, is undisputed by the United States.

In law and in equity, the mortgagor on real estate continues the owner thereof until foreclosure.

4 Kent, Com., 182, 183, Marg. 160, 161, and n. a, p. 180; *Watkins v. Gregory*, 6 Blackf., 113; *King v. Ins. Co.*, 7 Cush., 7; *Borst v. Boyd*, 3 Sandf. Ch., 501; 1 Hill. Mort., 154, 155, 285, 389, 390.

This contract, intended to be executed in the State of Kansas, so far as the property in question is concerned, is a Kansas mortgage, and governed by the laws of the State of Kansas relating to mortgages.

1 U. S. Stat. at L., 92, sec. 84, Judiciary Act; Conkl. Tr., 143; *Swift v. Tyson*, 16 Pet., 1; *Amis v. Smith*, 16 Pet., 303; *Wilcox v. Jackson*, 13 Pet., 517; *Carroll v. Safford*, 3 How., 462; *U. S. v. Morrison*, 4 Pet., 124.

It is not true that the laying of taxes on property that may fall to the United States by foreclosure or seizure, conflicts with the rights of the United States. For it is not certain that the Railroad Company will refuse or fail to discharge its obligations to the General Government. The presumption of law is, that every contract will be observed; that contracts are made to be kept, not broken; that the Railroad Company will pay its bonds; will push its road westward as agreed; will carry government plate and transport plate, just as it has promised.

The argument for the complainants proceeds on the ground of a contemplated breach of contract on the part of the Railroad Company. It is true, the complainants say they cannot perform their obligations and pay taxes. But, as paying taxes is a paramount duty of the Company, unless relieved therefrom by compact, the argument of the complainant goes to the extent of shielding the Company from any kind of pecuniary responsibility to third parties. This Company's train, through some negligence, is thrown from the track, and a passenger is injured or killed. By a parity of argument, the Company could refuse compensation for these injuries, on the ground that to do so would impoverish the Company, possibly to an extent that would prevent it from fulfilling its contract with the General Government.

The complainants say that, "If you may tax, you may sell the property for taxes, and so destroy the lien of the United States."

This argument was very conclusively answered in *Carroll v. Safford*, 3 How., 441. There the question arose, whether land sold by the United States, but yet unpatented, could be taxed by the State. The court, in affirming that it could be taxed, says:

"Michigan does not warrant the title for lands sold for taxes. The deed, by the express words of the statute, when duly executed, may be given in evidence in the same manner and with like effect as a deed regularly acknowledged by the grantors. The government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale, and when there has been fraud or mistake, the patent may be withheld,

and every purchaser at a tax sale incurs the risk as to the validity of the title he purchases."

Tried by any test, the property of this defendant Corporation is its own, it is under its control and it is not "means" created and used by the General Government for its own purposes.

Mr Chief Justice Chase delivered the opinion of the court:

The Union Pacific Railway Company, Eastern Division, was originally incorporated in 1855, by the Legislature of the Territory of Kansas, as the Leavenworth, Pawnee and Western Railroad Company, with authority to construct the road from the west bank of the Missouri to the western boundary of the Territory. Subsequently, in 1862, under an Act of the State of Kansas, it assumed its present name, with authority to unite or consolidate with any other company or companies, organized or to be organized, under the laws of the United States or of any State or Territory.

Some months later, the Union Pacific Railroad Company was incorporated by Congress, with power (conferred by the original Act of 1862, and various amendatory Acts) to construct a railroad and telegraph westward through the territory of the United States, from the hundredth meridian east of Greenwich, to connect with the Central Pacific Railroad Company, incorporated by the State of California, and so to form, in connection with eastern roads, a continuous line from ocean to ocean. Several other railroad companies, already incorporated by Missouri and Iowa, as well as the Company just mentioned, chartered by Kansas, were authorized to construct roads through the national territory so as to join the Union Pacific road on the hundredth meridian; and to all these roads large grants of land were made and large subsidies engaged, on the security of a second mortgage, on the condition of paying at maturity the bonds advanced by way of subsidy, and of rendering certain services to the government in the transmission of messages and in the transportation of mails, troops, munitions and other property, at reasonable rates of compensation.

But neither by the original Act nor by any amendment, did Congress undertake to incorporate any railroad, or authorize the construction of any railroad, within the limits of any State, without the consent of the State concerned. And this is as true of the Union Pacific Railway Company, Eastern Division, as of any other of the roads aided by Congress. Indeed, it may be truly said, that whatever was done by Congress in reference to this last named road, was done not merely with the consent, but upon the urgent solicitation, of the State of Kansas.

The Corporation, however, remained a State Corporation, though entitled to certain benefits and subject to certain duties under the legislation of Congress. In this case we have no concern with any of the connected roads which form or are destined to form links in this great chain of transcontinental railroads. We have only to consider the liabilities and rights of this particular Corporation in respect to taxation under state legislation. Argument has been heard on behalf of some of the connected corporations, only because of their interest in the question by reason of their similar situation and circumstances in reference to like legislation.

The complainants in the bill before us, which was filed in the Circuit Court of the United States for the District of Kansas, state that they are stockholders of the Union Pacific Railway Company, Eastern Division, one of the defendants; that three of the defendants, James Blood, John M. Funk and William Coy, are Treasurers, respectively of Douglas, Wyandotte and Jefferson Counties in the State of Kansas; that under an Act of the Legislature of that State certain taxes have been imposed on the railroad and telegraph property of the Company, which the Treasurers of the counties named are proceeding to collect; that the property of the Company is mortgaged to the United States; that the Company is bound to perform certain duties, and ultimately to pay five per cent. of its net earnings to the United States; that the Company will be greatly hindered and embarrassed in the performance of its obligations and duties to the United States, if the taxes imposed shall be collected; and that, to some extent, taxes of the same description have been already paid by the Company, to the prejudice of the just rights of the complainants and of the securities of the United States. Upon this case the complainants prayed an injunction to restrain the Company from paying, and the other defendants from collecting, the taxes assessed; and a temporary injunction was allowed by the district judge.

The answer of the Company admits the allegations of the bill. The answers of the three County Treasurers admit the assessment of the taxes under the laws of Kansas, but deny that such taxes have been imposed with any view to impede or embarrass the Railway Company, and insist that the property of the Company only bears its due proportion of the taxes levied upon all property in the State of Kansas, and that no discrimination is made against the Company in the matter of taxation.

To these answers no replication was put in, but an agreed statement of facts was filed, which recited sundry Resolutions of the Kansas Legislature, urging upon Congress legislation in aid of the Railroad Company; and admits that the property of the Company is liable, under the laws of Kansas, to be taxed for state, county, and municipal purposes; that the taxes complained of have been assessed in conformity with the Statute of the State; that the Company has executed a first mortgage, prior in lien to the debt of the United States, and that a table of earnings and expenditure for 1867-8 appended to the agreed statement is correct.

Upon these pleadings and this agreed statement, the question arose whether the property of the Railway Company described in the bill was subject to the tax which the Statutes of Kansas authorized to be levied on all other property not specially exempted for state, county and municipal purposes. Upon this question the judges of the circuit court were divided in opinion, and it has been certified here for decision.

The counsel for the complainants have justly said that this question is one of very grave importance.

It was suggested, rather than argued, by one of them, that the property of the State is exempt by the State Constitution from taxation; and that the State, having reserved to itself in the charter the right to purchase the road at

the end of fifty years at a valuation then to be made, upon two years' notice to the Company, has, therefore, a property in the road which cannot be taxed. But it is too plain for argument that the interest thus reserved is too remote and too contingent to be regarded as within the meaning of the exemption.

The main argument for the complainants, however, is, that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is, therefore, exempt from taxation under state authority. It is to be observed that this exemption is not claimed under any Act of Congress. It is not asserted that any Act declaring such exemption has ever received the sanction of the National Legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish postoffices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State.

The case of *McCulloch v. Maryland* is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in this. In that case the main questions were: Whether the incorporation of the Bank of the United States, with power to establish branches, was an act of legislation within the constitutional powers of Congress, and whether the bank and its branches, as actually established, were exempt from taxation by state legislation. Both questions were resolved in the affirmative. In deciding the first the court did not hold, as counsel suppose, that Congress, under the Constitution, has absolute and exclusive power to determine whether an Act of legislation is or is not necessary and proper as a means for carrying into effect one or more of its enumerated powers. It defined the words "necessary and proper" as equivalent in meaning to the words "appropriate, plainly adapted, not prohibited, but consistent with the letter and spirit of the Constitution," and held that the incorporation of a bank with branches was a necessary and proper means to the effectual exercise of granted power within the definition thus given. It held further that Congress was, within this limit, the exclusive judge as to the means best adapted to the end proposed, and that its choice of any means of the defined character was restricted only by its own discretion. But the question, whether the particular means adopted was within the general grant of incidental powers, was determined by the court. A great part of the argument was directed to the proposition that the incorporation of a bank was an exercise of incidental power within the true meaning of the terms "necessary and proper," as explained by the court—an argument which would have been quite superfluous if that ques-

tion was to be determined finally by the Legislative and not by the Judicial Department of the Government.

We do not doubt, however, that upon the principles settled by that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any state taxation which will really prevent or impede the performance of them.

But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect?

It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers and functions. It did not owe its existence, or any of its qualities, to state legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.

In like manner other means and operations of the government have been held to be exempt from state taxation; as bonds issued for money borrowed (*Weston v. Charleston*, 2 Pet., 467); certificates of indebtedness issued for money or supplies (*The Banks v. The Mayor*, ante, 57); bills of credit issued for circulation, *Bank v. Supervisors* [ante, 60]. There are other instances in which exemption, to the extent it is established in *McCulloch v. Maryland*, 4 Wheat., 316, might have been held to arise from the simple creation and organization of corporations under Acts of Congress, as in the case of the national banking associations; but in which Congress thought fit to prescribe the extent to which state taxation may be applied. *Van Allen v. The Assessors*, 8 Wall., 578 [70 U. S., XVIII., 229]; *Bradley v. The People*, 4 Wall., 459 [71 U. S., XVIII., 433]; *People v. Commissioners*, 4 Wall., 244 [71 U. S., XVIII., 344]. In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The state tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition that needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in

which the real estate, or other property of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

It is true that some of the reasoning in the case of *McCulloch v. Maryland*, seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the Government of the United States.

And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon state taxation, derived from the express permission to tax shares in the national banking associations, is to be so construed as not to embarrass the imposition or collection of state taxes to the extent of the permission fairly and liberally interpreted. *Bank of Louisville v. Kentucky* [ante, 701]; *Lionberger v. Ross* [ante, 731].

We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland*, beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection.

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine, that no State has a "right to tax the means employed by the Government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. *Lane County v. Oregon* [ante, 105]; *Bank v. Kentucky* [ante, 701].

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more

or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments.

The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the General Government. The allegation is, that the government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the Company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this State Corporation, owing its being to state law, and indebted for these benefits to the consent and active interposition of the State Legislature, has a constitutional right to hold its property exempt from state taxation; and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

We are unable to find in the Constitution any warrant for the exemption from state taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us, in the affirmative.

Cited—18 Wall., 32; 43 Cal., 429; 52 Wis., 56; 6 Am. Rep., 258 (104 Mass., 458); 22 Am. Rep., 421 (56 N. H., 38).

Ex parte IN THE MATTER OF JOSIAH MORRIS AND JOHN F. JOHNSON, Petitioners.

(See S. C., 9 Wall., 605-610.)

Mandate of this court must be obeyed—re-imbursment of money by third person—United States cannot be ordered to refund.

The mandate of this court, requiring the restitution of money, must be obeyed. All distributees must refund what they have received.

If a third person received any part of the fund, the rights of the petitioners followed the money into his hands and he is liable for it.

The court has no authority to order the United States to refund.

[No. 12. Orig.]

Argued Apr. 22, 1870. Decided Apr. 30, 1870.

PETITION for *mandamus*.

This petition was filed in this court for a writ of *mandamus*, to compel Richard Busted, a Judge of the United States District Court, to execute a certain mandate of this court.

The case is stated in the opinion of the court.

Mr. F. Phillips, for petitioners.

When judgment is set aside after execution for irregularity, there need be no *scire facias* for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution.

See 2 WALL.

Anonymous, 2 Salk., 588; *Duncan v. Kirkpatrick*, 13 S. & R., 294.

The Marshal and District Attorney were peculiarly within the power of the court, in their character as officers. That their resignations had taken place when the mandate of the court was sent down, does not affect the jurisdiction. As to all past acts, the power of the court is maintained and will be vindicated, if necessary, by the process of attachment for contempt.

The Laurens, 1 Abb. Adm., 514; *Brockway v. Wilber*, 5 Johns., 856.

This process of attachment is frequently exercised against persons not parties to the suit.

As for the rescue of property on process. *People v. Church*, 2 Wend., 262.

Against referees for not reporting. *Thompson v. Parker*, 3 Johns., 260.

For not paying money into court. *Adams v. Haskell*, 6 Cal., 816.

(No counsel appeared in this court in opposition.)

Mr Justice Swayne delivered the opinion of the court:

This is a petition for a writ of *mandamus* against Richard Busted, Judge of the District Court of the United States for the Middle District of Alabama.

The United States filed an information in the District Court for the Middle District of Alabama, against certain bales of cotton which, it was alleged, were liable to seizure and confiscation, and had come into the possession of the petitioners. The court entered a personal decree against them for the value of the cotton. They brought the case here by appeal. This court reversed the judgment and remanded the cause, with directions to the district court "to cause restitution to be made to the appellants of whatever they have been compelled to pay under that decree." A mandate to this effect was sent to the district court. Nothing effectual has been done under it. The petition, which is the foundation of this proceeding, was filed in this court. The district judge waived the issuing of a rule to show cause, and submitted a return by which the following facts appear.

After the rendition of the decree the judge made an order directing the money, when collected, to be distributed as therein prescribed. Five per cent. was to be paid to F. Q. Smith, the attorney of the United States; one per cent. to John Hardy, the marshal; one per cent. to E. C. F. Blake, the clerk of the court; and one half of the entire amount, less costs and charges, to E. R. McCrosky, the informer. The other half was to be held in the registry of the court, subject to the order of the Secretary of the Treasury. A *fi. fa.* was issued on the decree, and the full amount collected from the petitioners. The mandate of this court was presented to the district court, and proceedings instituted to enforce the order of restitution. Written answers were filed by the parties who were brought before the court.

McCrosky, the informer, was beyond the limits of the State of Alabama. He did not appear or answer. The district attorney admitted that he had received the amount adjudged to him; but insisted that he had a right to hold it. In his oral examination before the



court it was proposed to show by his testimony that he had received a large part of the money paid to the informer. This was objected to by his counsel, and the objection was sustained by the court.

The clerk answered that he had received nothing under the order.

The Marshal answered that after paying Smith and McCrosky, he had deposited the residue, less the costs of the case, in the First National Bank of Selma, pursuant to instructions from the Interior Department. That bank has since failed, and is now in the hands of a receiver. The receiver's answer is in the case, but requires no particular notice.

Under these circumstances the district judge was at a loss how to execute the mandate heretofore sent to him, and submits himself to this court for further instructions.

The duty of the district court is simple and obvious, and its power ample. The mandate of this court must be obeyed as far as practicable. All the distributees within reach of the territorial jurisdiction of the court, except the United States, must be required by the proper order to refund what they have received. If they fail to do so, they should be dealt with promptly, by attachment, for contempt. This will in no wise interfere with any other remedy to which the petitioners may be entitled, except that they cannot be paid twice.

If Smith, the district attorney, received from McCrosky any part of the fund ordered to be paid to the latter, the rights of the petitioners followed the money into his hands, and he is liable for it. *Taylor v. Plumer*, 3 Maule & S., 562; *Osceola v. Platt*, 8 How., 401. He should have been required to disclose the facts touching that subject, and if they were as the petitioner sought to show, he should have been required to restore the money so received, as well as that which was paid to him under the order of distribution.

McCrosky being beyond the reach of the court, no order can be made in relation to him. He will be amenable to a suit at law wherever he may be found.

The circumstances of the Marshal's deposit should be inquired into. If the money in question was deposited in the Bank of Selma, pursuant to instructions from the proper authority, he is exonerated. In that event, the proper certificate should be given by the court to the petitioners, and they must be left to seek redress in the appropriate manner. The court has no authority to order the United States to refund.

A writ of mandamus will be sent to the District Court, directing it to proceed to execute the mandate of this court in conformity to this opinion.

BENJAMIN F. IRVINE, *Plff. in Err.*,

JOHN R. IRVINE.

(See S. C., 9 Wall., 617-630.)

Estoppel by deed—new title—Acts of Congress—infant's deed only voidable—confirmation of, how made—evidence of.

Where one makes a deed of land, covenanting therein that he is the owner, and he subsequently

acquires a new title, his new title inures to the benefit of his grantee.

A patent given to a purchaser of government land is not a new acquisition of title. It is only a confirmation of a right which he had before the patent was made.

The Acts of Sep. 4, 1841, May 29, 1830, and Jan. 22, 1832, relate only to preemptive rights conferred upon actual settlers.

An infant's deed is not void; it passes the title of the land to his grantee.

A confirmation of the deed after the infant becomes of age, may be by an act of a character less solemn than is the act of avoiding a deed.

If, after becoming of age, he receives from his grantee a lease of part of the land, it is evidence of confirmation.

Whether the evidence shows an affirmance or not, is a question for the jury and not for the court, if there is any tending to show it.

[No. 193.]

Submitted Apr. 25, 1870. Decided Apr. 30, 1870.

THIS is an action of ejectment brought in the court below by the plaintiff in error to recover certain lots in St. Paul.

He claims under a patent from the United States, dated Oct. 8, 1849.

The defendant claims under a deed from the plaintiff, dated May 8, 1849.

The plaintiff objected to the introduction of this deed; it, having been executed prior to the issue of the patent, did not convey the estate acquired thereby.

The court having overruled this objection, the plaintiff excepted.

It is admitted that the plaintiff was a minor when the deed of May 8, 1849, was executed.

The plaintiff, being called as a witness, testified that, when he executed the deed, he was under twenty one years of age; and that he was really forced by his brother, the defendant, who was some sixteen years his senior, to deed the property to him.

It appeared that the plaintiff preempted the land; that he paid for it Feb. 21, 1849, and took an informal receipt for it of that date, which was subsequently replaced by a formal duplicate, but of what date does not appear.

The plaintiff then rested, and the defendant's counsel then put in evidence under objections and exceptions by the plaintiff's counsel:

A written lease dated May 8, 1854, from the defendant, John R. Irvine, to himself, the plaintiff, and two other persons doing business under the firm name of J. R. Irvine & Co., of a certain warehouse, situated on a parcel of the land described in the patent, and in the deed of May 8, 1849, but not on any part of the premises described in the declaration.

And the defendant's counsel offered to prove by the testimony of the defendant, that after the deed from plaintiff to defendant of May 8, 1849, and before the commencement of this suit, large and valuable improvements to the amount of \$40,000 had been erected on portions of the land described in said deed, but no part of them on the premises described in the declaration in this case; and under the objection and exception of the plaintiff's counsel, defendant's counsel was allowed to and did introduce said testimony, and evidence to show by competent witnesses, that sometime in 1853 or 1854, the defendant applied to plaintiff to get him to execute to defendant a deed of the premises described in said deed of 8th May, 1849, and that plaintiff refused to execute the same, saying that if he had any rights to said property, he in-

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tended to hold on to them; and also that in 1858 he gave notice in the newspapers of St. Paul that he claimed to be the owner of the premises described in said patent, and that the deed of May 8, 1849, was void.

The counsel for the plaintiff requested the court to give to the jury the following instructions:

First. That the deed in evidence from plaintiff to defendant, dated May 8, 1849, did not pass the estate acquired subsequently under the patent in evidence, from the government to the plaintiff, even assuming the majority of the plaintiff at the time of its execution. But the court declined so to instruct the jury.

Second. If the jury find that the said deed was executed by the plaintiff while under age, (and the evidence is uncontroverted on that point) the said deed is void. But the court declined so to instruct the jury.

A deed of land executed by an infant, may be avoided by the infant after he becomes of age, at any time within the period of the Statute of Limitations, which in this State is twenty years; that is, he may in such case in this State avoid his deed at any time within twenty years after he becomes of age. And the court instructed the jury that such was the law, unless the infant had previously ratified the deed.

Such avoidance may be by another deed of same land to another grantee after the infant becomes of age, or it may be by suitor by other similar unequivocal act. And the court so instructed the jury.

In case of sale or deed of real estate by an infant, there must be some act of affirmance by him after he becomes of age, as solemn in character as the original act itself; otherwise the deed may be avoided by him at any time before the Statute of Limitations bars him. Mere acquiescence, however long, if short of the Statute of Limitations, is not sufficient. The Act of confirmation must be of such solemn and undoubted nature as to establish a clear intention to confirm the deed after a full knowledge that it was voidable. And the court declined to instruct the jury that the act of affirmance must be as solemn in character as the original deed itself; but stated that mere acquiescence is not, of itself, sufficient evidence of affirmance, and that the ratification or affirmance must be of a clear and unequivocal character, showing the intention of the infant to confirm his deed.

There is no evidence whatever of any affirmance or confirmation of the deed in this case by the plaintiff after he became of age, of the nature and character required. The evidence in this case shows no affirmance of this deed by the plaintiff after he became of age. But the court declined so to instruct the jury.

No agency or trust binding on the plaintiff has been shown to have been created or to have existed between plaintiff and defendant during the infancy of the former. No contract is binding on an infant made by him during his infancy, except for necessities. And the court instructed the jury that the latter portion of this request was true, and that although an agency or trust could not be created, binding upon the infant, still if there was subsequent ratification by the infant of acts done during his infancy, he would be bound by them.

Even had the plaintiff been of full age when

the defendant gave him the money to enter the land, as defendant testifies, and directed him to enter the land for defendant, as defendant testifies, and the said plaintiff had entered the land in his own name, still the defendant could not have compelled the plaintiff in law or equity to deed or convey the property to him. And the court declined to so instruct the jury, upon the ground that it was admitted by the defendant that said plaintiff was not of full age when the money to enter the land was given him and, consequently, this request had no application to the case in hand.

No trust has been shown in this case between the parties to this suit, by which the defendant could have enforced a conveyance of the land from said plaintiff to him. And the court declined to instruct the jury as above requested, but said that there had been evidence on the part of the defendant, going to show that the plaintiff was employed to enter the land in question and would be bound by it although an infant, as he afterwards affirmed his act.

Even if the plaintiff had entered the land as agent for the defendant, and had entered it in his own name contrary to instruction of his principal; yet, if the defendant afterwards approved of such entry, such approval was a ratification of said entry. And the court instructed the jury that this might be true; but the evidence showed that the infant had conveyed the land after entry by him, and it was for the jury to say whether he had ratified his deed.

No acts of affirmance by the plaintiff have any bearing in this case, except they relate to the property described in the declaration, and all evidence on this point, except as to the lots described in the declaration, must be excluded and disregarded by the jury. And the court declined so to instruct the jury.

To all and singular which refusals and instructions the counsel for plaintiff excepted.

And the said judge of said court did then and there further instruct said jury as to four, five and six of said instructions, so prayed by said plaintiff's counsel, as aforesaid.

The question here is not, whether there has been an avoidance. The defense is, that the deed has been ratified by plaintiff. I am of the opinion that said ratification should be, if not equally solemn, of a clear and unequivocal character, showing the intention of the party to confirm the deed. An avoidance may be by a deed to a third party, or as held in this country, in other ways. But the deed from plaintiff to defendant was not void; it was simply voidable and passed the title absolutely, until by some adequate act he affirmed it. The question is: has it been disaffirmed or ratified by plaintiff since he became of age? All the facts in proof, such as leasing part of the property, remaining in the vicinity a long time without asserting his claim, while valuable improvements were being put on the property, are to be considered by the jury in deciding whether there has been a ratification by plaintiff; but mere acquiescence does not amount to a ratification. The authorities are somewhat conflicting as to what is necessary to constitute an avoidance. Lord Lyndhurst was of opinion that a deed was necessary to avoid a deed given while under age. I think that this doctrine is perhaps sound and ought to have been held in this country; but it has

been held in this country, that an infant may avoid his deed by going upon the land and by bringing suit, etc.

And with the foregoing qualifications, the 6th instruction asked by the plaintiff's counsel is correct, with the exception that the counsel has reversed the application of the law in his proposition. The act of avoidance, and not the ratification, is what the law requires to be equally solemn with the conveyance.

To which instructions, in so far as they differed from, or changed, or qualified the said instructions so prayed by said plaintiff's counsel as aforesaid, the counsel for plaintiff excepted.

And the said judge of said court did then and there further instruct said jury, that there had been evidence on the part of defendant, going to show that the plaintiff was employed as an agent to enter the land in question; and although an infant, if he afterwards affirmed his agency, he would be bound by the terms of such agency; to which instruction the plaintiff's counsel excepted.

The verdict and judgment of the court below having been in favor of the defendant, the plaintiff sued out this writ of error.

Messrs. Lorenzo Allis and W. H. Peckham, for plaintiff in error:

The court erred in admitting the deed from defendant, of May 8, 1849.

It could not convey the estate and title subsequently acquired by the plaintiff under the patent.

If it be regarded as an attempt to convey or assign the rights secured to the plaintiff by his preemption of this land, it was void, and also the Act of Congress of Sep. 4, 1841, by virtue of which the preemption was made.

5 Stat. at L., 455, sec. 10, *et seq.*; 5 Stat. at L., sec. 12, p. 455; *Taylor v. Baker*, 1 Cranch, 245; *Arbours v. Nettles*, 12 La. Ann., 217; *Penn v. Ott*, 12 La. Ann., 233; *McCue v. Smith*, 9 Minn., 255; *Cundiff v. Orms*, 7 Port., 58; *Marks v. Dickson*, 20 How., 501 (61 U. S., XV., 1002); see, also, Act, May 29, 1830, 4 Stat. at L., 420; Act, Jan. 23, 1832, 4 Stat. at L., 496.

If the deed of May 8, 1849, was void, as coming within the prohibition of section 12 of the Act of 1841, the covenants therein contained would, of course, be entirely inoperative for any purpose.

A deed, void in its granting part, cannot certainly be operative as a conveyance by virtue of its covenants.

2 Hill., Real Prop., 419.

The court erred in allowing the defendant to show that large and valuable improvements to the amount of \$40,000 had been erected on portions of the land described in said deed, but no part of them on the premises described in the declaration; and erred, also, in allowing the defendant to put in evidence the lease of a warehouse located on a part of the premises described in said deed, but not on any part of the premises described in the declaration.

The only conceivable view in which this evidence could be offered is, that it tends to prove the confirmation of the deed of May 8, 1849, by the plaintiff after he became of age.

But it is no evidence of such confirmation; because: first, it does not affect the property described in the declaration.

Second. In the case of sale or deed of real estate by an infant, the act of affirmation by him after he becomes of age must be as solemn in character as the original act itself. Mere acquiescence, however long, if short of the Statute of Limitations, is not sufficient. The act of confirmation must be of such solemn and unequivocal nature as to establish a clear intention to confirm the deed after a full knowledge that it was voidable.

Without some clear, intentional, positive and solemn act of ratification of this deed, by the plaintiff after he became of age, he was at liberty to disaffirm or avoid it any time within the statutory period of twenty years.

The evidence then, offered and admitted, was wholly incompetent and irrelevant for the purpose of showing the ratification or confirmation of the deed of May 8, 1849, by the plaintiff after he became of age.

It should have been excluded.

Trucker v. Moreland, 10 Pet., 65; *Jackson v. Carpenter*, 11 Johns., 542, 543; *Jackson v. Burchin*, 14 Johns., 124; *Curtin v. Patton*, 11 Serg. & R., 309; *Drake v. Ramsey*, 5 Ohio, 251; *Cressinger v. Welch*, 15 Ohio, 156, 193; *Boody v. McKenney*, 23 Me., 517; *Ins. Co. v. Noyes*, 32 N. H., 845; *Voorhees v. Voorhees*, 24 Barb., 150; *Rogers v. Hurd*, 4 Day, 57; *Zouch v. Parsons*, 8 Burr., 1794; *Hoyle v. Stone*, 2 Dev. & B. (N. C.), 320; 2 Greenl. Ev., secs. 862-868, and authorities there cited; *Chit. Cont.*, pp. 145-147, authorities cited in *n.*; *Story, Eq. Jur.*, secs. 222, 223, 240, 242.

There was absolutely no evidence of any act on the part of the plaintiff after his majority, either prior to or after the issuance of the patent, tending to prove any affirmation of his employment by defendant in entering the land; and moreover, such an employment, had it existed, would have come directly within the purview of the Act of Sep. 4, 1841, and would have constituted the very mischief which section 12 of that Act was intended to prevent. The employment would, therefore, have been void, and hence could not afterwards have been affirmed.

There are, then, but two questions presented by the case at bar:

First. Was the deed of May 8, 1849, void by reason of its contravening the Act of Congress of Sep. 4, 1841? Or was it ineffectual to pass the subsequently acquired title and estate of the plaintiff, under the patent of Oct. 8, 1849?

Second. If the deed was merely voidable, by reason of the infancy of the grantor, did he, after he became of age, affirm the deed?

(No counsel appeared in this court for the defendant in error.)

Mr. Justice Strong delivered the opinion of the court:

Though the exceptions found in this record are numerous, the questions which they present are few. If the answers given to the requests of the plaintiff for instructions to the jury were correct, it is certain that the objections made by him to the admission of evidence were unfounded. Those objections were all based upon the assumption that the evidence offered was immaterial and irrelevant to the issue. Whether the assumption was well grounded will be seen when we consider the law of the case as expounded in the charge to the jury.

The plaintiff submitted twelve propositions, which he asked should be given to the jury as instructions. The first was, in substance, that the deed of May 8th, 1849, from the plaintiff to the defendant, did not pass the estate acquired by the plaintiff under the patent from the United States made subsequently, to wit: on the 8th of October, A. D. 1849, and that it would not have passed the estate had the plaintiff attained his majority before the deed was made. It is a general rule, that when one makes a deed of land, covenanting therein that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee, on the principle of estoppel. As the deed of the plaintiff in this case contained an assertion that he was well seised in fee, and had good right to sell and convey in fee, it would not be difficult, were it necessary, to show that in taking the patent he was, in law, acting for his grantee. But it is not necessary to rely upon that principle. The evidence in the case was, that prior to his deed to the defendant, to wit: on the 21st of February, 1849, he had bought the land from the government, and had paid all the purchase money. The patent subsequently given to him was, therefore, not a new acquisition of title. It was only a confirmation of the right which he had acquired before the deed was made.

But it is argued, on behalf of the plaintiff, that the deed was inoperative, because it was forbidden by the 12th section of the Act of Congress of September 4, 1841 (5 Stat. at L., 456), which granted preemption rights, and enacted that any grant or conveyance, made before the entry of the land, shall be null and void, except in the hands of *bona fide* purchasers for a valuable consideration. To this it may be answered, that neither that Act nor the Acts of May 29, 1830, and January 23, 1832, have any application to the present case. They relate to preemptive rights conferred upon actual settlers. The plaintiff did not enter the land in dispute under either of these, and no Act of Congress deprived him of the power to sell and convey after he had made an entry and paid all the purchase money, though before he had received his patent. The court could not then have affirmed the proposition which the plaintiff submitted.

His second point was, that the deed was void because made by the plaintiff during his minority. This the court refused to affirm. Whatever may have been the doubts once entertained, it has long been settled that the deed of an infant, being an executed contract, is only voidable at his election; that it is not void. It operates to transmit the title. And there are some cases, of which the present, in one aspect of it, may possibly have been one, in which such a deed is held to be not even voidable. They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do. *Zouch v. Parsons*, 3 Burrow, 1794. Whether this was such a deed need not be considered; for conceding that it was not, clearly it was not void.

The third proposition of the plaintiff does not appear in the record.

The fourth and fifth were affirmed, and the sixth was answered correctly.

The minority of the plaintiff at the time

when he made his deed to the defendant was an admitted fact, and this suit was an attempt to avoid the deed. The evidence disclosed nothing that could amount to an avoidance of the deed before the suit was brought; nothing which the law recognizes as an act of avoidance. The struggle at the trial was over the question, whether the plaintiff had not confirmed the deed after he came of age? He contended, and he asked the court so to instruct the jury, that an act of affirmance must be of as solemn a character as the deed itself. This instruction the court declined in terms, stating, however, that mere acquiescence, however long, if short of the statutory period of limitations, is not sufficient, and that an act of confirmation, if not equally solemn with the deed, must be of such a solemn and undoubted nature, of such a clear and unequivocal character, as to establish a clear intention to confirm the deed after a full knowledge that it was voidable. Certainly this was all that the plaintiff had a right to demand. There is a well recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those that are sufficient to confirm it. The authorities frequently assert that such a deed cannot be avoided except by some act equally solemn with the deed itself. Some assert that it cannot be done by anything short of an entry; and this whether the deed operates by livery of seisin, or transmits the title by virtue of the Statute of Uses. Others hold that it may be avoided, without a previous entry, by another deed made to a different grantee. But all the authorities recognize the doctrine, that acts which would be insufficient to avoid such a deed may amount to an affirmance of it. While, generally, it has been held that mere acquiescence, though long continued, will not suffice; yet even that, in connection with other circumstances, may establish a ratification. *Cresinger v. The Lessee of Welch*, 15 Ohio, 198; *Drake v. Ramsay*, 5 Ohio, 251; *Ferguson v. Bell*, 17 Missouri, 347; *Bostwick v. Atkins*, 3 N. Y., 53. And, where an infant had sold land, and after coming of age saw the purchaser making large expenditures in valuable improvements upon the land sold, and said nothing in disaffirmance for four years (facts very like those appearing in this case), it was held that the circumstances were not such as to excuse this long silence, and there being evidence that after he had reached twenty-one years of age he had said that he had sold the land, had been paid for it, and was satisfied, and had authorized an offer to purchase it, it was ruled, as a legal conclusion, that he had confirmed his deed. *Wheaton v. East*, 5 Yerg., 41-62. So in *Wallace's Lessee v. Lewis*, 4 Harr., 75, it was adjudged that an infant's acquiescence in his deed for four years after he came of age, in view of extensive improvements made upon the property, amounted to a confirmation. See, also, *Hartman v. Kendall*, 4 Indiana, 405.

There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to his grantee. Now, if the deed be avoided the ownership of the land is re-transferred. The seisin is changed. There is fitness in a rule

that title to land shall not pass, by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is, therefore, itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner.

By the seventh proposition the court was asked to instruct the jury that there was no evidence of any confirmation of the deed by the plaintiff after he came of age, and that the evidence showed no affirmance. Whether the evidence showed an affirmance or not was a question for the jury and not for the court, if there was any tending to show it; and that there was, is beyond doubt. Had there been nothing more than the lease of a part of the land conveyed, a lease made by the defendant to the plaintiff, with others, on the 8th of May, 1854, it would have been impossible for the court to have withheld from the jury the inquiry whether the plaintiff had not confirmed his deed, or to have declared there was no evidence of confirmation. True, the lease was not for the particular parts of the land conveyed by the deed which are the subjects of the present suit, but it was still very significant. The defendant held the part demised by the same title by which he claims the lots now in dispute, to wit: under the plaintiff's deed. He held by no other right. If the deed was effective to assure to him the premises demised, it was equally so to protect him in the ownership of the lots, for it conveyed the whole property, the lots and the demised premises. When, therefore, the plaintiff signed and sealed the lease, he acknowledged by a solemn act that the defendant rightfully held under the deed. It might well have been inferred from this that he intended to assent to the conveyance he had made. There was other evidence of ratification, but this suffices to show that the plaintiff's proposition was inadmissible.

The eighth and tenth points relate to some evidence that had been given, tending to show an employment of the plaintiff by the defendant to enter the land for him, and that the plaintiff paid for it with the defendant's money, furnished to him for that purpose. The court was asked to instruct the jury that no trust or agency had been shown which could have been enforced. We do not perceive how the court could rightfully have affirmed what was asked. An infant may, undoubtedly, be a trustee, and be compelled to execute his trust. Especially, if, after he came of age, he affirms the trust, and ratifies the acts which he did in accordance with the trust, will it be out of his power to deny that any trust ever existed. But we need not discuss this subject; it is of small importance to the case. It is enough that, in our opinion, it was not for the court to deny that there had been a resulting trust, and had they denied it the plaintiff would have gained nothing. The controlling question, the one submitted to the jury, was, whether he had conveyed his interest, whatever it might have been, to the defendant, and whether he had confirmed his conveyance after he attained his majority.

The ninth request for instruction presented an abstract question not raised by anything in the case. The court did well to decline answer-

ing it. Certainly it should not have been affirmed.

The eleventh proposition was affirmed, and the twelfth was correctly answered, as we have shown in our remarks upon the seventh.

We have thus reviewed the entire record and have found no error. If anything has been left unnoticed it is because we consider it unimportant. The plaintiff has himself well summed up the case by stating that there are but two questions presented by it: "First, was the deed of May 8, 1849, void by reason of its contravening the Act of Congress of September 4, 1841, or ineffectual to pass the subsequently acquired title and estate of the plaintiff under the patent of October 8, 1849? Second, if the deed was merely voidable by reason of the infancy of the grantor, did he, after he came of age, affirm it?" The first we have answered in the negative, and the second was properly submitted to the jury.

The judgment of the Circuit Court is affirmed, with costs.

Cited—102 U. S., 312; 21 Minn., 200; 54 Mo., 83; 19 Am. Rep., 445 (118 Mass., 300); 29 Am. Rep., 448 (12 W. Va., 10); 44 Am. Rep., 270 (36 Ind., 57).

THE STEAM PROPELLER CORSICA,
HER TACKLE, ETC., THE BRITISH AND
NORTH AMERICAN STEAM PACKET COM-
PANY, Claimant, *Appt.*,

v.

SAMUEL SCHUYLER.

(See S. C., "*The Corsica*," 9 Wall., 630-634.)

Rules of navigation—collision.

If two ships under steam are crossing so as to involve risk of collision, the one which has the other on her starboard side shall keep out of the way.

It is the duty of the latter ship to keep on her course. If she does not she is liable for damages if a collision thereby occurs.

[No. 171.]

Argued Apr. 12, 1870. Decided Apr. 30, 1870

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed against *The Corsica*, in the District Court of the United States for the Southern District of New York, for the recovery of damages occasioned by a collision of said propeller with the libellant's steamboat, *America*.

The decree of the district court in favor of the libellant for \$30,500 and costs, was affirmed on appeal by the circuit court. Whereupon the case was brought here by appeal.

A further statement of the case appears in the opinion of the court.

Mr. D. D. Lord, for appellant.

Mr. C. Van Santvoord, for appellee:

On the respective courses of the steamers as they were approaching, *The Corsica* proceeding down past the pier to which *The America* was bound, and heading straight down the river, and *The America* standing across and up the

NOTE.—*Collision; rules for avoiding; steamer meeting steamer. See note to Williamson v. Barrett, 54 U. S. (13 How.), 101.*

river, on a course crossing that of The Corsica, it was the duty of The America to keep out of the way, and of The Corsica to keep her course.

See Act to prevent collisions on the water, Apr. 29, 1864, Stat. at L., p. 53, Arts. 14, 18.

Arts. 14, 18, English and French regulations for preventing collisions at sea in the same words.

The Rose, 2 W. Rob., 5, for the import of the expression, "give way."

The expression in the above rule, "keep out of the way," is of the same import, and made it obligatory on The America as having The Corsica on her starboard side, to stop and back, to let The Corsica pass on her course and then go in under her stern, and not across The Corsica's bow.

The America's pilot understood this, and if the master and pilot of The Corsica had been as well instructed, there would have been no collision.

Upon the courses tried by the maritime rule, as well settled and understood before the enactment of the said Act of Congress, The Corsica falls in the same condemnation for starboarding when she should have kept on her course or ported.

The Duke of Sussex, 1 Wm. Rob., 274; *McCord v. The Johnson*, in this court, and cases cited by the libellant, 1 R. S. N. Y., 8d ed., 1859.

There can be no pretense of special circumstances in this case, rendering a departure from the above rule necessary in order to avoid immediate danger; and exceptions are not favored, because increasing the dangers of navigation.

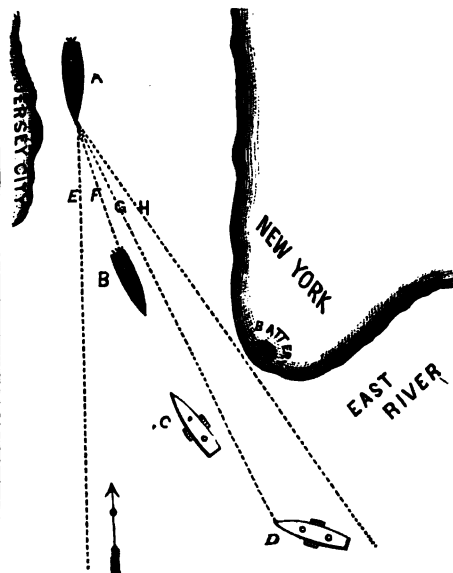
See, *St. John v. Paine*, 10 How., 582.

Mr. Justice Bradley delivered the opinion of the court:

This is an appeal from the Circuit Court for the Southern District of New York, affirming a decree of the District Court of said district. The appellee, as owner of the steamer America, libeled the steam propeller, Corsica, for damages incurred by a collision of the two vessels in the harbor of New York, on the 9th day of September, 1865, about one o'clock P. M.

The pleadings and evidence in the case show that The Corsica, one of the steamers of the Cunard Line, having just steamed out from her dock, preparatory to her outward passage, had turned her stem southwardly, and was proceeding, at a distance of about three or four hundred yards from the line of the Jersey City wharves, straight down the river towards the Narrows. The evidence as to her speed is contradictory. Her master says about five or six knots an hour; the master of The America says eight or nine knots, and the pilot seven or eight miles. The chief engineer of The Corsica says she was gradually increasing her speed, and had got up to fifteen revolutions per minute; that at full speed she made twenty-five revolutions and ten knots an hour. Fifteen revolutions would, therefore, make about six knots, which is equivalent to seven miles an hour. A number of vessels were at anchor on the westerly side of the river, and some to the east; amongst others were two ships nearly opposite the Battery, one a little southerly of the other. Whilst The Corsica was thus starting on her course, The America came around the Battery from the East River, at a speed of about six

miles an hour, passed between the two ships above mentioned, and directed her course across the river in a diagonal line, making for her wharf in Jersey City, where she was accustomed to take in coal and water. Her course lay across that of The Corsica, and the men on the two vessels each saw the approach of the other when they were about 400 or 500 yards apart.



A—Corsica. B—Corsica, just before starboarding. C—America, just before Corsica starboarded. D—America, when first seen. E—First course. F—Two points. G—Three points. H—Four points.

From the course the vessels were respectively pursuing, the one southerly, nearly in line with the river, and the other northwesterly, in a diagonal line, The Corsica was off the starboard bow of The America, and the latter was off the larboard bow of The Corsica. Both being steamers, and standing on an equal footing, they were subject to the following rule, adopted by Congress in the Act of April 29th, 1864 (13 Stat. at L., 60):

"If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

This rule made it the duty of The America to keep out of the way of The Corsica; and, by implication, the corresponding and reciprocal duty of The Corsica to keep on her course. It can hardly be doubted from the evidence, taken together, that had The Corsica kept on her course, the collision would not have occurred. The diagrams furnished by the counsel for the appellants render this fact very clear and demonstrable. But, instead of doing this, the persons in charge of The Corsica, just before the collision occurred, ordered her helm hard a-starboard, and thus turned her right upon The America, which, as in duty bound, was backing out of her way. It is so apparent that this was the immediate cause of the disaster that it casts the burden of proof upon the appellants

to show a sufficient cause in the conduct of The America to justify such a sudden change of course. We have carefully examined the testimony to see if anything of the kind was elicited, and have failed to find it. It is admitted by the pilot of The America that his first intention was to pass ahead of The Corsica; but seeing that it was risky, he took the more prudent course of stopping and backing. The master of The Corsica says, in effect, that The America had got right ahead of him, in his way, and he was obliged to turn to the left as the best means of avoiding or diminishing the danger. Now, the diagram of the courses of the two vessels shows that this could not have been so, until The Corsica had herself changed her course. And the master of The Corsica admits that instead of keeping her course, her helm was starboarded, and her course was altered two points, for the purpose of passing under the stern of The America, soon after the latter vessel was discovered. This, if so, was the first error. It was the business of The Corsica, as we have seen, to have kept on her course. After this, perceiving the danger she had brought upon herself, her helm was again starboarded, and the collision ensued. According to the master of The Corsica's own account, therefore, the accident occurred in consequence of her assuming to perform the duty which devolved on The America under the Congressional rule above quoted.

It is also evident that The Corsica was under considerable headway when the collision occurred. The force of the blow proves this. The America did not contribute to the effect of the blow, for the weight of the evidence is, that she was backing away from The Corsica at the time. The fact is, that the latter vessel was under too much speed for the place she was in—a crowded harbor, spotted with vessels at anchor and in motion. This made her headway uncontrollable, and accounts for the fact that, although her officers tried to check her speed, they were only very partially successful.

We are satisfied that the decree of the Circuit Court was right, and ought to be affirmed.

Decree affirmed.

Att'g—6 Blatchf., 190.

Cited—1 Bro., 246; 5 Hughes, 124.

JOEL C. GREEN, M. H. MEDARY ET AL.,

Plffs. in Err.,

v.

UNITED STATES.

(See S. C., 9 Wall., 655-658.)

Parties may be witnesses, in actions by United States.

The Act of July 2, 1864, admitting parties as witnesses, applies to trials in which the United States is a party, as well as those between private persons. In such actions the parties may be witnesses.

[No. 155.]

Submitted Mar. 30, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was an action of debt brought by the United States in the court below against the principal and seven sureties on the official bond of Joel C. Green, as pension agent at Cincinnati, to recover a balance claimed to be due to

the United States, on the adjustment of his accounts at the Treasury, with interest thereon.

On the trial, a verdict and judgment were rendered for plaintiffs; whereupon certain defendants took a bill of exceptions, and sued out this writ of error.

Mr. Charles Fox, for plaintiffs in error:

By the Code of Ohio, § Swan, & C., 1035, it is provided that no person shall be disqualified from testifying in any civil action, by reason of his interest in the event of the same, as a party or otherwise.

In *Wright v. Bales*, 2 Black, 536 (67 U. S., XVII., 265), this court reversed the judgment of the circuit court, because the judge had refused to permit a party to the suit in that court to testify in the case. The Supreme Court then holding, as it had always previously held, that the local laws of the State in which the case is tried declaring what evidence should be used, is binding upon the courts of the United States.

We claim that the Government is as much bound by the language of a statute regulating the admission of evidence in civil suits where it is a party, as any individual, in the absence of any express stipulation contained in the statute. In fact, it ought to be bound, unless it provides that it shall not apply to cases in which the United States is a party.

The case of *Atty-Gen. v. Radloff*, 10 Exch., 84, referred to in *Jones v. U. S.*, 1 Ct. of Cl., 894, fully establishes our view of the law. In that case the court was unanimous in the opinion, that if that was a civil case, the party was competent.

We claim the Act of Congress, not having excepted the United States in civil suits, it is not proper for this court to make the exception. To do so, would be to make the law, not to administer it.

Messrs. E. R. Hoar, Atty-Gen., and W. A. Field, Assistant Atty-Gen., for the United States:

The Statutes of the United States relating to the competency of the witnesses offered are: The 84th section of the Act of Sep. 24, 1789 (1 Stat. at L., 92), the effect of which, in making parties admissible as witnesses in courts of the United States, held within a State whose laws admit them as witnesses, has been determined by this court in *Vance v. Campbell*, 1 Black, 427 (66 U. S., XVII., 168); *Hausknecht v. Claypool*, 1 Black, 431 (66 U. S., XVII., 173); *Wright v. Bales*, 2 Black, 535 (67 U. S., XVII., 264); *Ryan v. Bindley*, 1 Wall., 67 (68 U. S., XVII., 560).

The Statutes, both of the United States and of Ohio, were plainly intended to confer the same privilege on both parties to a suit. In *King v. Barrett*, 11 Ohio St., 264, the Supreme Court of Ohio says of the Code, that "It clearly aims to give each party an equal standing in court, in respect to evidence." Do these provisions of the laws of the United States, or of Ohio, as adopted by the laws of the United States, embrace parties defendants to a suit by the United States, a party plaintiff that cannot testify?

In *Jones v. U. S.*, 1 Nott. & H., 384, it was held, that a claimant could not testify as a witness in his own behalf, in a suit against the United States in the Court of Claims partly on

the ground that the United States is not within the purview of the statutory provisions, named. The opinion contains the authorities on the application and modification of the doctrine that "The King is not bound by any Act of Parliament, unless he be named therein by special and particular words."

Mr. Justice Bradley delivered the opinion of the court:

This is an action of debt brought by the United States against Joel C. Green and the official sureties on his bond as agent for payment of pensions at Cincinnati. Seven sureties were named in the bond, all of whom executed it. The defendants charge the sureties besides filing a joint plea of *non est factum*. Each filed separate special pleas: first, to the effect that they signed a writing whilst the same was in blank as to the names of the obligors, at the request of the principal, Joel C. Green, upon the assurance and agreement that it should also be signed and sealed by other parties (named in the plea), as joint obligors with the defendants, and should not be delivered as a bond until signed and sealed by said persons; that those other persons never did sign the same; and that the defendants never would have executed the bond, except upon the condition that they should sign. A second plea averred that the bond was signed whilst it was in blank, as to the names of the obligors, on the conditions above named, and being thus signed, was left with Joel C. Green as an escrow, to be by him delivered to the plaintiff, in case it should be executed by the other persons named, and not otherwise; but that those other persons never did sign the bond, and it never was delivered as a valid bond of the defendants and thereby became wholly annulled and vacated.

To these special pleas, the plaintiff demurred, but the demurrers were overruled, to which overruling the District Attorney excepted, and the exception was entered of record: and thereupon replications were filed and issue joined on the plea. The replications denied that the bonds were signed in blank, as pleaded; denied any legal subsisting agreement whereby Green was to obtain the signature of the persons named in the plea; and averred that the defendants delivered the bond without giving the plaintiffs any notice that it was imperfect, but on the contrary, delivered it as a full and complete obligation.

Upon these issues the parties went to trial, and a verdict was found for the plaintiffs, for several thousand dollars. On this trial the defendants offered one or more of their number to prove the facts set up in their pleas; but the court rejected the witnesses, on the ground that they were parties defendant to the action, and the Government, being plaintiff, could not testify. To this ruling a bill of exceptions was taken, and a writ of error brought to this court.

By the 8d section of the Act of Congress passed July 2, 1864 (18 Stat. at L., 351), it is provided "That in the courts of the United States there shall be no exclusion on account of color; nor in civil actions, because he is a party to or interested in the issue tried." This section is amended by an Act passed March 3, 1865 (18 Stat. at L., 533), by the addition of the following proviso: "Provided that, in actions

by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

The trial in this case took place in June, 1866, after the passage of the above Acts.

We see no reason why these Acts should not be applied to trials in which the United States is a party, as well as those between private persons. The express exception of executors, administrators, and guardians would seem, by necessary inference, to leave all other suitors under the operation of the law. It is urged that the Government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to civil actions would seem to show that Congress intended it to apply to actions in which the Government is a party, as well as those between private persons. For the United States is a necessary party in all criminal actions, which are excluded *ex vi termini*; and if it had been the intent to exclude all other actions in which the Government is a party, it would have been more natural and more accurate to have expressly confined the law to actions in which the Government is not a party instead of confining it to civil actions. It would then have corresponded precisely with such intent. Expressed as it is, the intent seems to embrace, instead of excluding, civil actions in which the Government is a party. Nothing adverse to this view can be gathered from the exceptions made in the Amendment passed in 1865. These exceptions only relate to evidence of transactions with, or statements by, a deceased party (who cannot testify), or by a party under guardianship. In this case no transactions with, or statements of, the agents of the United States were attempted to be proved by the defendants who were called as witnesses; nothing but conversations between the defendants themselves. We think the witnesses were competent under the Act, and that the court erred in rejecting them.

For this reason the judgment must be reversed and a new trial awarded.

The court, however, deem it proper to say that they have grave doubts whether the facts set up in the special pleas, and offered to be proved by the witnesses constitute a valid defense to the action. But as this point was not discussed by counsel, we refrain from expressing any opinion upon it.

Cited—16 Wall., 3; 106 U. S., 281; 1 Dill., 184; 12 Bank. Reg., 341; 2 Low., 184.

E. E. DOWNHAM AND HENRY GREEN,
Partners, as DOWNHAM & Co., *Pliffs. in Err.*,

THE CITY COUNCIL OF ALEXANDRIA.

(See S. C., 9 Wall., 659-661.)

Virginia Act, valid—writ of error, to what state courts.

NOTE.—What is "final decree" or judgment of state or other court from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

The Virginia Act of February, 1867, extending the limitation upon appeals, is not in conflict with the Constitution of the State.

Where the judgment of the district court of a State is final and without appeal, that court is the highest court in which the decision could be made, and a writ of error will lie to it from this court.

[No. 244.]

Argued Apr. 22, 1870. Decided Apr. 30, 1870.

IN ERROR to the Fourth Judicial District Court of the State of Virginia.

On motion to dismiss.

The history and facts of the case are sufficiently stated in the opinion of the court.

Mr. D. L. Smoot, for defendant in error.
Messrs. Brent & Wattles, for plaintiff in error.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion to dismiss the writ of error, on the ground that the Fourth Judicial District Court of the State of Virginia is not the highest court of the State in which a decision of the suit could be had.

The judgment of the district court was in affirmance of the judgment in the Circuit Court for the County of Alexandria. The judgment of the Circuit Court was wholly affirmed, and the matter in controversy was less than \$500.

The writ of error was allowed and issued on the 9th of March, 1869, and service of citation was acknowledged on the 7th of April.

At that time the Constitution of 1864 was in force.

That Constitution excluded from the appellate jurisdiction in civil cases of the Supreme Court of Appeals, all suits where the matters in controversy, exclusive of cost, is less than \$500, except certain specified controversies, among which are distinctly mentioned controversies concerning the right of a corporation to levy tolls and taxes.

The case before us is a controversy concerning the right of the Corporation of Alexandria to impose and collect a tax upon the petitioners in error, and is, therefore, a controversy within the very terms of the exception.

But we are referred to an Act of the Legislature of Virginia, passed Feb. 27, 1867, by which it is provided that no appeal to the Supreme Court shall be allowed in any case from a judgment of the District Court, wholly affirming the judgment of the Circuit Court, and where the matter in controversy does not exceed \$1,000.

This Act extends the limitation upon appeals to all cases where original judgments of the circuit court are fully sustained by the judgment of the district court, and where the amount in controversy does not exceed the legislative limit. And the case before us, though not excluded from the appellate jurisdiction of the Court of Appeals by the Constitution, seems to be excluded by this Act. The only question, then, is, whether this Act of the Legislature is in conflict with the Constitution of the State. And we perceive no conflict. The Legislature, then, having thought fit to make the judgment of the district court in this case final and without appeal, that court is, for this case, the highest court in which the decision could be made; and

the writ of error is, therefore, warranted by the Act of Congress, and regular.

Motion to dismiss must be denied.

Cited—23 Wall., 308.

UNITED STATES, *Appt.*,

ALONZO CHILD, ELONG G. PRATT, ELIAS W. FOX AND PERLY A. CHILD.

(See S. C., "*United States v. Adams*," 9 Wall., 661-664.)

Certiorari to Court of Claims, when not proper—how findings of facts may be obtained from that court—exception.

A *certiorari* is not the proper method to have the findings of the Court of Claims made complete.

The proper method of obtaining a finding of facts by that court is an order of this court, requiring it to make return as to the existence or non-existence of such facts.

But this court cannot give the Court of Claims any directions as to what finding it shall make.

If that court should refuse to find a material fact, the proper remedy would be to make a request that such finding be made, and to except in case of refusal.

[No. 380.]

Argued Apr. 26, 1870. Decided Apr. 30, 1870.

APPEAL from the Court of Claims.

On motion for *certiorari*.

This case arose upon a petition by the appellees, in the court below, to recover certain sums deducted from their claims against the United States. Judgment having been given for the claimants in that court, the respondents took an appeal to this court.

The case is further stated by the court.

Messrs. E. R. Hoar, Atty-Gen., and T. H. Talbot, Asst. Atty-Gen., for appellant.

Mr. James Hughes, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

In this case, in accordance with the rules adopted by this court to regulate appeals from the Court of Claims, the latter court have sent up a finding of the facts and their conclusions of law on the said facts, on which they founded their decree. On behalf of the United States, application is now made for a *certiorari*, to require said court to certify as to the existence or proof of certain other facts which are not contained in their original finding and return.

The suit was brought in the Court of Claims by the appellees, to recover certain deductions made from vouchers issued to them by quartermasters at St. Louis, which deductions had been made in 1861-2, by direction of a Commission, after examination of the claims for which the vouchers were issued. Since the decision of the case of *U. S. v. Adams* [ante, 584], in this court, it has become material for the Government, in cases of this sort, to show the fact that the claimants voluntarily presented their claims to the said Commission. This fact, though proof of it is alleged to have been offered in the court below, was not stated in the finding of facts sent to this court, probably not being deemed material at the time the find-

NOTE.—*Certiorari in United States courts. See note to Clark v. Hackett, 66 U. S. XVII., 66.*

ing was made. What the solicitor for the United States particularly desires to be certified is:

First. Whether or not, before the seizure of the books and papers of the claimants, as found by the said court, the claims of the claimants had been submitted or presented to the said Commission by the said claimants.

Second. Whether or not the said claims were so submitted or presented after such seizure.

Third. Whether or not the said claimants appeared before the said Commission with witnesses to support their said claims; and if they did so appear, whether or not it was before or after the seizure of their books and papers by the provost guard of St. Louis.

And the appellants further ask that the Court of Claims be directed in making the findings of facts herein called for, to use and regard the deposition of E. W. Fox, one of the claimants, as an admission on the part of the said appellees.

Whilst we are of the opinion that the appellants are entitled to have the finding made complete on the points indicated by the interrogatories, either affirmatively or negatively, we do not regard a *certiorari* as the proper mode of effecting the object. This writ is properly used to bring up to the court of error, on an allegation of diminution, out-branches of the record, or other documents and writings in the court below which have not been previously certified or sent. The facts asked for in this case are not documents or writings, but conclusions to be deduced from the evidence before the Court of Claims. The proper method of obtaining a finding in reference to these alleged facts is an order of this court, to be directed to the court below, on motion duly made, requiring that court to make return as to the existence or non-existence of such facts. Such an order it will be proper to make, for the same reason that renders a *certiorari* proper on an allegation of diminution of the record. But we cannot give the Court of Claims any directions as to what finding it shall make, or how it shall proceed to make up its finding on the points in question. If that court should refuse, with the proper evidence before it, to find a material fact desired by either of the parties, the proper remedy would be to make a request that such finding be made, and to accept in case of refusal. Perhaps an additional rule on the subject would make the rights of parties and the duty of the court less ambiguous than they now are. The following order will be made in the case:

Ordered: That the record in this case be remanded to the Court of Claims, and that said court be instructed to find and certify to this court, as matters of fact, in addition to the facts found and certified in said record:

First. Whether or not, before the seizure of the books and papers of the claimants, as found by the said court, the claims of the claimants had been submitted or presented by them to the Commission, consisting of Hon. David Davis, Joseph Holt, and Hugh Campbell, referred to in the record.

Second. Whether or not the said claims were so submitted or presented after such seizure.

Third. Whether or not the said claimants appeared before the said Commission with witnesses to support their said claims; and, if they

did so appear, whether or not it was before or after the seizure of their books and papers by the provost guard of St. Louis.

And it is further ordered that the said record, with the said additional findings of fact, be returned to this court with all convenient speed.

Cited—14 Wall., 550.

JOHN H. HERNDON, *Appl.*,

v.

VOLNEY E. HOWARD ET AL.

(See S. C., 9 Wall., 664, 665.)

Assignee may be substituted for bankrupt, as a party.

An assignee in bankruptcy may be substituted for the bankrupt as appellant in this court.

[No. 251.]

Argued Apr 26, 1870. Decided Apr. 30, 1870.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

On motion for leave to assignee in bankruptcy to appear as appellant.

This case arose in the District Court of the United States for the District of Texas, having circuit powers, upon a petition of one Howard, to quiet his title and possession to certain lands. The petitioner having died, his heirs were substituted in his place. A decree was entered in said court in favor of the petitioner, against one of the respondents, Herndon; who thereupon took an appeal to this court.

The appellant having made an assignment in bankruptcy, this motion was made for leave to the assignee to become a party.

Messrs. W. W. Boyce and J. W. Harris, for appellant.

Messrs. P. Phillips and C. Cushing, for appellees.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion that Branch T. Masterson be admitted as a party appellant in this cause with the appellant John H. Herndon, who has become bankrupt.

It is supported by the production of the deed of assignment of the register in bankruptcy of the District Court of the United States for the Eastern District of Texas in the matter of John H. Herndon, bankrupt, to Branch T. Masterson, duly attested by the clerk of the court.

The 14th section of the Bankrupt Law provides that the assignee in bankruptcy may prosecute and defend in his own name all suits at law and in equity, pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, in the same manner and with like effect as they might have been prosecuted or defended by the bankrupt, and makes a copy of the register's assignment, duly certified by the clerk of the proper court, conclusive evidence of the right of the assignee to sue. This legislation, we think, governs the present case.

It seems to require that Masterson, the assignee, be substituted as appellant for Herndon,

the bankrupt, who may be said to be *civiliter mortuus*, precisely as an executor or administrator would be made party instead of an appellant actually deceased; and an order will be made accordingly.

Cited—12 Wall., 382; 105 U. S., 469; 4 Bank. Reg., 61; 30 N. J. Eq., 344; 17 Am. Rep., 206 (58 N. Y., 68).

THE ETNA INSURANCE COMPANY,
Plff. in Err.,

v.

CHARLES WEIDE ET AL.

(See S. C., 9 Wall., 677-681.)

Question of practice, not subject of error—books, when evidence—evidence of contents of lost papers.

The question whether a new complaint should be filed on a removal of a cause from a state court, is one of practice, and not the subject for which error will lie.

Day-books and ledger, the entries in which are testified to be correct by the persons who made them, are proper evidence.

A memorandum shown to be correct, taken from lost papers, is evidence of their contents.

[No. 187.]

Argued Apr. 21, 1870. Decided Apr. 30, 1870.

IN ERROR to the Supreme Court of the United States for the District of Minnesota.

This case was brought in one of the courts of the State of Minnesota, by the defendants in error to recover \$10,000 on a policy of insurance.

On petition of the defendant, the cause was removed into the Circuit Court of the United States for the District of Minnesota, under the 12th section of the Judiciary Act.

The verdict and judgment in the court below having been in favor of the plaintiffs, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. John B. Brisbin, O. W. Moulton, Bartley & Stanton and Morris Lamprey, for plaintiff in error:

Upon the transfer of the cause from a state court to the Circuit Court of the United States, the action should have proceeded in the same manner as if originally commenced in said court, and the plaintiffs below were required to file a new complaint or declaration therein, there being no complaint or declaration made, or entitled, or filed in said cause at all. By the plaintiffs in the Circuit Court of the United States, there was no declaration for the defendant to answer. It became a question of jurisdiction, and the action should have been dismissed on defendant's motion. The Act of Congress did not require the defendant to file any copy of declaration or complaint in the circuit court, and the defendant could not plead for the plaintiffs.

1 Stat. at L., p. 73, ch. 20, sec. 11; *Martin v. Kanouse*, 1 Blatchf., 149; *Coggill v. Lawrence*, 2 Blatchf., 304; *McLeod v. Duncan*, 5 McLean, 842.

The bill of exceptions shows that the ledger commenced Oct. 1, 1866, and among other things, purported to contain a merchandise ac-

count of the plaintiffs, all the items of which were posted from their day-books, except the first, which the witness stated was transferred from a former ledger which was lost, and which former ledger is not shown to have been correct. This ledger was, therefore, clearly incompetent for any purpose. The first item affects the whole account.

Marcy v. Shultz, 29 N. Y., 346; *Cognwell v. Dolliver*, 2 Mass., 217; *Prince v. Smith*, 4 Mass., 454.

To introduce into any cause a copy of any paper, the truth of the copy must be established, and a proper foundation laid for it.

Smith v. Carrington, 4 Cranch, 65; *Callin v. Underhill*, 4 McLean, 199; 1 Cranch (C. C.), 87.

The fly-leaf and the first item in the merchandise account in the ledger, were not used to refresh the witness' recollection, because in that case, after the witness refreshes his recollection, the memorandum must be laid aside, and the witness must be able to testify from his recollection independent of his memoranda. But the said fly-leaf and first item were offered as evidence *per se*; they were not original entries, but were partial copies from old inventories not produced and, therefore, could not be admitted in evidence.

Robertson v. Lynch, 18 Johns., 451; *Fector v. Heath*, 11 Wend., 479; 5 Serg. & R., 87; 12 Serg. & R., 87; 2 Phil. Ev., Cow. & H., notes, 4th Am. ed.; pp. 577, 578, 585, 586, and notes and cases there cited; *Clute v. Small*, 17 Wend., 288.

This court will not review the decision of the court below on the motion of plaintiff in error to dismiss, because it was on a mere question of practice.

Brockett v. Brockett, 2 How., 238; *Wyle v. Coxe*, 14 How., 1; *Parsons v. Bedford*, 3 Pet., 438.

Messrs. Lorenzo Allis and W. H. Peckham, for defendants in error:

The plaintiff in error, by appearing and answering to the complaint on file, waived its right to afterwards object to any irregularity in it.

Evans v. Gee, 11 Pet., 80; *Smith v. Clapp*, 15 Pet., 125; *Marine Bk. v. Fulton Bk.*, 2 Wall., 252 (69 U. S., XVII., 785).

The day book and ledger and what is called the fly-leaf of the ledger, were competent evidence as memoranda in connection with the testimony of the persons making the entry, showing them to have been made in the ordinary course of business, and to have been correctly made.

See Cow. & H. Notes to 4th Am. ed. of Phil. Ev., note 587, to p. 917 of Vol. 2; and p. 361 of Vol. 1; *State v. Rawls*, 2 Nott. & M., 324; *Merrill v. R. R. Co.*, 16 Wend., 586; *Halcy v. Sinebaugh*, 15 N. Y., 485; *Guy v. Mood*, 23 N. Y., 462; *Briggs v. Rafferty*, 14 Gray, 535; *Lapham v. Kelly*, 35 Vt., 195; *Pembroke v. Allentown*, 41 N. H., 365.

The entries on the fly-leaf were, it is true, abstracts from inventories themselves, only memoranda; but the original inventories were destroyed by the fire, so they could not be produced; and proof of their contents could be made by memoranda of such contents, as well as any other fact could be so proved.

Whitney v. Sawyer, 11 Gray, 242; *Wolcott v. Goodall*, 18 N. H., 439.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Minnesota.

The suit was brought against the plaintiff in error, on a policy of insurance, to recover \$10,000 insured upon a stock of goods lost by fire, within the conditions of the policy.

It was commenced against the Company in the state court, and removed to the United States Circuit Court under the 12th section of the Judiciary Act. A copy of the process and complaint in the state court was filed in the circuit court, and in which the Company, the defendant, appeared and put in its answer to the complaint.

On the trial, the counsel for the defendant moved to dismiss the cause from the docket, on the ground that a new complaint or declaration properly entitled had not been filed in the circuit court, which was denied.

If there had been any irregularity in this respect, it was too late, after the defendant had taken issue upon the complaint, to take advantage of it. The question, however, whether a new complaint or declaration should have been filed on a removal of the cause from a state court, is one of practice, and not the subject for which error will lie.

The principal question in the case is as to the admissibility of evidence. Both the plaintiffs in the court below were witnesses to prove the value of the goods in the store lost by the fire. All the books of account were burned, except two day-books and a ledger. The day-books covered entries of sales and purchases in the store from 1865 down to the day of the fire, which was on the 22d of February, 1867. The ledger commenced the 1st of October, 1866, and contained the merchandise account, posted from the day-book, also coming down to the time of the fire. *J. R. Weide*, one of the plaintiffs, testified that the value of the goods at the time of the fire, according to the books, was \$45,564.64, and with profits added would amount to \$70,000; that the cash inventory of the goods the last of February, 1866, amounted to \$75,500; that he got the amount from the fly-leaf of the ledger, upon which, in July, 1866, he made an abstract from the inventories for several years before the fire. These inventories were destroyed by it. The witness identified the day-books and ledger, and testified that these books were kept by him and his partner, as they had no clerk, and that they were correct and were the books kept in their business; that the entries in the day-books were the original entries of purchases and sales; that he could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of taking the last inventory, in February, 1866, nor by the purchases and sales after that inventory. This witness was cross-examined, among other things, as to the entries in the ledger, and as to the entries on the fly-leaf, and as to the correctness of these entries and the amounts therein stated. The evidence on the cross-examination is not stated in the bill of exceptions.

Charles Weide, the partner, was also examined and, as the record states, gave in substance the same testimony as the first witness. See 9 WALL.

Other witnesses were called and gave evidence as to the value of the goods in the store at the time of the fire. The plaintiffs then offered in evidence the fly-leaf of the ledger, a copy of which is in the record. The defendant objected to the same, as incompetent and immaterial, and not made at the date of the transaction.

The court admitted it.

They also offered in evidence the two day-books and ledger, which was objected to, but admitted.

There can be no doubt but the day-books and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence, *per se*, but with the testimony accompanying them all objections were removed. *White v. Ambler*, 8 N. Y., 170.

So, in respect to the memorandum on the fly-leaf of the ledger. It was made by one of the witnesses, taken from inventories, present at the time it was made, but which had been subsequently destroyed by the fire. Those inventories, if they had been in existence, would have been the best evidence and, unless their loss was accounted for, must have been produced. But, being lost, parol evidence of their contents was admissible, as secondary evidence, and so was the memorandum taken from them, for the like reason. As we understand the evidence in the case, the correctness of the entry was testified to. The witness was cross-examined, among other things, as to the correctness of it. The testimony is not given, but, if the evidence of the witness had not been satisfactory, it should have been placed upon the record.

In *Merrill v. R. R. Co.*, 16 Wend., 586, it was held that when original entries are produced, and the person who made them and knew them at the time to be true, testified that he made the entries, and that he believed them to be true, although at the time of testifying he had no recollection of the facts set forth in the entries, such evidence is admissible, as *prima facie* evidence for the jury. In this case, *Mr. Justice Cowen*, who delivered the opinion of the court, examined most of the authorities, English and American, on the subject. The same doctrine is also sustained by the case of *Guy v. Mead*, 22 N. Y., 465, 466.

The learned counsel for the plaintiff in error is mistaken in supposing that the witness *Joseph Weide* did not testify to the correctness of the facts stated in the memorandum. As already stated, this very point was made the subject of cross-examination, and, if the witness failed to testify to it, the fact should have been set forth in the record, as it was most material for the defendant. The witness had stated on his examination-in-chief, that he made the abstract in July, 1866, from the inventories for several years previous to the fire. Nothing else being shown, the inference is that it was correctly made: hence the cross-examination on this point to show the contrary.

We think that the memorandum was properly admitted, and that the judgment should be affirmed.

WILLIAM A. FREEBORN, JAMES F. FREEBORN AND HENRY P. GARDINER, Merchants, as W. A. FREEBORN & Co., Libellants, *Appts.*,

v.

THE SHIP PROTECTOR, HER TACKLE, ETC., JAMES C. BELL, Claimant.

(See S. C., "*The Protector*," 9 Wall., 687-690.)

The time of the continuance of the war not counted in reckoning time for bringing appeal.

The time during which the war lasted is not to be counted in reckoning the time allowed for an appeal from an Alabama court.

The Act of Mar. 2, 1867, is not repugnant to this rule.

[No. 274.]

Argued Apr. 22, 1870. Decided Apr. 30, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

The history and facts of this case are stated in the opinion of the court.

Messrs. P. Phillips and P. Hamilton, for appellee.

Messrs. J. Pyne and F. S. Blount, for appellants.

Mr. Justice Bradley delivered the opinion of the court:

Motion is made in this case to dismiss the appeal, on the ground that it was not brought within the time allotted by law.

The libel was originally filed against the ship *Protector*, in the District Court for the Southern District of Alabama, January 25, 1859, on behalf of the appellants (who were residents of the City of New York), for the price of certain necessary supplies and materials previously furnished to the ship in the Port of New York. A decree dismissing the libel was pronounced in December, 1859. This decree was affirmed by *Mr. Justice Campbell* in the circuit court, on the 5th of April, 1861. The appeal from the circuit court to this court was not taken until the 28th day of July, 1869, more than eight years after the date of the decree appealed from. By the 22d section of the Judiciary Act of 1789, it was enacted that writs of error should not be brought but within five years after rendering or passing the decree or judgment complained of; or, in case the person entitled to such writ be an infant, *feme covert*, *non compos mentis*, or imprisoned, when within five years, as aforesaid, exclusive of the time of such disability. When by the Act of 8d March, 1808, appeals were given instead of writs of error, in cases of equity and admiralty jurisdiction, it was provided that they should be subject to the same rules, regulations and restrictions as are prescribed in law in cases of writs of error; and the same limitations apply to appeals as to writs of error.

It is plain that by the literal terms of the Act of 1789 the period of limitation had expired more than three years prior to the taking of this appeal. But this court has decided, in the case of *Hanger v. Abbott*, 6 Wall., 532 [73 U. S., XVIII., 989], that a Statute of Limitations did not run, during the rebellion, against a party residing in New Hampshire, so as to preclude his remedy for a debt against a person residing in Arkansas, one of the insurrectionary States. It is unnecessary to go over again the ground which was examined in that case. We are of opinion that the same law applies to this. And by throwing out of the eight years which elapsed between the decree and the appeal the four years and more during which the war continued, the time is reduced to a period of less than five years.

But it is urged that the Act of March 2d, 1867, has regulated this subject, and has prescribed a limitation of one year from the passage of that Act within which to bring all appeals and writs of error which were suspended or interrupted by the rebellion. The terms of the Act are, "that where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by interrupted by insurrection or rebellion, such appeal or writ of error shall be valid and effectual, notwithstanding the time limited by law for bringing the same may have previously expired; and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error may be brought within one year from the passage of this Act." 14 Stat. at L., 545. We are of opinion that this statute is an enabling and not a restraining one; that it was not intended to take away any right of appeal, but to continue the right in cases where it had been lost. "Where the common law and a statute differ," says *Blackstone*, "the common law gives place to the statute; and an old statute gives place to a new one. * * * But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative." 1 Bl. Com., 89. Such repugnancy does not exist here. Many cases may be supposed, in which the right of appeal would be saved by the Statute of 1867, which would not be saved by the Act of 1789 and the operation of the common law rule followed in *Hanger v. Abbott* [*supra*]. If four years of the five elapsed before the war, the right of appeal would be saved by the Act of 1867, but would be gone under the operation of the Act of 1789, unless the appeal were brought before the passage of the former Act. If Congress had intended to limit all appeals from courts in the insurrectionary States to one year from the passage of the law, it should have been so expressed in the Act.

The motion to dismiss the appeal is denied.

NOTE.—*Suspension of Statute of Limitations during war.* See note to *Hanger v. Abbott*, 73 U. S. XVIII., 989.

S. C.—11 Wall., 82; 12 Wall., 700.
Cited—11 Wall., 264, 265, 508, 513; 14 Wall., 285; 1 Dill., 385, 387; 12 Bank. Reg., 541; 3 Hughes, 28; 40 Wis., 629; 10 Am. Rep., 540, 544 (30 N. Y. 632); 11 Am. Rep., 453 (51 Mo., 307); 13 Am. Rep., 747 (5 Vroom., 444).

THE BOARD OF SUPERVISORS OF
POWESHIEK COUNTY, IOWA, *Plffs.*

in Err.,

v.

UNITED STATES, *ex rel.* CLARK DURANT.

State Court cannot enjoin process of Federal Court.

Supervisors of a county cannot be excused for neglecting to execute a *mandamus* from the Circuit Court of the United States commanding them to levy a tax to pay a judgment against the county, on the ground that they have been enjoined by a State Court against such levy.

[No. 202.]

Submitted Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

Clark Durant recovered judgment against Poweshiek County in the Circuit Court for Iowa, May 17, 1867, for \$4,507.80. Execution was issued on the judgment; returned "no property." A demand was made to levy taxes to pay the judgments, and neglected by defendants. An alternative writ was issued, and the defendants returned an answer: "That no valid law exists for the levy of taxes; officers have no right to do it. That an injunction was issued by a State Court against such levy."

To this the plaintiff demurred, that the State Court could not by any process arrest a levy to pay such judgments; and that the plaintiff was no party to the decree, and the decree itself a violation of the Constitution of the United States. The demurrer was sustained and a peremptory writ issued. The defendant asked leave till the next term to make return to the peremptory writ, and if return was not sufficient, they were to be attached forthwith. Whereupon the defendants sued out this writ of error.

Mr. S. V. White, for plaintiff in error.

Mr. James Grant, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Iowa.

The writ of error brings up the petition of the relator for an alternative writ of *mandamus* to the Supervisors of Poweshiek County, commanding them to levy a tax sufficient to pay a judgment against the County; a return, demurrer to the same, judgment sustaining the demurrer, a writ of peremptory *mandamus*, and leave granted till the next term to make a sufficient return to peremptory *mandamus*; or, if not that, an attachment issue returnable forthwith.

We perceive no error in the proceedings and the judgment for peremptory mandamus is affirmed.

SUPERVISORS OF POWESHIEK COUNTY, IOWA, *Plffs.* *in Err.,*

v.

UNITED STATES, *ex rel.* THOMAS C. DURANT.

(See S. C., "*Supervisors v. Durant*," 9 Wall., 736, 737.)

Order for mandamus may be entered nunc pro tunc—return of officer allowed to be amended.

It is no objection to a *mandamus* that it was issued without an order being entered for it, when See 9 WALL.

the order was actually made, and a note of it entered, and the court subsequently allowed it to be entered *nunc pro tunc*.

The court below may allow the return of the Marshal to be amended by inserting that it was exhibited at the time of service.

[No. 201.]

Submitted Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

This was a petition filed in the court below, for an alternative writ of *mandamus*, to the Board of Supervisors of Poweshiek County, to compel the levy of a tax for the payment of a judgment of \$57,103.50, with interest, previously rendered by said court against said County, in favor of the relator.

An alternative writ issued, to which respondents made return, denying that it was their duty to levy the tax, and averring that the State Court had forbidden the levy.

To this return the relator demurred. The demurrer was sustained, and a peremptory writ issued and was duly served.

The order for the peremptory writ was entered by both judge and clerk, upon their respective dockets; but the clerk had omitted to enter it upon his journal. This entry was subsequently ordered to be made *nunc pro tunc*.

The court also permitted the Marshal to amend his return of service of the peremptory writ, by adding that he "showed the original writ to each respondent, and finally left it with the president of the Board."

Mr. S. V. White, counsel of record for plaintiffs in error, made no argument in this court.

Mr. James Grant, for defendant in error:

The practice objected to, is sanctioned (*Gray v. Brignardello*, 1 Wall., 627 (68 U. S., XVII., 698)), and is common in the Iowa State Courts, in both civil and criminal practice. *State v. Munzenmaier*, 24 Iowa, 87; *Buckwalter v. Craig*, 24 Iowa, 215.

It is a matter of every day practice to permit an officer to amend his return of service, especially at such a state of the proceedings.

But the return of service was probably good without the amendment. See *Regina v. Birmingham R. Co.*, 16 Eng. L. & E., 94.

These are the rulings to which plaintiffs in error except. They have superseded the further action of the court since Oct. 1868. That the writ is merely for delay, is too apparent for comment.

We pray the court to affirm, with such damages as will discourage trifling with legal forms.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Iowa.

The writ of error in this case brings up a petition on the part of the relator for an alternative writ of *mandamus* to the Supervisors of Poweshiek County, commanding them to levy a tax sufficient to pay a judgment he holds against the County, or show cause for not so doing; the order for an alternative *mandamus* and the issuing of the same; a return; demurrer to the return; an order for peremptory *mandamus*; application for attachment against the Supervisors for not obeying the peremptory writ and order for attachment.

Several objections were taken to the proceedings, on the part of the Supervisors, but no brief has been filed in the case in support of them, or appearance of counsel.

One is, that the writ of peremptory *mandamus* was issued without any order of the court, having been entered upon the journal record of the clerk. The order was made by the court and a note of it entered upon the clerk's docket, and also upon the judges.

The court, on motion, allowed the entry to be made in the journal *nunc pro tunc*, which, is an inadvertence of the clerk, was the common practice and the matter of course.

Objection was also taken to the return of the Marshal, that it did not appear that the original writ of the peremptory *mandamus* was exhibited at the time of the service of same upon the Supervisors. The court allowed the return of the Marshal to be amended by adding: "I also exhibited the original writ to each of the foregoing named persons so served, and I finally left it with said Snow," who was chairman of the Board.

Amendments of this description are of daily practice.

Judgment for a writ of attachment affirmed.

Cited—26 U. S., 396; 6 Sawy., 46.

ELIZA WALKER, *Appl.*,

v.

JOSEPH S. BEAL ET AL., Executors of
WILLIAM J. WALKER, Deceased.

(See S. C., 9 Wall., 748-758.)

Husband and wife—deed of separation, when valid—husband as trustee—income not suspended by returning to husband—circuit courts have jurisdiction over executors—waiver—exception—compensation of trustee.

Deeds of separation between husband and wife, for the separate maintenance of the wife, through the intervention of a trustee, are legal; and equity will enforce them if made as to a separation immediately to occur, or that has already taken place.

The agreement, that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband and cohabit with him, is valid.

A husband may be a trustee for his wife and can be compelled in equity to account for any money or property belonging to her which he has received, in the same manner that a stranger would be held to account.

It makes no difference whether the property which he has received was settled by him upon his wife, or came to her through other sources.

The income secured to her was not suspended by her returning to live with her husband, on his solicitation; nor had he any right to retain it by way of set-off against the expense of her living.

Circuit Courts of the United States have jurisdiction over executors and administrators, and will enforce the same rules in the adjustment of claims against them, that the local courts administer in favor of their own citizens.

The wife, by accepting provisions in her husband's will in satisfaction of dower, did not waive her right under the trust deed.

An exception to a master's report will not be allowed when, by long acquiescence, it should be treated as having been settled.

A trustee should be allowed no compensation, when he literally did nothing towards executing his trust, but was guilty of the grossest abuses concerning it.

[No. 172.]

Argued Apr. 13, 1870. Decided Apr. 30, 1870.

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A PPEAL from the Circuit Court of the United States for the District of Massachusetts.

The bill in this case was filed in the Circuit Court of the United States for the District of Massachusetts.

The complainant is the widow of William J. Walker, late of Newport, in the State of Rhode Island, and the respondents are the executors of the last will and testament of the deceased, as duly constituted under the laws of Massachusetts.

Introductory allegations of the bill of complaint are, that the complainant, in Sep., 1845, was the lawful wife of the deceased, and that they both then were, and for many years previously had been, inhabitants of Charlestown in that State; that at that time, and for many months before, he, the husband, had been guilty of such extreme cruelty towards the complainant, that she ultimately, on or about Sep. 15 of that year, was compelled to leave his home, and no longer cohabit with him; that his acts and conduct towards her were such that, by the laws of the State, she was entitled by reason thereof, to prosecute and maintain against him a suit for divorce from bed and board, and to be decreed in such suit a liberal and suitable allowance for alimony; that, being about to institute proceedings for such divorce, he, in order to induce her to forbear to carry that intention into effect, and to avoid a decree against him for such alimony, proposed to execute an agreement with the complainant that they should live separate and apart from each other, and to provide for her support and maintenance by a conveyance of real and personal estate to trustees with power, whose duty it should be to appropriate the income thereof for that purpose. Based upon those introductory averments, the bill of complaint proceeds to allege that the complainant accepted the proposition of her husband, then in full life, and that the indenture embodying the terms of the same was, Feb. 24, 1846, duly executed by all the parties, including the trustees; that property, real and personal, to the amount therein agreed, was transferred to the trustees therein named in trust; that they should pay the income of the same to the complainant during her life, upon the conditions therein provided.

By the terms of the indenture, they covenanted to live separate and apart from each other during coverture, unless they should thereafter elect to live together, as the provisions assumed they might do; and the complainant also agreed, in case her husband should sell any portion of his real estate during her lifetime, to relinquish to the purchaser her claim of dower in the same, and after his decease to release her dower, or right of dower in all his remaining real estate, when thereto requested by his heirs, executors or administrators. Subject to these conditions and some others not material to be mentioned, the complainant accepted the provision in full satisfaction for her support and maintenance, and of all alimony during coverture, and covenanted and promised that she would at all times thereafter live separate and apart from her husband during coverture, unless they should thereafter mutually agree to live together. But the express provision was, that "if they shall at any time or times hereafter cohabit and live together as heretofore, these

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presents shall not be thereby rendered invalid." On the contrary, the stipulation was that the trusts therein contained should, in that event, be executed in like manner as if they should live separate and apart.

Pursuant to that indenture they separated, and the complainant lived separate and apart from the date of the instrument until April, 1846, when, at his request as she alleges, she returned to live with him, and continued to live with him until June, 1860, "when she was compelled by his cruel and harsh treatment of herself and daughters to cease to live with him, and ever afterwards, during his life, continued so to live separate and apart." Due conveyance was made of the described real and personal property to the trustees, and they covenanted in the same instrument that they would collect the rents, interest and income of the same, and cause to be paid out of the trust property, rents, interest and income, all debts which the complainant might thereafter contract, and after deducting all necessary and proper charges and expenses, to pay annually or oftener, the residue of the rents, interest and income to the complainant during her natural life, for her sole and separate use and benefit, and upon her own order and receipt in writing.

Execution of the indenture is admitted, and it is not controverted that the persons named as trustees in the instrument accepted the trust and continued to execute the same during the lifetime of the husband and until his death. They collected the rents, interest and income as covenanted, and the proofs show that in every instance except the first, they gave the checks for the net amount to the complainant. When they were about to pay the first semi-annual payment, the proof is that the husband presented an order from the complainant for the amount, and it appears that the money was paid to him under that order, he stating that he had advised the complainant to allow him to invest the money for her use and profit. Subsequent payments, however, throughout the entire period of the controversy, were, without exception, made to the complainant. Payments were made in checks, and the proofs show that the checks were always received by the complainant, and that she gave the proper receipt.

The allegation of the bill of complaint is that the complainant, at the suggestion of her husband and upon his agreement to invest the several amounts so received by her from the trustees, for her benefit and that of her children, delivered the checks to him, and that he semi-annually received the same from her as they came to hand, promising at all times to make the investment as he had originally agreed. Proof of the several payments, substantially as alleged, is full and satisfactory, as they appear in the schedule signed by complainant, and found among the papers of the deceased, which passed into the hands of his executors. Proof also is exhibited of the agreement of the husband to make the investment as alleged in the bill of complaint.

The bill was sustained by the court below, and the cause referred to a master for an accounting.

The master's report made certain deductions, among them one of \$1,682.38, as commissions to the trustees for services.

See 9 WALL.

Various exceptions to the master's report by both parties having been overruled, a final decree in favor of the complainant was entered for \$81,750.85, and costs. Appeals to this court were taken by both parties; that of the complainant being to so much of the decree as overrules her exception to the master's report.

All other important facts appear in the opinion of the court.

Messrs. S. Bartlett and B. R. Curtis, for complainant:

It is settled law that such a trust as the one in question, either with or without the covenant of the trustees to indemnify the husband against the wife's debts, is founded on valuable consideration; is valid, and is not terminated by the subsequent cohabitation of the parties.

Compton v. Collinson, 2 Bro. Ch., 377; *Worrell v. Jacob*, 3 Mer., 266; *See v. Thurlow*, 2 Barn. & C., 546; *Webster v. Webster*, 1 Sm. & G., 489; S. C., 23 Eng. L. & E., 216; S. C., before *Vice-Chancellor Shadwell*, 4 De G. M. & G., 437; and 17 Eng. Law & Eq., 278; *Randle v. Gould*, 8 El. & Bl., 457; *Wells v. Stout*, 9 Cal., 479; *Dillingers Appeal*, 35 Pa., 357; *Gaines v. Poor*, 3 Met., Ky., 508; *Wilson v. Mushett*, 3 B. & Ad., 743; Bell, Husband and Wife, 525-541.

It is clear that a husband may be a trustee for his wife. All that is necessary is, that he should agree to become so; and although the agreement be made between him and her alone, the trust will attach upon him in the same manner, and under the same circumstances that it would if he were a mere stranger.

2 Story, Eq., sec. 1380; *Neves v. Scott*, 9 How., 212.

Such agreement imposes the character of a trustee upon the husband, even when there is no valuable consideration, and it is made concerning property belonging to him. *A fortiori*, when there is a valuable consideration and it is made concerning her separate property.

2 Kent, Com., 63, and cases cited; *Woodward v. Woodward*, 8 Law Times (N. S.), 749; *Grant v. Grant*, 12 Law Times (N. S.), 721.

The objection that the suit should have been brought in Rhode Island, is untenable.

The scope of the bill is, to charge the estate of the defendant's testator with a trust, and to procure a decree in favor of the complainant as a creditor, for that sum of money which may be found due to her on an account of such trust.

The contracts out of which the trust arose were all made in Massachusetts, between persons then domiciled there.

It is the settled law of Massachusetts, where this will was proved, that the assets received and inventoried by the executors here, are liable to the claims of citizens of Massachusetts; and if the estate be solvent, they are to be paid in full here.

Richards v. Dutch, 8 Mass., 506; *Dawes v. Head*, 3 Pick., 128; Rev. Stat., ch. 70, secs. 21, 22; Gen. Stat., cl. 101, secs. 28, 89.

The remaining questions in the cause are the correctness of the rulings of the court below upon the several exceptions of the parties to the master's report.

As to plaintiff's exceptions:

First exception. The master has found that

the testator paid the sum of \$3,400, upon the request and on the account of complainant, and is entitled to be credited therefor. Complainant insists that the sum should be \$1,500.

The question turns on the inference to be drawn from the following paper, construed in reference to the surrounding circumstances:

Exhibit B. "Out of the sum of two thousand eighty-seven dollars and ninety-seven cents, which I have received of the trustees as specified in their first two accounts, I have refunded to my husband \$1,500 (fifteen hundred dollars), being part payment of twenty-four hundred dollars, which he gave at my request and on my account, in equal proportion to my two sons, John Brooks and Joseph Hurd; and I agree that the like sum of twelve hundred dollars shall be given successively to my other children, Frances Emily, Kate Edward and Abbie J. Walker, in such manner as may be agreed upon between me and my husband, as far as the income of the trust property will allow, reserving to myself the right to use as much of said income as I may need for private expenses, and any charitable objects I may wish to favor.

Signed, ELIZA H. WALKER,
Boston, March 27, 1847."

As the case shows that she received from the trustees nothing but their checks, which she immediately passed to her husband, the document was intended by the husband as a voucher in discharge *pro tanto* of the trust funds, consisting of the checks passed to him for investment.

The question then is: whether, under these circumstances, with means of the wife in his hands to satisfy the whole \$3,400 thus advanced to their children, the inference is that it was their joint intention to leave her in debt to her husband for the balance of the \$3,400, and that the husband, instead of paying himself in full, should go on and invest the balance of the moneys in his hands, for her use, without any suggestion on the face of the paper that she was to pay the balance of the \$2,400 thereafter, and how? Or, is it the just intendment that the husband consented that the balance should be deemed his share of the contribution to their children? On this point it is to be noted that, although said paper contains no provision or promise in relation to the payment of this balance, yet it does contain other promises from her to him.

Second exception. The question is: whether the interest should have been compounded annually or semi-annually.

The master disallowed semi-annual interest "because severe."

It is submitted that in a case for "severe" treatment, the interest is to be compounded semi-annually.

This is asserted by the highest authority.

Barney v. Saunders, 16 How., 585; *Raphael v. Boehm*, 11 Ves., 92; *S. C.*, 18 Ves., 407, 590; *Fry v. Howe*, 1 Pick., 528; *Jennison v. Hapgood*, 10 Pick., 104; *Boynton v. Dyer*, 18 Pick., 1.

This is a case for "severe treatment."

Sixth exception. We respectfully submit that a trustee is not to be allowed compensation when he has done nothing in the execution of his trust, and has been guilty of the grossest

abuses of it, and his representatives have denied its existence and forged the *cestui que trust* to establish it by this suit.

Lamb's Appeal, 58 Pa., 142.

Messrs. Benjamin F. Thomas and H. C. Hutchins, for respondents:

The plaintiff and her husband resided in Massachusetts when the agreement for separation was made, the indenture executed and the money delivered for which plaintiff seeks to recover. The validity of the contract and the effect of the payments must, therefore, be determined by the laws of Massachusetts.

The question affecting the marriage relation and its rights and duties is peculiarly one of state policy of the *lex loci*.

Story, Conf. L., secs. 276-280; *Decouche v. Savetier*, 8 Johns. Ch., 190; *Blanchard v. Russell*, 13 Mass., 1; *Anstruther v. Adair*, 2 Myl. & K., 518.

There can be, defendants submit, no reasonable doubt that the courts of Massachusetts would declare invalid the agreement relied upon.

See, among other cases, *Ames v. Chew*, 5 Met., 820; *Albee v. Wyman*, 10 Gray, 222.

The policy which tolerates these voluntary separations is an extremely vicious one; for though the relation of marriage is entered into by contract, its rights and duties and obligations are fixed by law, and exist altogether independent of the will of the parties. These voluntary separations are evasions of the law, only to be tolerated when the rigor of the law of divorce was intolerable.

The reasons which have operated to sanction them in England, do not exist here; the law itself affording all reasonable facilities for separation.

Ames v. Chew (*supra*); *Albee v. Wyman*, (*supra*).

The recognition of their validity has been deeply regretted whenever and wherever made.

St. John v. St. John, 11 Ves., 526; 2 Story, Eq. Jur., secs. 1427, 1428; *Durant v. Tilley*, 7 Price, 577; 8 Bro. Ch., 614; *Jones v. Waile*, 5 Bing., N. C., 841; Opinions of Lords Abinger and Denman.

If the agreement was not void, it was annulled or suspended during the period of the reconciliation and the cohabitation of the parties thereto; because the agreement was based on separation, and by the reconciliation new obligations arose, inconsistent with separation.

Durant v. Tilley (*supra*); 2 Story, Eq. Jur., sec. 1428; *St. John v. St. John* (*supra*); 8 Bell. Marr. and Div., 629; *Hunter v. Bryant*, 2 Wheat., 82; *Westmeath v. Salisbury*, 5 Bligh (N. R.), 889; *Clan., Husband and Wife*, 414; *Fletcher v. Fletcher*, 2 Cox, Ch., 99; *Baleman v. Ross*, 1 Dow, P. C., 245; *Jee v. Thurlow*, 2 Barn. & C., 550; *Westmeath v. Westmeath*, 1 Dow. & Cl., 519; *Bright, Hus. and W.*, 845; *Hindley v. Westmeath*, 6 Barn. & C., 200; *Wells v. Stout*, 9 Cal., 479; *Heyer v. Burger*, Hoff. Ch., 1; *Sheikhar v. Gregory*, 2 Wend., 429; *Slatter v. Slatter*, 1 You. & Col., Exch., 38; *Carson v. Murray*, 3 Paige, 488; *Chapman v. Gray*, 8 Ga., 841.

A court of equity will not require the husband to account for the income of the separate estate of the wife which the husband, with the consent of his wife, has been accustomed to receive.

2 Story, Eq. Jur., sec. 1896; *Hunter v. Bryant*, 2 Wheat., 32; *Squire v. Dean*, 4 Bro. Ch., 326.

The income of the trust fund, when paid to the complainant by the trustees, became wholly discharged of the trust. The trustees had fully performed their duty, in relation to it, and the money thus paid to her as income, when paid by her to her husband became by the laws of Massachusetts then in force, the property of her husband.

Allen v. Wilkins, 8 Allen, 321; *Lord v. Parker*, 8 Allen, 129; *Edwards v. Stevens*, 3 Allen, 815; *Ingham v. White*, 4 Allen, 412.

No action could have been maintained by the complainant against her husband in his lifetime, at law or in equity, by the laws of Massachusetts, upon the promise alleged in the bill.

Turner v. Nye, 7 Allen, 176.

At least such action could not have been maintained until the Statute of May 5, 1855, ch., 304, which was subsequent to the promises and most of the payments alleged in the complainant's bill.

Farrelly v. Ladd, 10 Allen, 127; *Ayres v. Ayres*, 11 Gray, 180; *Ayer v. Warren*, 47 Me., 217.

If the complainant ever had any claim, she is precluded by the indenture of compromise made by her and her children with the executors and residuary legatees of the will, from setting it up.

Ingham v. White, 4 Allen, 412.

Under the General Statutes of Massachusetts, ch., 97, sec. 16, the executors were not liable to this suit.

Mr. Justice Davis delivered the opinion of the court:

This is a bill in equity to charge the estate of Doctor William J. Walker, in the hands of his executors, with a trust in favor of his widow. The court below found that the trust existed and was valid, and this appeal seeks to review that decision as erroneous. A short history of the facts of the case, on which it is claimed the alleged trust was founded, is necessary in order to a clear understanding of the legal points of difference between the parties. In the month of September, 1846, Doctor Walker, a citizen of Charlestown, Massachusetts, without cause, compelled his wife and two of their children to leave his house. Before this time he had treated his wife with great harshness and cruelty, proceeding so far as to inflict personal violence on her. This conduct entitled the wife, by the laws of Massachusetts, to a decree of divorce from bed and board, and for a proper allowance of alimony; and with a view to obtain these, she applied to counsel to take legal proceedings against her husband. On learning this, Doctor Walker sought the advice of his friend, Uriel Crocker, and wished him to confer with a lawyer on the subject. This friendly service was performed by Mr. Crocker, and the conference resulted in recommending the husband to settle on his wife \$50,000, and that articles of separation between them be executed. It was considered that the sum agreed upon was a suitable settlement under the circumstances, as the greater part of it had been obtained by the husband from the estate of the wife's father, and as he was, without this, a person of large fortune.

See 9 WALL.

The parties adopted the recommendation of Mr. Crocker and his conferee, and on that basis the articles of separation were drawn and executed. By these articles Dr. Walker transferred to trustees, in trust for his wife, the agreed amount of property and directed the income to be paid to her during her life. This transfer was, however, on the express condition that Mrs. Walker should release her possibility of dower, when asked to do so, to all the real estate he should sell during his lifetime, and if she survived him, that she should release her right of dower to his entire estate. The trustees covenanted to indemnify the husband from all payment of alimony thereafter, and the deed contained a stipulation that if the parties should afterwards come together, the trust should remain and be executed, in like manner as if they should live separate. The parties continued to live apart after the execution of these articles, until the month of April, 1846, when Mrs. Walker returned to her husband at his request, and lived with him until June, 1860, when she abandoned his house on account of the cruel treatment of herself and daughters, and remained away from him during the residue of his life. The main controversy in this case grows out of the transactions which occurred after Mrs. Walker returned to her husband's house, and before her final separation from him. It is claimed on behalf of the complainant, that while living with her husband he took from her the income secured by the deed of trust, and which was her separate estate, under an express agreement to invest it for her use, and that he made himself her trustee for that purpose. Having failed to comply with his agreement, his executors are asked to account.

In this condition of the record, two principal questions are presented for consideration:

1. Is the trust created by the articles of separation in this case valid, and will a court of equity enforce it?

2. Can a husband be a trustee for his wife; and, if so, did Doctor Walker constitute himself such a trustee or not?

It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled. *Compton v. Collinson*, 2 Brown's C. C., 377; *Worrall v. Jacob*, 3 Merivale, 266; *Lee v. Thurlow*, 2 B. & C., 546; *Webster v. Webster*, 1 Smale & Gelf., 489; 23 English L. & E., 216; 4 De G. M. & G., 489; 17 Eng. L. & E., 278; *Randle v. Gould*, 8 El. & Bl., 457; *Carson v. Murray*, 8 Paige, 483; *Nichols v. Palmer*, 5 Day, 47; *Hutton v. Ducey*, 8 Barr., 100; *Bettie v. Wilson*, 14 Ohio, 257; *Chapman v. Gray*, 8 Ga., 341; *Reed v. Beasley*, 1 Blackford, 97; *Wells v. Stout*, 9 California, 494; *Dillinger's Appeal*, 35

Pa., 357; *Gaines v. Poor*, 8 Met. (Ky.), 508; *Hunt v. Hunt*, by Lord Westbury in 5 L. T. R., 778.

It is true that different judges, in discussing the question, have struggled against maintaining the principle, but while doing so they have not felt themselves at liberty to disregard it, on account of the great weight of authority with which it was supported and have, therefore, uniformly adhered to it. It is unnecessary to consider whether the extent to which the doctrine has been carried meets our approbation, nor are we required to discuss the subject in any aspect which this case does not present. It is enough for the purposes of this suit to say that a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one that had already taken place. And this is especially true if the separation was occasioned by the misconduct of the husband, and the provision for the wife's support was reasonable under the circumstances, and no more than a court, before which she was entitled to carry her grievances, would have decreed to her as alimony. In this state of the law on the subject, it is clear the deed of settlement in controversy was unobjectionable. It is equally clear that the separation accomplished by it was the best thing for the parties at the time, and that it ultimately led to a re-union which lasted over fourteen years. The evidence shows that the bad conduct of Dr. Walker to his wife justified her in leaving him, and entitled her to a legal separation at the hands of a court, with alimony in proportion to the value of his estate. For many reasons, which are apparent without stating them, it was desirable, if possible, to avoid a judicial investigation, and accordingly negotiations to this end were commenced on the part of the husband, which resulted in securing to the wife a suitable provision for her support. This settlement was made by him, and accepted by her, not only in lieu of alimony, which she could have obtained, but also in place of dower; and the covenant of the trustees against any future claim of alimony, and their agreement that the wife's debts should be paid out of the property conveyed to them, furnished the security to the husband for the permanent arrangement contemplated by the parties. If we consider that the value of the property transferred to the trustees for the benefit of the wife was but little more than the husband received in her right from her father's estate, and that, at the time, he was worth between three and four hundred thousand dollars, it would seem the provision for the wife's maintenance was less than she had a right to demand and ought to have received. If the law authorizes a wife to leave her husband on account of cruel treatment, and to get from him a competent support, it cannot withhold its sanction to the articles of separation concluded between these parties under the circumstances disclosed by the evidence in this case. It is insisted the obligation of the trust was discharged when the wife returned to her husband's house,

but this is a mistaken view of the effect of the instrument. It was the intention of the parties that the arrangements should be permanent, and to accomplish that purpose the agreement was framed so that the wife should enjoy her separate estate during life, although she should subsequently become reconciled to her husband and cohabit with him. We can see no valid objection to such a provision, and it is certainly supported by authority. *Wilson v. Mussett*, 8 B. & Ad., 748; *Bell, Husband and Wife*, 525-541. The husband had a right to make a settlement upon his wife without any view to separation, and the insertion of this provision shows that he did not intend the settlement to cease on the return of the wife to cohabitation. There is no good reason why effect should not be given to the intention of the parties on the subject. If, on grounds of public policy, it is desirable that the parties should be reconciled, whatever tends to promote such a result will receive the favorable consideration of a court of equity. Without this provision there was no inducement for Mrs. Walker to return to her husband; with it she could try to live with him again, and if his previous bad treatment was repeated she was fortified against the contingency of being turned away another time penniless. There was nothing in his previous conduct to inspire her with confidence in his subsequent good behavior, and but for the fact that the means of support were secured to her in case her life became intolerable with him, it is reasonable to infer that she would never have ventured to cohabit with him after the separation. It is clear, then, that this trust was operative during the life of the wife, and that a court of equity will enforce it.

The next inquiry relates to transactions which occurred after the wife returned to her husband at his request, and on which the claim for relief in this case is based. That a husband may be a trustee for his wife, and can be compelled in equity to account for any money or property belonging to her which he has received, in the same manner that a stranger would be held to account, is a doctrine so well settled that it hardly requires a citation of authorities to sustain it. 2 Kent, Com., 163, and cases cited; 2 Story, Eq., sec. 1390; *Neves v. Scott*, 9 How., 212; *Woodward v. Woodward*, 8 L. T. R., N. S., 749; *Grant v. Grant*, 12 L. T. R., N. S., 721.

It makes no difference whether the property which he has received was settled by him upon his wife, or came to her through other sources.

If the property was her own separate and exclusive estate, and he has agreed to become her trustee respecting it, his liability attaches, and he will be charged with the trust. The property settled upon Mrs. Walker by the articles of separation was her separate estate, and to be enjoyed by her in the same manner as if it had been conveyed to trustees for her benefit, by settlement before marriage. The income secured to her was not suspended by her returning to live with her husband, on his solicitation, nor had he any right to retain it by way of set-off against the expense of her living. If for any cause he desired the state of separation to cease, and invited his wife to return, it was his duty, as it should have been his pleasure, out of his abundant means, to have given her a decent support. What, then, is the evidence

touching the question whether Dr. Walker constituted himself the trustee for his wife in respect to the income derived from her separate estate?

In September, 1846, when the first payment was due under the deed of trust, Dr. Walker went to Mr. Crocker, the managing trustee, with an order for the money from his wife, who was then living with him, and stated that she had agreed that he should invest the amount for her, with the sum of \$1,000 previously paid to her at Crocker's request.

On the occasion of the second payment, which was made to the wife in person, as were all the rest, Miss Emily Walker testifies that her father wished her mother to give him the money unconditionally, as she had no need of it; but the request was declined. The subject was discussed between the parties for several days, and finally Mrs. Walker surrendered the checks for the money, on the promise of her husband to invest them for her at the time he received them. The same discussion ensued when the next payment was made, and the same struggle occurred on the part of the husband to get the money from his wife, without any promise and with the same result—his agreement to invest it for her. The discussion and struggle were renewed on the occasion of the receipt by the wife of the third payment, and was ended by the husband promising the wife to invest the check then on hand and all future checks he should receive from her for her benefit. After this there was quiet in the family, and Mrs. Walker, relying on the faith of her husband's promise, paid to him while she remained in his house, the successive checks as they were received from the trustee. In 1855; Dr. Walker was very ill, and in taking a retrospect of his past life, the neglect to invest the money he had received from his wife affected his conscience and troubled him a great deal, as was natural under the circumstances. He said it ought to have been done; it was her money and all she had; but the difficulty had been to find a safe investment.

At another time he desired Crocker to go to his house and pay his wife the money which was then due; as he had a good chance to invest it, having previously requested him to defer the payment on account of his apprehension that she would be unwilling to have it invested for her, as he wished to do. But it is unnecessary to pursue this investigation further, for the evidence is clear and uncontradicted, that Dr. Walker received the rents and incomes of his wife's estate, from her, on the condition to which he agreed, that he would invest them for her benefit as they were received, and this agreement imposed on him the character of a trustee as to this property. To hold otherwise would be to sanction the grossest fraud. It is not necessary to create the trust that the husband should use any particular form of words, nor need those words be in writing. All that is required is that language should have been employed equivalent to a declaration of trust. That the words which Dr. Walker used constituted him the trustee of his wife, cannot admit of controversy. An attempt is made to discredit the principal witness, by whom the important facts in this case are proved, but it has wholly failed. Her narrative of the occurrences

which led to the separation, and of the transactions out of which the trust arises, is intelligently given, does not vary on cross-examination, and bears the impress of truth.

It is insisted that this suit should have been brought in Rhode Island, because Dr. Walker had his domicile in that State when he died, and his will is proved there. But the will was also proved in Massachusetts, where ancillary administration was obtained; and if, as is conceded in such a case, the assets received and inventoried by the executors there are liable to the claims of the citizens of Massachusetts, the citizens of other States will be placed on the same footing in this respect, in the Federal Courts sitting in Massachusetts, where there is no suggestion of insolvency. The Circuit Courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different States, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens. *Green's Admr. v. Creighton*, 28 How., 90 [64 U. S., XVI., 419]; *Harvey v. Richards*, 1 Mas., 381.

It is urged that Mrs. Walker is estopped from setting up this claim because she was a party to the indenture of compromise. But if so, she was only a formal party to it, received nothing under it, and was not concerned with the residue of the estate, which it proposed to adjust only after the debts, legacies and liabilities were paid. Having done nothing to conceal her claim, nor imposed upon the parties to the compromise respecting it, she cannot be considered as having waived her right to prosecute it.

But if this defense is overruled, it is, nevertheless, contended that Mrs. Walker, by accepting the provisions of her husband's will, waived her right to institute this suit; but this is giving an effect to the acceptance not warranted by the terms of the will, or anything connected with the case. Dr. Walker in his will saw fit to make a limited provision for his wife, and to declare that it was to be received, with the income under the trust deed, in full satisfaction of dower in his estate. Nothing is said about the other trust under which he received the separate property of his wife to be invested, and it is hard to see how his estate can be released from accounting for it, or the status of the complainant affected, because she consents to take, under the will, what is given her in satisfaction of dower.

It is objected that the executors are not liable to this suit because it was commenced within one year after they gave bonds for the discharge of their trust. See, Gen. Stats. of Mass., ch. 97, sec. 16. But this defense is not now open to the respondents. To have availed themselves of it, it was necessary that it should have been presented at the earliest stage of the proceedings. In not doing so, they will be considered as having waived their right to insist that the suit was brought too soon.

The remaining questions in this case relate to the exceptions of the parties to the master's report. In dealing with these exceptions, it seems to us that all we are required to notice are embraced in three different points of inquiry:

1. Did the master err in allowing Dr. Walker \$2,400, as a deduction from the income of the trust property?

2. Should the interest charged against the trustee be compounded annually, or semi-annually?

3. Was the trustee entitled to any compensation for his services?

The solution of the first inquiry depends on the effect to be given exhibit B attached to the bill in this case, which is a receipt or memorandum signed by the complainant, bearing date March 27, 1847. The complainant insists in the adjustment of the account the master mistook the effect of the instrument, and that he should have allowed as a credit against her \$1,500, instead of \$2,400. It is not easy, after this lapse of time, to tell the exact basis on which the accounts should be settled with reference to this receipt. It was a memorandum made when the parties were living in harmony, and after Dr. Walker had undertaken to invest for his wife the first check delivered to him by her, and after her purpose was manifest that the entire income of her estate should be invested to provide against the contingencies of the future. And yet this memorandum shows that she so far modified this purpose as to authorize her husband to give for her \$1,200 to each of her two sons, and expressed the intention of making an equal donation to her other children. The matter was probably adjusted between the parties, and, although there is no proof on the subject, the circuit court, doubtless, in approving this part of the master's report, acted on the idea that by long acquiescence it should be treated as having been settled. We cannot say that this view of the subject is wrong, and the exception is, therefore, overruled.

2. The next exception relates to the manner of computing interest. That Dr. Walker acted in utter disregard of his trust, is too plain for controversy. He treated the money as his own; neither kept nor rendered any account of his trust; and his conduct throughout is irreconcilable with the intention to perform his agreement. There is not a shadow of excuse for his neglect. The reason assigned for it to his daughter, when on his sick bed, that he had not been able to find safe investments for the money, was the merest pretense. It could not be otherwise, as he was an intelligent man, of large wealth, and well informed on the subject of investing moneys. The condition of his estate shows that he had abundant opportunities for profitable investment on his own account; and if so, how can it truthfully be said he could not find safe investments for the small sums in his hands belonging to his wife? A court of equity the especial guardian of trusts, will not tolerate excuses of this sort on the part of a trustee, for omitting to discharge his duty to his *cestui que trust*. There is, therefore, no hesitation in the court to allow, in the adjustment of the trustee's account, the interest to be compounded annually. It has been argued with earnestness that this is a case for severe treatment, and that the master should have allowed semi-annual rests; but we are not at liberty to discuss the subject, as the court are equally divided in opinion upon the question which it presents.

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3. The master was wrong in allowing any compensation to the trustee for his services, and the exception taken to that part of his report is, therefore, sustained. To hold that, in a case like this, the trustee should be allowed compensation, when he literally did nothing towards executing his trust, but on the contrary was guilty of the grossest abuses concerning it, would be a departure from correct principle. The sustaining this exception renders a modification of the decree in the circuit court necessary. That court passed a decree in favor of the complainant for \$81,750.85. It should have been increased by the addition of \$1,622.88, which sum was deducted, in the account stated, for the trustee's services. The decree of the circuit court is, therefore, modified, on the basis that the complainant, at the time it was rendered, was entitled to recover from the respondents the sum of \$83,438.23.

Interest will follow from the date of the decree, at the rate allowed on judgments and decrees in Massachusetts.

Cited—1 Low., 545; 2 Dill., 60; 5 Bank. Reg., 41; 7 Bank. Reg., 105, 106; 109 Mass., 480; 18 Am. Rep., 479 (113 Mass., 235); 33 Am. Rep., 609 (53 Vt., 206).

JOHN W. WATKINS ET AL., *Plfs. in Err.*,

UNITED STATES.

(See S. C., 9 Wall., 759-766.)

Waiver of demurrer—adjustment of accounts by treasury officers, when evidence—credits in suits by United States, when allowed.

Pleading over to a declaration adjudged good on demurrer, without any reservation, is a waiver of the demurrer.

The duly certified transcript of the adjustment of a Marshal's accounts, by the accounting officers of the Treasury, is sufficient evidence to recover upon against him, although the Marshal had no notice of the adjustment of his accounts, nor of the balance found against him.

Claims for credit cannot be admitted in suits between the United States and individuals, unless they have been duly presented to the accounting officers of the Treasury, and have been by them disallowed.

[No. 203.]

Argued Apr. 26, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This suit was brought by the defendant in error, in the District Court of the United States for the District of Maryland, against John W. Watkins and the sureties on his official bond as Marshal, for making false returns, and for failure to pay over public moneys due from him as such officer.

The judgment of the district court for \$2,211.81, with interest and costs, having been affirmed on error, by the circuit court, the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. William Meade Addison and R. J. Brent, for plaintiffs in error.

Messrs. E. R. Hoar, Atty Gen., and W. A. Field, Asst. Atty Gen., for the United States.

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Mr. Justice Clifford delivered the opinion of the court:

Persons accountable for public money, if they neglect or refuse to pay the sum or balance reported to be due to the United States, upon the adjustment of their accounts, are liable for the amount; and it is made the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due the commissions of the delinquent, and interest at the rate of six per cent. per annum from the time the officer received the money until it shall be repaid. 1 Stat. at L., 512. Transcripts from the books and proceedings of the Treasury, certified by the register and authenticated under the seal of the department, are expressly declared to be competent evidence in every such case of delinquency, and all copies of bonds, contracts or other papers relating to or connected with the settlement of any such account, when certified by the register to be true copies of the original on file, and authenticated under the seal of the department, may be annexed to such transcripts and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court. 1 Stat. at L., 513. Judgment is required to be rendered in such cases at the return term, unless the defendant shall, in open court, make oath that he is equitably entitled to credits which had been submitted to the consideration of the accounting officers of the Treasury, and been rejected previous to the commencement of the suit, specifying each particular claim so rejected, in the affidavit, and stating to the effect that he cannot safely go to trial without that evidence. Such an affidavit being filed, the court may grant a continuance to the next term, but not otherwise; and the 4th section of the Act provides that, in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the Treasury for their examination, and which have been by them disallowed in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in the possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States, or some unavoidable accident. 1 Stat. at L., 515.

Pursuant to law, the first named defendant was, on the 28th of March, 1857, commissioned as Marshal of the United States for the District of Maryland, to hold the office for the term of four years from the first day of April following, unless sooner removed by the President. On the 7th of April of that year he gave his official bond for the faithful performance of all the duties of his office, and the other two defendants named in the declaration were the sureties in that bond.

The present suit is an action of debt upon that bond, and the breaches assigned are as follows: (1) That the Marshal did not make true returns of all public moneys which came to his hands during the term of his office. (2) That he did not render his accounts quarter yearly to the proper accounting officers of the Treasury, with the vouchers necessary to a correct and prompt settlement thereof, within three

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months after each successive quarter. (3) That he did not pay into the Treasury all the sums and balances of the public moneys reported to be due upon the adjustment of his accounts at the Treasury Department. (4) That he did not pay into the Treasury, or deposit to the credit thereof, all the surplus and emoluments of his office, which his half yearly returns showed to exist, beyond the allowances which he was authorized to retain. Verdict and judgment were for the plaintiffs, and the defendants excepted to two of the rulings of the court, which give rise to the only questions of any considerable importance presented for decision in the record.

Apart from those questions, however, it is insisted by the defendants that the court erred in overruling their demurrer to the declaration. They demurred specially to the several assignments of breaches in the condition of the bond, and the court overruled the demurrer as to the first three breaches, and sustained it as to the fourth, and both parties acquiesced in the ruling and decision of the court. Subsequently the defendants pleaded performance, concluding with a verification, and the plaintiffs replied, tendering an issue, which was joined, and upon that issue the parties went to trial.

Pleading over to a declaration adjudged good on demurrer, without any reservation, is a waiver of a demurrer, as held by the repeated decisions of this court. *Aurora City v. West* [ante, 42]; *U. S. v. Boyd*, 5 How., 29; *Clearwater v. Meredith*, 1 Wall., 42 [68 U. S., XVII., 609]; *Jones v. Thompson*, 6 Hill, 621.

II. Evidence was then introduced by the plaintiffs to show that there was a balance due from the Marshal under his official bond, and the amount of the same, which evidence consisted of the duly certified transcript of the adjustment of his accounts by the accounting officers of the Treasury. Having introduced that proof the plaintiffs rested, and the defendants moved the court to instruct the jury that the plaintiffs were not entitled to recover upon that evidence, because it is not averred or proved that the Marshal had any notice of the adjustment of his accounts, nor of the balance found against him in the certified transcript; but the court refused to instruct the jury as requested, and the defendants then and there excepted to the ruling of the court.

Officers and agents of the United States who receive public money, which they are not authorized to retain as salary, pay or emolument, are required by law to send their accounts quarter yearly to the proper accounting officers of the Treasury, with the vouchers necessary to the correct and prompt settlement thereof, within three months at least after the expiration of each successive quarter, if resident within the United States, or within six months if resident within a foreign country. 3 Stat. at L., 728.

Provision is also made that every officer or agent who shall offend against that enactment shall be promptly reported to the President, and that he shall be dismissed from the public service. Notice to the person required to account is not necessary, as the whole subject is regulated by law. Such officers and agents are required to render their accounts quarter yearly, and when they do so they are charged with

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what they have received, and credited with what they have lawfully paid out or disbursed. Regulated as the whole matter is by law, they are presumed to have and in general actually do have, full knowledge of the proceedings and of the result and it is believed that no case of hardship arising from any surprise has ever occurred in the history of the department. *Walton v. U. S.*, 9 Wheat., 651; *Smith v. U. S.*, 5 Pet., 292.

III. By the evidence set forth in the second exception, it appears that the defendants claimed at the trial that a credit should be allowed, in the adjustment exhibited by the plaintiffs of the Marshal's accounts, of \$4,875.70, for advances alleged to have been made by him in payment for work done and expenses incurred by him in taking the census, in pursuance of orders from the Secretary of the Interior. They offered the paper called the statement of differences, exhibited in the bill of exceptions, to show that the claim had been duly presented at the Treasury and disallowed, and they also offered to prove that the disbursements were made as charged in the account. Objection was made to the admissibility of the evidence by the district attorney, because no account of the particulars of the claim was ever presented to the accounting officers of the Treasury; and in making the objection he introduced the three accounts current set forth in the bill of exceptions. Both parties being heard, the court excluded the evidence, because it did not appear that the claim had been duly presented and disallowed, and the defendants excepted.

Marshals, like other officers, are required to render their accounts quarter yearly to the accounting officers, with the vouchers necessary to the correct and prompt settlement thereof, within the time prescribed by law. In the case before the court it is not stated in the bill of exceptions, nor is it shown in the record, that any statement of items was furnished, nor that any vouchers were submitted to the accounting officers in support of the claim for credit now under consideration. Vouchers are required by the very words of the Act of Congress, and it is very clear that the presentment of an account without items or vouchers would be a useless act. Without such evidences before the accounting officers there could not be any intelligent scrutiny of the claim, nor any decision which would be satisfactory to the claimant or to the public.

No evidence to prove a claim for credit can be admitted at the trial, "in suits between the United States and individuals," unless it be shown that the claim has been legally presented to the accounting officers of the Treasury for their examination, and that it has been by them disallowed, except under certain special circumstances, which do not exist in this case. Independently of the express terms of the Act of Congress, the question has repeatedly been before this court, and has on every occasion been decided in the same way.

The right of set-off did not exist at common law, but is founded on the Statute of 2 George II., ch. 24, sec. 4, which in substance and effect provided that where there were mutual debts between the plaintiff and the defendant, * * * one debt may be set against the other, and such matter may be given in evidence un-

der the general issue. Set-offs might, ever after the passage of that Act, be made in a proper case, between plaintiff and defendant, but it never extended to suits between the Government and individuals, and since the decision in the case of *United States v. Giles*, 9 Cranch, 236, it has never pretended that, in suits "between the United States and individuals," any claim for credit can be admitted at the trial, unless it appears that the claim had previously been presented and disallowed, or was otherwise brought within the 4th section of the before mentioned Act of Congress. Whether the claim for credit is a legal or equitable claim, if it has been duly presented to the accounting officers and has been by them disallowed, it is the proper subject of set-off under that Act, but it cannot be adjudicated in a Federal Court unless it has been so presented and disallowed. *U. S. v. Wilkins*, 6 Wheat., 148. The rejection of such a claim by the accounting officers constitutes no objection to it as a claim for set-off, as it cannot be admitted in evidence unless it has been presented and disallowed, as required by the Act of Congress. *U. S. v. McDaniel*, 7 Pet., 11; *U. S. v. Ripley*, 7 Pet., 25. Such claims as fall within that Act are not specifically defined, and in view of that fact this court has held that the Act intended to allow the defendant the full benefit at the trial of any credit, whether it arises out of the particular transaction for which he was sued or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt for which he is sued, subject of course to the requirement of the Act that the claim must have been presented to the proper accounting officers and have been by them disallowed. *U. S. v. Fullbrown*, 7 Pet., 48.

Questions of set-off in the Federal Courts arise exclusively under the Acts of Congress, and no local law or usage can have any influence in their determination. *U. S. v. Robeson*, 9 Pet., 324; *Gratiot v. U. S.*, 15 Pet., 370. Claims for credit cannot be admitted in suits between the United States and individuals unless they have been duly presented to the accounting officers of the Treasury and have been by them disallowed, because it is so provided by an Act of Congress. *U. S. v. Eckford*, 6 Wall., 488 [73 U. S., XVIII., 922]; *U. S. v. Gilmore* [ante, 282].

Supported as the ruling of the court is by an Act of Congress and by a course of decision extending through a period of three quarters of a century, it can hardly be expected that it will be disapproved.

Judgment affirmed.

WILLIAM BUTLER AND W. T. HICOX,
Plffs. in Err.,

v.
JOSIAH MAPLES.

(See S. C., 9 Wall., 766-779.)

General and special agency—authority of agent—immaterial error—treasury permit—secondary evidence.

The distinction between general and special agencies is, that the one is created by power given to do acts of a class, and the other by power given to do individual acts only.

A delegation of authority to buy cotton in a county and its vicinity, generally, although guarded by secret instructions, was a general agency.

An authority to buy "on the best possible terms, not paying an average of more than thirty cents per pound," authorized him to pay in some cases above thirty cents.

Where there was no request for an instruction, it is not error for the court not to give it, particularly if the evidence did not demand it.

It is to be presumed, until the contrary is established, that a treasury agent in granting a permit acted rightly.

There are no degrees of secondary evidence, and books are of no higher order than the testimony of a witness.

[No. 177].

Argued Apr. 20, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

This suit was brought in the court below by the defendant in error to recover the price of a lot of cotton which the plaintiff alleged he had sold to the defendants in Nov., 1863, through their agent, Daniel Shepherd. Process was served on Butler and Hicox only, and they appeared and pleaded the general issue. The plaintiff then dismissed his suit as to Bridge and Pierce.

The plaintiff was bound to prove two essential facts, both of which were strenuously disputed by the defendants. These facts were: first, that the place where the contract relied upon by the plaintiff was made, was at the time within the lines of military occupation by the national forces operating from the North, and that Daniel Shepherd was duly licensed to trade according to the treasury regulations then in force. Second, that Shepherd, with whom the plaintiff claimed to have dealt, was at the time and in respect to that transaction, the agent of the defendants.

To establish the alleged agency of Daniel Shepherd, the plaintiffs produced a certain written agreement which purported to be dated on the 16th of October, 1863, between H. E. Bridge & Co., of St. Louis, Missouri, and Daniel Shepherd, of Desha County, Arkansas. The name of Shepherd and of H. E. Bridge & Co., by Butler, appeared to the paper, and the handwriting of Shepherd and Butler are proven. A copy of this paper is given here, that it may readily be understood.

"An article of agreement, made and entered into Oct. 16, 1863, by and between H. E. Bridge & Co., of St. Louis, Missouri, and Daniel Shepherd, of Desha County, Arkansas, for the purpose of purchasing R. C. Stone's cotton and such other as said Shepherd may be able to purchase in said county and vicinity, under the conditions and restrictions hereinafter set forth:

The said H. E. Bridge & Co. have this day furnished said Shepherd with \$4,000, the receipt whereof is hereby acknowledged by him, and are to furnish him such other money, from time to time, as may be necessary to purchase said cotton. The said Shepherd is to buy said cotton, if it can be bought at the price herein set forth, and as much more as he can on the best possible terms, not paying an average of more than thirty cents per pound for middling cotton, and lower in proportion to the grade, to be delivered at such times and places of shipment as may be agreed upon. Said Shepherd is to pay as little as possible on said cotton till

it is delivered on a boat, or within the protection of a gunboat; and when said cotton is thus delivered on a boat and thus paid for, the property and ownership thereof is to vest exclusively in said H. E. Bridge & Co., except as herein provided for his share of the profits.

Said H. E. Bridge & Co. are to ship said cotton to Memphis, Tenn., and sell the same to the best possible advantage; and after re-imbursing themselves—the purchase money, cost of hauling, shipping, drayage, commission, etc.—are to pay said Shepherd one eighth part of the net profits.

It is expressly understood that all contracts, shipments, permits, etc., necessary to purchase and get said cotton to Memphis, are to be in the name of said Shepherd; and that said H. E. Bridge & Co. may thus use his name when necessary.

Witness our hands this day and year above written.

Duplicates signed,

H. E. BRIDGE & Co.,
By W. BUTLER,
DANIEL SHEPHERD."

The plaintiff, after having read the foregoing agreement, offered to read the deposition of one George N. Carleton to the jury, which was taken in the City of New York Mar. 23, 1866.

Carleton deposed that Nov. 5, 1863, he was appointed by the Secretary of the Treasury, Special Agent of the Treasury Department for the Western District of Tennessee, and Acting Surveyor of Customs at Memphis; that about that time he was well acquainted with the defendants.

It is also stated by Carleton in his deposition that about the month of November, 1863, Mr. Butler applied to him for a permit for the purchase and transportation of cotton in the then insurrectionary districts of the United States.

"I, therefore, issued to H. E. Bridge & Co., of St. Louis, Missouri, at the request of Butler who, I understand, was a partner of the firm of Bridge & Co., upon authority issued to them by Thomas H. Yeatman, Assistant Special Agent of the Treasury, a permit to purchase and transmit to market, cotton within the lines of the Federal Military Occupation, First Special Agency, bearing date Nov. 17, 1863, to the amount of fifteen hundred bales. The First Special Agency comprised the districts of the United States west of the Alleghany Mountains known as the Valley of the Mississippi, and extending southward so as to include so much of the States of Alabama, Mississippi, Arkansas and Louisiana, as was occupied by the national forces operating from the North."

The defendants objected to the reading of the deposition of the witness, Carleton, to the jury, upon the ground that it was not competent to prove the official acts of the witness, Carleton, in granting a permit by parol, without preliminary proofs of the loss or inaccessibility of his official books. The court overruled the objection to the introduction of the deposition, and it was read to the jury.

The cause was tried by a jury, and resulted in a verdict and judgment in favor of the plaintiff, for the sum of \$9,336. Whereupon the defendants sued out this writ of error.

Some additional facts appear in the opinion of the court.

Mr. John N. Palmer, for plaintiffs in error.

Messrs. P. Phillips and D. K. McRea, for defendant in error:

The court instructed the jury that if Shepherd had dealt with the plaintiff, claiming to be agent in the purchase of his cotton alone, the plaintiff would contract at his risk, and if it turned out that he had exceeded his authority, Bridge & Co. would not be bound by the contract, as in this case Shepherd would be a special agent.

That if, however, he went into Deaha County to buy cotton generally, representing himself to be the agent of Bridge & Co., to make such general purchases, then he would be claiming to be a general agent, and if really sent there to purchase cotton for Bridge & Co., would be their general agent.

"That the principal is bound by all that a general agent does, within the scope of the business in which he is employed as general agent; and even if such general agent should violate special or secret instructions not disclosed to the party with whom he deals, the principal would still be bound, if the agent's acts were within the scope of the business within which he was employed, and of his general agency."

There were no charges requested by defendants, but they contented themselves with exceptions, the first of which is: that the court charged that the written authority produced in evidence established Shepherd as the general agent of Bridge & Co. This is not true in point of fact.

The question of special or general agency was left to the jury, to whom it properly belonged. *Paley, Ag., 210.*

The charge was not confined to the written power, but extended to all the evidence on this head. The proof shows that at the time of the sale, no such written power was presumed to be in existence. The defendants' own witness, Martin, says that he never knew of any such instrument, and that the instructions to Shepherd were given verbally through him.

The third exception is as to the legal definition of special and general agency, and its relevancy to the facts of the case.

The charge as given, is in exact conformity to the definitions of all the elementary writers.

1 Pars. Cont., 89; *Paley, Ag., 198*; *Story, Ag., sec. 127*; *Johnson v. Jones, 4 Barb., 872.*

It is difficult to understand how it can be said that the charge was erroneous because irrelevant. The whole question of liability rested upon the fact whether Shepherd's agency was special or general.

In the brief filed for the appellants, it is objected that the court erred in not instructing the jury that, though a principal may be liable under some circumstances for the unauthorized acts of his agent, yet this liability would not exist if the party dealing with the agent had notice of his want of authority.

This is another error of fact, as will be seen by that portion of the charge where the liability is limited to cases in which the instructions were not disclosed to the party. If the charge was not full enough, the attention of the court should have been called to the fact by a prayer for an additional charge.

Thus, when it was objected that the judge, in charging on the subject of a demand, had

not instructed the jury that it must be shown that a tender of the price was made, this court answered the objection by saying: "It does not appear that any exception was taken at the time of the trial, for any omission of this kind. No exception can be taken here, which was not moved for below."

Pennock v. Dialogue, 2 Pet., 15; *Barrow v. Read, 9 How., 370.*

Much of the argument in the brief for appellant is rested upon the ground that the sale from the plaintiffs to Shepherd was illegal, if Shepherd had no permit to purchase, although in so purchasing he acted as agent for Bridge & Co., who had a permit.

The proof shows that the whole territory, for a hundred and fifty to two hundred miles south of the *locus in quo* was, at the time of the transaction, within the Federal lines. It required no permit to authorize the sale. Even if all the parties had been within the Confederate lines, the sale would have been valid. Contracts between Confederates within their lines, not entered into for the purpose of aiding the rebellion, are upheld by this court. *Texas v. White (ante, 227)*; *Thorington v. Smith (75 U. S., XIX., ante, 361).*

Mr. Justice Strong delivered the opinion of the court:

This was an action brought by Maples, the plaintiff below, against Butler and Hicox, who, with others, had traded under the name of H. E. Bridge & Co., to recover the price of a lot of cotton which the plaintiff alleged he had sold to the defendants in November, 1863, through their agent Daniel Shepherd. The writ issued against others in addition to these two defendants, but those others were not served with the process, and issue was joined only between the plaintiff and Maples and Hicox.

At the trial it was, of course, incumbent upon the plaintiff to prove not only the contract of sale, but also that Shepherd, with whom the contract had been made, had authority to act for and bind the defendants. Accordingly evidence was submitted to show that the cotton was purchased by Shepherd when professing to act as an agent for the defendants. There was hardly any controversy about this fact, and no questions are now raised respecting the competency or sufficiency of the proof, or the manner in which it was submitted to the jury. But the authority of Shepherd to make the contract for the defendants and bind them to its performance was stoutly denied, and it is now strenuously insisted that the court erred in the instructions given to the jury respecting the evidence of his agency.

That evidence, so far as it was direct, was of two kinds. The first and principal was an article of agreement made on the 16th day of October, A. D. 1863, between H. E. Bridge & Co. (of which firm these two defendants were proved to have been members) and Shepherd, describing him as of Deaha County, Arkansas. The agreement declared its purpose to be "purchasing R. C. Stone's and such other cotton as said Shepherd may be able to purchase in said county and vicinity, under the conditions and restrictions hereinafter set forth." Having thus declared its purpose, it recited that H. E. Bridge & Co. had furnished Shepherd \$4,000, and stipulated that they would furnish him such other

money, from time to time, as might be necessary to purchase said cotton. By the instrument it was further agreed that Shepherd should buy the cotton, if it could be bought at the price therein set forth, and as much more as he could on the best possible terms, not paying an average of more than thirty cents per pound for middling cotton, and lower in proportion to the grade, to be delivered at such times and places of shipment as might be agreed upon. It was further agreed that Shepherd should pay as little as possible on the cotton until it should be delivered on a boat, or within protection of a gunboat, and when thus delivered on a boat and paid for, the property and ownership thereof should vest exclusively in the said H. E. Bridge & Co., except as in the agreement as provided for his share of the profits. The instrument then stipulated that H. E. Bridge & Co. should ship the cotton to Memphis, sell it to the best possible advantage and, after re-imbursing themselves the purchase money, the cost of hauling, shipping, drayage, commissions, etc., should pay Shepherd one eighth part of the profits. It also provided that contracts, shipments, permits, etc., necessary to purchase and get the cotton to Memphis, should be in Shepherd's name, and that H. E. Bridge & Co. might thus use his name when necessary.

The other direct evidence of the agency was supplied by the testimony of M. E. Martin, a witness for the defendants. He was sent by them to Arkansas, with money and instructions for Shepherd, the instructions being that he should purchase cotton for the firm, but was not to agree to pay more than from thirty to thirty-five cents per pound for it. He might make small advances, but he was instructed not to pay the balance of the purchase money, or make it payable until the firm should be able to send a boat up the Arkansas River for the cotton, and until it was in their possession, weighed and placed on the boat. He was directed to take no risks for the firm, of the destruction of the cotton by incendiaries, or in any other way, except to the extent of the money advanced. There was other indirect evidence of Shepherd's agency, to which it is not now necessary to refer. Clothed with such powers and under such instructions, he bought cotton of divers persons, representing himself to be the agent of H. E. Bridge & Co., though not speaking of his written authority, or of any particular instructions. A portion of the cotton thus bought was shipped on board the steamboat, *Progress*, belonging to the firm or chartered by them. Among the persons from whom he bought was plaintiff, from whom he purchased one hundred and forty-four bales, agreeing to pay for it forty cents per pound, as soon as it could be weighed. He bought it as it lay. It was then weighed and he removed a part of it. But a large portion of it having been subsequently burned, before it was placed on board a boat, the defendants deny that they were bound by the contract, and they now complain of the instructions given to the jury respecting Shepherd's agency.

They insist the court erred in charging that the written agreement between him and H. E. Bridge & Co. constituted him their general agent. We do not find that the court did thus instruct the jury, though it must be admitted

the charge may have been thus understood. The jury was instructed that if Shepherd held himself out as the general agent of H. E. Bridge & Co., the defendants were bound by the contract he made with the plaintiff for the cotton, though in making the contract he transgressed the instructions he had received, and secret limitations of his authority, which instructions and limitations were not revealed to the plaintiff. It is true, as has been noticed, there was other evidence of a general agency beyond that which the agreement furnished, but as it was parol evidence, its force and effect were for the jury, and hence the court could not rightly have charged that the defendants were bound by the contract unless the agreement did itself constitute Shepherd a general agent. But did it not? The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency; but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents—one to buy cotton, another to buy wheat and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is, that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise. Looking to the agreement between H. E. Bridge & Co. and Shepherd, it cannot be doubted that it created a general agency. It was a delegation of authority to buy cotton in Deaha County and its vicinity; to buy generally, from whomsoever the agent, not his principals, might determine. It had in view not merely a single transaction, or a number of specified transactions, which were in the mind of the principals when the agent was appointed, but a class of purchases, a department of business. It is true that it contained guards and restrictions which were intended as regulations between the parties, but they were secret instructions rather than limitations. They were not intended to be communicated to the parties with whom the agent should deal, and they never were communicated. It was, therefore, not error to instruct the jury as the court did, that the agency was a general one, and that the defendants were bound by the contract, if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It may be remarked here, that the reasons urged by the plaintiffs in error in support of their denial of liability for the engagements made by Shepherd are, that he agreed to pay forty cents per pound for the plaintiff's cotton; that he bought the cotton where it lay instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase. The argument is, that in the first two particulars he transcended his powers, and that his authority to buy at all was conditioned upon his obtaining a permit from the government. All this, however, is immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid and the antecedent qualifications required of him, were matters between him and his principals. They are not matters in regard to which one dealing with him was bound to inquire. But even as between H. E. Bridge & Co. and Shepherd, a purchase at forty cents per pound was not beyond his authority. He was authorized to buy "on the best possible terms, not paying an average of more than thirty cents per pound." This contemplated his agreeing to pay in some cases above thirty cents. The average was regulated, but no maximum was fixed. Nor is there anything in the agreement that forbade his purchasing cotton deliverable at once where it lay, though not on a boat or in the protection of a gunboat. He was authorized to purchase, deliverable at such times and places of shipment as might be agreed upon; that is, deliverable when and where it might be stipulated between him and the seller. True, he was to pay as little as possible until the cotton was delivered on a boat, or within the protection of a gunboat; and when thus delivered the property in the goods was to vest in the principals, excepting his share of the profits; but he was not prohibited from paying the whole price, or agreeing to pay the whole price, if insisted on by the vendor. The stipulation respecting the vesting of ownership was nothing more than a definition of right between him and his principals, as is manifested by the exception. Nor was Shepherd bound to procure a permit in his own name. He might have been had it been necessary, but if under the permit granted by H. E. Bridge & Co. he could purchase as their agent, it was all the agreement required.

It is further objected to the charge given to the jury respecting general and special agency, that it was not applicable to the proof in the case, and was, therefore, irrelevant and calculated to mislead the jury, and because, as stating abstract questions of law, the instruction was erroneous. If, in truth, it was irrelevant, it was not on that account necessarily erroneous and calculated to mislead the jury. We are not shown, nor do we perceive, how the jury could have been misled by it. They were instructed that, in cases of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was cor-

rect, and it was applicable to the evidence in the case. It has been intimated during the argument that the court should have added that no such liability can exist to one dealing with an agent with notice that the particular act of the agent was without authority from the principal. To this several answers may be made. The exception to the general rule, which it is said the court should have recognized, is implied in what the court did say. Again; there was no request for any such instruction; and still again, the evidence in the case did not demand it. There was no pretense that the plaintiff had any notice of secret instructions given to Shepherd, or of any limitations upon his authority. Nor was there anything that imposed upon him the duty of making inquiry for secret instructions or for restrictions. There were no circumstances that should have awakened suspicion. The plaintiff was not apprised that the authority was in writing. The argument is very far fetched that infers a duty to inquire whether the agent had private instruction, from the fact that the contract was made in a region that had been in a state of insurrection.

It is next insisted that the court erred in instructing the jury that in granting the permit to H. E. Bridge & Co. to buy cotton, the special agent of the Treasury, who was authorized to grant permits, exercised judicial functions, and decided conclusively that the district of country to which the permit extended was within the lines of Federal military occupation. This is not, however, quite an accurate statement of what the court did charge. The judge said, in effect, that the Treasury agent, in granting the permit, exercised judicial functions, and that granting it was a decision by him that the region designated in it was within the lines of military occupation, but he did not say it was a conclusive decision. He did charge, as a matter of law, that "upon the proof in the case as to the condition of the country, and upon the permit granted to H. E. Bridge & Co., Desha County, Arkansas, was, at the date of the contract, in November, 1868, within the lines of the national forces operating from the north, and that the plaintiff and Shepherd had a right to make the contract for the sale and purchase of the cotton." The instruction was not based upon the grant of the permit alone. There was uncontradicted evidence in the case that, before the permit was granted, the part of the State in which Desha County is situated had been evacuated by the Confederate forces, who had been retreated toward the Red River, and into Texas; that there were no such forces within from one hundred and fifty to two hundred miles from Red Fork, in Desha County, and that the military occupation of the national forces extended over the region. It was also proved that the citizens generally had taken the oath of allegiance, or obtained protection papers. Coupling these facts, about which there was no dispute, with the other fact that the Treasury agent had granted a permit to H. E. Bridge & Co. to buy cotton there, the judge was not in error when he gave the instruction to which exception is now taken. It may be that the grant of the permit was not technically a judicial act, but it was an exercise of the Treasury agent's judgment, and a deduction

from the facts known by him, that the region over which the permit extended was within the military lines. It is to be presumed that he acted rightly, and as he could not lawfully grant the permit in the absence of such military occupation, his grant of it raised a presumption that the occupation existed. It established at least a *prima facie* case. In *United States v. Weed*, 5 Wall., 73 [72 U. S., XVIII., 584], this court said: "The fact that the proper officers issued these permits for certain parishes, must be taken as evidence that they were properly issued until the contrary is established." But a *prima facie* case, with nothing to rebut it, is a case made out. If, then, what amounts to military occupation, the facts being ascertained, is, necessarily, a question of law, as must be conceded; and if there was nothing to rebut the presumption of fact arising from the grant of the permit, and no contradiction or impeachment of the direct testimony, the court was justified in declaring, as matter of law, that Desha County was within the lines of military occupation from the north, and that the contract was not illegal.

The next objection to the charge may be disposed of in a word. Indeed, it has not been seriously urged here. That the defendants cannot set up a new contract, obtained by one of them from the plaintiff for a sale of part of the cotton, as a discharge from the contract made for them by Shepherd, if the new contract was obtained by their own misrepresentations, or by their denial of Shepherd's agency, is too plain to need discussion. And yet, that they may, must be maintained by them in order to convict the court below of error in the instructions given respecting the new contract.

A single exception remains to be considered. It is to the admission of the testimony of George N. Carleton. He was introduced to prove that he, as special Treasury agent, had issued a permit to H. E. Bridge & Co., and to prove its contents, notice having been given to the defendants to produce the permit itself, and they having failed to do so. It is objected: first, that his official books should have been produced, and that it was incompetent to prove the permit in any other way. The permit itself would have been the best evidence; but it was not produced on call and, therefore, secondary evidence was admissible. There are no degrees of such evidence, and the official books of the Treasury agent, had there been any in existence, would have been at best but secondary proof, of no higher order than was the testimony of a witness. There was, also, no proof that any such books had been kept, and consequently nothing to show that there was any better evidence than that which was offered. Another objection was made against its subject-matter. It was, that the permit, of which the proof was offered, was to H. E. Bridge & Co., and not to Shepherd. We do not perceive any merit in this objection. We have already said that, in the agreement between him and his principals, Shepherd did not undertake to procure a permit unless it should be necessary to buy cotton and get it to Memphis, and we do not perceive why a permit to H. E. Bridge & Co. did not enable them to buy through an agent, and render any permit to their agent

See 9 WALL.

unnecessary. For these reasons, the objections urged against the admission of the testimony of Carleton cannot be sustained.

The judgment of the Circuit Court is affirmed.

THE HARTFORD FIRE INSURANCE COMPANY, *Plff. in Err.*,

v.

ISAAC VAN DUZER.

(See S. C., 9 Wall., 784, Note.)

Allowance of writ of error, indispensable.

An allowance of the writ of error to the Supreme Court of a State is indispensable to the jurisdiction of this court, to revise the state judgment.

Gleason v. Florida [ante, 780], followed.

[No. 281.]

Argued Apr. 22, 1870. Decided Apr. 30, 1870.

IN ERROR to the Supreme Court of Illinois.

On motion for a writ of *supersedeas*.

Mr. C. F. Peck, for plaintiff in error.

Mr. T. Lyle Dickey, for defendant in error.

Mr. Chief Justice Chase delivered the opinion of the court:

On looking into the record in this case, we find no allowance of the writ of error to the Supreme Court of Illinois. This is indispensable to the jurisdiction of the court in error to revise the judgment of the highest court of a State. This has been repeatedly decided, and very recently at this term, in the case of *Gleason v. Florida* [ante, 780].

The motion for a writ of *supersedeas*, therefore, cannot be considered.

The writ of error must be dismissed.

Cited—9 Wall., 784; 1 Sawy., 715.

CHARLES J. CARPENTER, *Plff. in Err.*,

v.

HENRY W. WILLIAMS.

(See S. C., 9 Wall., 785, 786.)

Case of no jurisdiction.

The decision of a state court, which recognizes the title confirmed by the Act of Congress, and only determines to whom that confirmation was made, presents no case for the jurisdiction of this court.

[No. 181.]

Submitted Apr. 21, 1870. Decided Apr. 30, 1870.

IN ERROR to the Supreme Court of Missouri.

On motion to *dissias*.

This suit was brought by the defendant in error, in the St. Louis Land Court, to determine the title to a certain field lot in the Grand Prairie common field of St. Louis. Both parties claimed under the same confirmation by Act of Congress of June 18, 1812.

The amended petition states, in substance: that the land in dispute was proved (confirmed) in the name of Louis La Croix, when, in fact, Joseph La Croix was the person intended; that

Recorder Hunt took proof of Joseph's right, but made a mistake in the name of the claimant, or by accident wrote Louis instead of Joseph, and the object of the suit as amended was, to reform the confirmation, correct the supposed mistake, and obtain a decree in favor of the persons claiming under Joseph La Croix, for the title which the defendant, Carpenter, had procured from the heirs of Louis La Croix. The amended petition, setting up an equitable title, was filed after the Supreme Court of Missouri had decided that Williams had no legal title, and could only recover on showing an equity if at all.

28 Mo., 454; 35 Mo., 52.

The suit was tried three times in the state courts; twice before juries, and once before a judge, and on each trial the plaintiffs had a verdict and judgment that Joseph La Croix was the person intended in the certificate of confirmation issued in the name of Louis La Croix in 1835, by the said recorder. The last judgment by the judge of the state court was affirmed by the court at General Term, and on appeal to the Supreme Court of the State judgment was finally affirmed in favor of the plaintiffs, with damages for the detention of the property. From this judgment and decision of the Supreme Court of Missouri, the defendant has sued out this writ of error.

Mr. Britton A. Hill, for defendant in error:

The record in this case does not show that either one or any of the questions stated in the 25th section of the Judiciary Act arose in the state court, and was decided in that court, as a question indispensable to the judgment in this case.

This court has no power to take jurisdiction of a writ of error from a state court, unless that court has decided against the validity of an Act of Congress, or some other question specified in the 25th section, "and have come to the very decision of that question as indispensable to that judgment."

Crowell v. Randell, 10 Pet., 892, on review by *Mr. Justice Story* of all the cases prior to that date, 1836; *Armstrong v. Treasurer, etc.*, 16 Pet., 281, 285; *Bk. v. Buckingham*, 5 How., 341; *Williams v. Carpenter*, 43 Mo., 340.

The following cases are directly in point against this court assuming jurisdiction in this case:

Matthews v. Zane, 7 Wheat., 164; *Erwin v. Lowry*, 7 How., 172; *Lyle v. Arkansas*, 23 How., 208 (63 U. S., XVI., 309); *Gibson v. Chouteau* (*ante*, 317).

Messrs. Glover and Shepley, for plaintiff in error.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Supreme Court of Missouri, to bring up a judgment of that court, which determines the title to a lot of ground once belonging to the common field lots of St. Louis.

We are of the opinion that the record presents no case for the jurisdiction of this court.

The counsel for plaintiff in error state the matter in issue very happily in their printed brief, in the following language: "The amended petition states in substance that the land in dis-

pute was proved (confirmed) in the name of Louis La Croix, when in fact Joseph La Croix was the person intended; that Recorder Hunt took proof of Joseph's right, and made a mistake in the name of the claimant, or by accident wrote Louis instead of Joseph, and the object of the suit as amended was to reform this confirmation, correct this supposed mistake, and obtain a decree in favor of the persons claiming under Joseph La Croix for the title which the defendant, Carpenter, had procured from the heirs of Louis La Croix."

The case, therefore, turns solely on the personal identity of the individual to whom the recorder confirmed or intended to confirm the lot in question. It involves the construction of no Act of Congress. The decision of the court below denies the validity of no Act under the authority of the United States. It recognizes to its fullest extent the title confirmed by the Act of Congress and the Act of confirmation, and only determines to whom that confirmation was made.

It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal Government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of federal cognizance.

If this were so, the title to all the vast domain, once vested in the United States, could be brought from the state courts to this tribunal.

In the case before us, the rules which must determine the question at issue are common law rules, and the result cannot be varied by the application of any principle of federal law or federal authority. *Ryan v. Thomas*, 4 Wall., 604 (71 U. S., XVIII., 480).

The writ is, therefore, dismissed.

THE PROVIDENCE RUBBER COMPANY.

Appt.,

v.

CHARLES GOODYEAR, Executor of
CHARLES GOODYEAR, Deceased, ET AL.

(See S. C., 9 Wall., 805-807).

Bill of review—when may be filed—not a matter of right.

The matter on account of which a bill of review is filed, must not only be new, but such as the party, by the use of reasonable diligence, could not have known; and if there be any laches or negligence in this respect, that destroys the title to the relief.

Whether an application to file a bill of review shall be granted or refused, rests in the sound discretion of the court. The requisite leave is never a matter of right.

[No. 25.]

Argued Apr. 26, 1870. Decided Apr. 30 1870.

APPEAL from the Circuit Court of the United States for the District of Rhode Island.

On motion to stay mandate and file bill of review.

The case is sufficiently stated by the court. See, also, the report of the decision by this court on the merits (*ante*, 566).

NOTE.—*Bill of review; nature of; when may be brought; who may maintain; time within which; what should contain. See note to Bk. of U. S. v. Ritchie*, 33 U. S. (3 Pet.), 123.

Mr. C. Cushing, for appellants.
Mr. W. E. Curtis, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

The appellants have submitted a motion that the mandate in this case be stayed, and that they have leave to file a bill of review. The ground of the application is the alleged fact that George B. Dorr and William Judson, both deceased, were very largely interested in the patent which lies at the foundation of this litigation, and that their legal representatives should have been made parties to the suit. It is shown that a suit has been recently instituted by Louisa Judson, widow and executrix of William Judson, against the appellants for the same infringements of the patent which are charged in the bill in this case. Affidavits are on file—taken to show the interest of Judson and that the appellants had no knowledge of the fact until since the determination of the case in this court. They are silent as to the interest of Dorr. Upon looking into the record, we find that the subpoena in this case bears date on the 30th of October, 1862. The litigation was in progress from that time until it was determined here by the opinion of this court delivered on the 7th of February last, affirming the decree of the circuit court in favor of the complainants.

Exhibit "B," annexed to the complainants' bill in the record, is the opinion of **Mr. Justice Grier** in the case of *Goodyear v. Day*, 2 Wall., Jr., 283, involving the same patent.

That opinion was delivered at the May Term, 1852, of the Circuit Court of the United States for the District of New Jersey. It appears by this opinion that the point was made in that case by the defendant, that William Judson and James A. Dorr were parties in interest, and should be made parties complainant. The assignment by Goodyear to Judson and Dorr was before the learned judge, and the question made was fully considered. They were not made parties. Exhibit "C," annexed to the bill, is the opinion of the same justice in the case of *Goodyear and the New England Car Spring Company v. The Central Railroad of New Jersey*, 1 Fish., 626, argued in the Circuit Court of that State on the 24th of March, 1853. The suit in that case was also founded upon the Goodyear patent. The objection that Judson and Dorr should have been co-complainants was set up. The assignment to them by Goodyear was analyzed and considered. The learned judge arrived at the conclusion that they were not necessary parties, and overruled the point. These exhibits were as much a part of the bill in this case as anything which it contained. The appellants are estopped from denying knowledge of its contents. They were sufficient to show the existence of the assignment to Judson and Dorr, and the general scope and character of its contents. If not satisfied with the views of **Mr. Justice Grier** upon the subject, they should have made the defense by plea or answer. Not having spoken at the proper time in that way, they cannot be permitted to speak with effect now, in this way. They have slept upon knowledge which, if material, should have awakened them to activity more than seven years ago. Their laches is fatal to their application. It is a set-
 See 9 WALL.

ted rule in this class of cases "that the matter must not only be new, but such as the party, by the use of reasonable diligence, could not have known; for if there be any laches or negligence in this respect, that destroys the title to the relief." Story, Eq. Pl., sec. 414. Whether such an application shall be granted or refused, rests in the sound discretion of the court. The requisite leave is never a matter of right. Story, Eq. Pl., sec. 417. The affidavits have failed to satisfy us that if a bill of review were filed the result would affect the decree which has been rendered.

We are all of the opinion that, under the circumstances, it would not be proper to withhold longer from the appellees the fruits of the relief to which we have found them entitled.

It is not probable that the appellants will be injured by any litigation which the representatives of Judson or Dorr may institute. If their interests, as claimed, shall be established, the circuit court which tries the case will, doubtless, so exercise its flexible jurisdiction in equity as to protect all rights and do justice to all concerned.

The motion for leave to file a bill of review is denied.

CHARLES BISCHOFF ET AL., *Plff. in Err.*,

JOHN WETHERED.

(See S. C., 9 WALL., 812-816.)

English judgment, when inoperative—question of fact.

A judgment recovered in the common pleas in England wholly without jurisdiction of the person can have no validity here.

A question of priority of invention, where a patent is attempted to be invalidated by a prior patent, is a question of fact for the jury, and not a question of law for the court.

[No. 192.]

Argued Apr. 22, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This suit was brought in the court below by the plaintiffs in error, on a judgment recovered in the Court of Common Pleas of Great Britain, for breach of covenant in the assignment of one fortieth part of a certain English patent.

The facts of the case fully appear in the opinion of the court.

The verdict and judgment in the court below having been in favor of the defendant, the case was brought here by the plaintiffs on a writ of error.

Mr. William Meade Addison, for plaintiffs in error:

The patent to Newton was void, because the invention was not novel, the same being substantially described in the patents previously granted to Moses Poole.

No evidence whatever was given to rebut the *prima facie* case made by the judgment in the original action. That judgment was overruled without any evidence of any import in addition to what was before the English court.

NOTE.—Service of notice to appear and defend; when necessary to validity of judgment. See note to *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.), 486.

Prima facie evidence becomes conclusive if not rebutted. "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose." *U. S. v. Wiggins*, 14 Pet., 347; *Kelly v. Jackson*, 6 Pet., 632.

Messrs. John H. B. Latrobe and John Withers, P. P., for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This was an action brought by the plaintiffs in error against the defendant, to recover damages for breach of covenant in the assignment of one fortieth part of an English patent granted to one William Henry Newton. The covenant was that the patent was, in all respects, valid and unimpeachable. The breach complained of was that it was null and void. The declaration contained certain other counts, namely: the ordinary money count, and a count on a judgment recovered in the Common Pleas of Westminster Hall, in England. To the latter count the defendant pleaded *null tiel record*; and the only evidence adduced in its support was an exemplified copy of a judgment recovered against the defendant in the said Common Pleas, without any service of process on him, or any other notice of the suit other than a personal notice served in the City of Baltimore. It is enough to say of this proceeding, that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null.

As no evidence was adduced to sustain the common counts, the only question of importance arises under the count of the alleged covenant, that the patent in question was valid and unimpeachable.

This patent was granted to Newton on the 25th of May, 1853, and was for certain improvements in the generation of steam, consisting of an accessory steam pipe carried from the boiler through the fire or chimney, so as to cause the steam conveyed therein to become superheated; and from thence carried to the steam chest or to any intermediate pipe, there to connect with the ordinary steam pipe, which conveys the steam from the boiler to the engine, so as to mix the superheated steam with the ordinary steam as it comes from the boiler. The effect of this mixture is described to be that the superheated steam converts into steam all the remaining watery particles, froth and foam contained in the ordinary steam, and thus dries and rarefies the whole mass, and makes it more effective.

The plaintiff having put in evidence the assignment containing the covenant declared on, and the letters patent granted to Newton, in order to show the breach of covenant, put in evidence a prior English patent granted to one Poole, in 1844, for an invention which the plaintiff claimed was identical with that patented to Newton. The plaintiff then called upon the court to compare the two specifications, and to instruct the jury that the patent to Newton was not a valid and unimpeachable patent, inasmuch as the invention therein described was not novel, but was already substantially described in the specification of Poole; and that

under the covenants contained in the assignment, the plaintiffs were entitled to recover \$300, the amount of purchase money paid, with interest. This the court refused to do, and the plaintiffs excepted.

The defendant then prayed the court to instruct the jury, among other things, that there is not on the face of the respective patents of Newton and Poole, such an identity as authorized the court to pronounce that they are for one and the same invention, and that for that reason the patent granted to Newton is invalid; and such invalidity being necessary to support the plaintiff's claim, and being wanting, the verdict must be for the defendant. The court granted this prayer, and instructed the jury accordingly, and a verdict was found for the defendants. The plaintiffs excepted to this instruction.

The question, therefore, is: whether the court was bound to compare the two specifications and to instruct the jury as matter of law, whether the inventions therein described were or were not identical.

This is an important question of practice under the Patent Law, and deserves to be seriously considered by this court.

It is, undoubtedly, the common practice of the United States Circuit Courts, in actions at law, on questions of priority of invention, where a patent under consideration is attempted to be invalidated by a prior patent, to take the evidence of experts as to the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them; and to submit all the evidence to the jury under general instructions as to the rules by which they are to consider the evidence. A case may sometimes be so clear that the court may feel no need of an expert to explain the terms of art or the descriptions contained in the respective patents, and may, therefore, feel authorized to leave the question of identity to the jury, under such general instructions as the nature of the documents seems to require. And in such plain cases the court would, probably, feel authorized to set aside a verdict unsatisfactory to itself, as against the weight of evidence. But in all such cases the question would still be treated as a question of fact for the jury, and not as a question of law for the court. And under this rule of practice, counsel would not have the right to require the court, as matter of law, to pronounce upon the identity or diversity of the several inventions described in the patents produced. Such, we think, has been the prevailing rule in this country, and we see no sufficient reason for changing it. The control which the courts can always exercise over unsatisfactory verdicts, will enable them to prevent any wrong or injustice arising from the action of juries; whereas, if the courts themselves were compellable to decide on these often recondite and difficult questions, without the aid of scientific persons familiar with the subjects of the inventions in question, they might be led into irremediable errors, which would produce great injustice to suitors. We are disposed to think that the practice adopted by our courts is, on the whole, the safest and most conducive to justice.

It may be objected to this view that it is the province of the court, and not the jury, to con-

strue the meaning of documentary evidence. This is true. But the specifications of patents for inventions are documents of a peculiar kind. They profess to describe mechanisms and complicated machinery, chemical compositions and other manufactured products, which have their existence *in pais*, outside of the documents themselves; and which are commonly described by terms of the art or mystery to which they respectively belong; and these descriptions and terms of art often require peculiar knowledge and education to understand them aright; and slight verbal variations, scarcely noticeable to a common reader, would be detected by an expert in the art, as indicating an important variation in the invention. Indeed, the whole subject-matter of a patent is an embodied conception outside of the patent itself, which, to the mind of those expert in the art, stands out in clear and distinct relief, whilst it is often unperceived, or but dimly perceived by the uninitiated. This outward embodiment of the terms contained in the patent is the thing invented, and is to be properly sought, like the explanation of all latent ambiguities arising from the description of external things, by evidence *in pais*.

We are, therefore, of opinion that the circuit court was justified in refusing to give the instructions demanded by the plaintiffs, and in giving that which was asked by the defendant.

The precise question has recently undergone considerable discussion in England, and has finally resulted in the same conclusion to which we have arrived. The cases will be found collected in the last edition of Curtis on Patents, section 446. It was at first decided in the cases of *Bovill v. Pimm*, 36 Eng. L. & E., 441, *Betts v. Menzies*, 1 Ell. & Ell., Q. B., 999, and *Bush v. Fox*, 88 Eng. L. & E., 1, that it was the province and duty of the court to compare the documents and decide on the identity or diversity of the inventions. But in 1862, Lord Westbury, in two very elaborate judgments, one of which was delivered in the House of Lords on occasion of overruling the decision in *Betts v. Menzies*, held that it belonged to the province of evidence, and not that of construction, to determine this question. "In all cases, therefore," he concludes, "where the two documents profess to describe an external thing, the identity of signification between the two documents containing the same description, must belong to the province of evidence, and not that of construction." Lord Westbury very justly remarks, that two documents using the same words, if of different dates, may intend very diverse things, as, indeed, was actually decided this court in the case of *The Bridge Proprietors v. The Hoboken Company*, 1 Wall., 116 [68 U. S., XVII., 571]. The court, in that case, said: "It does not follow that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word." And the decision was that the word "bridge," in an old bridge law, passed in 1790, did not mean the same thing as the same word meant when applied to the modern structure of a railroad bridge.

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This view of the case is not intended to, and does not, trench upon the doctrine that the construction of written instruments in the province of the court alone. It is not the construction of the instrument, but the character of the thing invented, which is sought in questions of identity and diversity of inventions.

The judgment of the Circuit Court is affirmed.

Cited—11 Wall., 546; 13 Wall., 456; 104 U. S., 749; 13 Am. Rep., 686 (72 Pa. St., 115); 81 Am. Rep., 340 (38 Mich., 765).

A. B. WOOD, *Ptff. in Err.*,

v.

DE FORREST RICHARDS.

Motion postponed, to give notice thereof.

Where a motion is made for additional security on writ of error, on the ground of the insolvency of the present sureties, if plaintiff in error has had no notice of the motion the hearing of the motion will be postponed, in order that such notice may be given.

[No. 215.]

Argued Apr. 26, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Alabama.

On motion for new appeal bond.

This case arose upon an action of detinue brought in the court below, by the plaintiff in error, to recover a large amount of personal property. Judgment having been given in that court for the defendant, the plaintiff sued out this writ of error.

The case is sufficiently stated by the court.

Messrs. L. P. Poland and Geo. S. Boutwell, for defendant in error.

Mr. P. Phillips, for plaintiff in error.

Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion in behalf of the defendant in error for an order that plaintiff in error, who was also plaintiff below, give additional security for costs and damages which may be sustained by the defendant by reason of his wrongful complaint. The motion is founded on affidavits of the insolvency of the sureties in the original bond, which certainly are, *prima facie*, sufficient.

But no notice of the motion appears to have been given to the plaintiff in error; and he has had no opportunity to put in counter affidavits.

The hearing of the motion will, therefore, be postponed until the first motion day in November next, in order that proper notice may be given.

WILLIAM S. GODBE, *Ptff. in Err.*,

v.

TOOTLE ET AL.

Writ of error dismissed for want of names of parties.

Where the writ of error describes the judgment as rendered in favor of a firm, without naming the

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persons who composed the firm, this court will not review the judgment, but the writ will be dismissed.

[No. 258.]

Argued Apr. 22, 1870. Decided Apr. 30, 1870.

IN ERROR to the Supreme Court of the Territory of Utah.

On motion to dismiss.

The case is sufficiently stated by the court.

Messrs. J. M. Carlisle and John Titus, for plaintiff in error.

Messrs. A. G. Thurman, R. N. Baskin and Bartley & Stanton, for defendants in error.

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Mr. Chief Justice Chase delivered the opinion of the court:

This is a motion to dismiss the writ of error by which the cause was brought here from the Supreme Court of the Territory.

The writ of error describes the judgment as rendered in favor of Tootle, Leach & Co., without naming the persons who composed the firm. But it has been often held that such a writ is irregular, and that this court will not undertake to review a judgment thus described. The cases are cited in *Mussina v. Cavazos*, 6 Wall., 862 [78 U. S., XVIII., 812], and need not be more particularly referred to.

The motion to dismiss the writ must be allowed.

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IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

DECEMBER TERM, 1869.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1869.

STATE OF TEXAS

v.

GEORGE W. WHITE, JOHN CHILES,
JOHN A. HARDENBERG, WESTON F.
BIRCH, BYRON MURRAY, JR., ET AL.

(See S. C., "*Texas v. Hardenberg*," 10 Wall., 68-91.)

Relief in equity cases, under general prayer of bill—bill for surrender of bonds—equity of State.

Where a bill prays for such other and further relief as to the court shall seem just and proper, any relief can be granted under such general prayer, that is agreeable to the case made by the bill.

In an action to compel the surrender of bonds, it is no objection that other securities were substituted for the bonds before the service of process.

Such substitution transferred the equities of the complainant to the substituted securities.

Defendant had notice of the equity of the State of Texas at the time he purchased the bonds.

[No. 6. Original. Dec. Term, 1869.]

Argued Nov. 12, 1869. Decided Nov. 29, 1869.

BILL of equity—on motion for a final decree. This case arose as an original suit in equity in this court, by the State of Texas against White, Chiles and others, to recover certain indemnity bonds held by them under a contract alleged to have been illegally made, for the purpose of aiding the rebellion, by said White and Chiles, with a certain Military Board of Texas.

NOTE—Overdue coupons, rights of holders of. Effect on bonds to which they are attached.

It will be presumed in favor of the holder of coupons that he acquired them *bona fide* before maturity and without notice of any defects. *City of Lexington v. Butler*, 81 U. S. (14 Wall.), 295.

Overdue coupons which are negotiable are subject to the same rules as other commercial paper. The holder takes them subject to the equities to which they were liable in the hands of the original parties. He gets no better title than the transferor had. *Arents v. Commonwealth*, 18 Gratt, 750; *Miller v. Town of Berlin*, 13 Blatchf., 245; *Gilbrough v. Norfolk & P. R. R. Co.*, 1 Hughes, 410; *First Natl. Bk. v. County Comrs.*, 14 Minn., 79; *Cromwell v. County of Sac*, 96 U. S., 51.

Coupons past due, attached to a bond when transferred, do not affect the coupons which were not then matured, so that the equities good between the original parties attach to them. *Miller v. Town of Berlin*, 13 Blatchf., 245; *contra*, that overdue coupon is attached to a bond, dishonor the bond itself so that the holder takes it subject to equities. *First Natl. Bk. v. County Comrs.*, 14 Minn., 79.

A decree was rendered in the case earlier in the present term, declaring that contract void, and establishing the right of the State of Texas to all the said bonds which were in the hands of White and Chiles, and to all that had been received by any other defendants with notice of the complainant's equity. The decree was further as follows:

"And it appearing upon pleadings and proof in this cause, that before the filing of the bill in this cause, the said defendants, Weston F. Birch and Byron Murray, Jr., had received and collected from the United States the full amount of four others of said U. S. Texas indemnity bonds, numbered 4897, 4898, 4914, and 4915, and that the defendant, John A. Hardenberg, before the commencement of the suit, deposited thirty-four of said U. S. Texas indemnity bonds, numbered 4777, and from 4287 to 4248 inclusive, and from 4930 to 4947 inclusive, and from 4282 to 4284 inclusive, in the Department of the Treasury of the United States, for redemption thereof according to their tenor; of which bonds the said Hardenberg claims to have received payment from the Secretary of the Treasury, before the service of process upon him in this suit; in respect to which payment and the effect thereof, the counsel for the said Birch and Murray and for the said Hardenberg, respectively, desiring to be heard, it is ordered, that time for said hearing be given to said parties on the first Friday of

This question was passed upon by the Supreme Court in *Cromwell v. County of Sac*, where it was held that an overdue coupon for interest attached to a municipal bond does not render the bond and subsequent maturing coupons dishonored so as to subject them in the hands of a purchaser for value to the defenses good against the original holder. *Cromwell v. County of Sac*, 96 U. S., 51.

Where the amount to be paid is uncertain and an indorsement fixing the place of payment is not filed, and there are overdue coupons attached, the holder does not sustain the position of a *bona fide* purchaser. *Parsons v. Jackson*, 99 U. S., 434 (distinguished in *Ry. Co. v. Sprague*, 108 U. S., 756).

Overdue coupons detached from a municipal bond which has not matured are negotiable by the law merchant. *Thompson v. Perrine*, 106 U. S., 589.

The mere presence of two unpaid coupons upon the bonds purchased was not, of itself, sufficient evidence of the dishonor of the bonds to which they were attached. *Ry. Co. v. Sprague*, 108 U. S., 756, citing *Natl. Bk. of North America v. Kirby*, 108 Mass., 497, and *Boes v. Hewitt*, 15 Wis., 290, distinguishing *Parsons v. Jackson*, 99 U. S., 434.

October next, or some convenient day thereafter.

And it is further ordered, adjudged and decreed, that the complainant, ———, and the defendants respectively, be at liberty to apply to the court at the foot of this decree for further direction in respect to the execution of the same, if they shall be so advised."

Motion was now made on the part of the complainant for a final decree as to Birch and Murray, and as to Hardenberg. Hardenberg appeared for counsel, to be heard upon the motion; but no appearance was made for the others.

Accordingly, the case was now argued as to the nature and effect of the alleged payment before the service of process upon him in this suit, of the thirty-four bonds to Hardenberg, made by the Secretary of the Treasury.

The bill in this case was filed Feb. 15, 1867, but service of process on Hardenberg was not made until Feb. 27, 1867. In the meantime (Feb. 16), the alleged payment was made. Previous to this, however, Hardenberg had been informed by Comptroller Tayler, that payment was delayed for information from Texas, and more recently (Feb. 8, preceding) that payment was delayed on account of legal proceedings by the State against the Secretary of the Treasury.

As to the nature of the alleged payment, the evidence was chiefly the following document: (Deposition of Mr. Tayler so far as it relates to the bonds in question.)

To the fifth interrogatory he says that, during the latter part of the year 1866, Mr. Hardenberg presented for redemption thirty-four bonds heretofore described, with 170 coupons, making a total of \$38,250. I annex hereto a copy of my report to the Secretary of the Treasury of January 29, 1869, recommending payment. I am not aware that any letter was written by the Secretary of the Treasury, at any time, to the *Chief Justice*, in relation to the bonds held by Hardenberg. One was written by me to the *Chief Justice*, under date of Jan. 22, 1868, of which a copy is hereto annexed, with a copy of an answer received from Mr. Middleton, clerk of the court; also a copy of a memorandum statement handed by me to one of the counsel in the case, dated Jan. 24, 1868. The facts stated in these papers are truly stated, but for some additional particulars you are referred to my answer to one of the cross-interrogatories on the part of Mr. Hardenberg.

To the first cross-interrogatory on the part of Mr. Hardenberg, he says:

1. That he does not mean by anything stated in his previous answers that the bonds presented by Hardenberg for payment were not, in fact, paid and redeemed, except as is stated in former answers, and in his answer to the next succeeding interrogatory. The books of the Treasury Department show that the bonds were redeemed and paid to Hardenberg or his attorney, and do not show anything in relation to the trust.

2. To the second cross-interrogatory on the part of Mr. Hardenberg, he says: Referring to the letter to the *Chief Justice*, and to the memorandum hereinbefore mentioned, I have to state that the arrangement by which the bonds were redeemed, as stated, was made by me with S. S. Cox, Atty. of Hardenberg, after con-

sultation with the Secretary, and I annex copies of my letters of Feb. 19, and Mar. 2, 1867, to Mr. Cox, and on Feb. 26, 1867, to W. S. Huntington, Esq., cashier, explaining the trusts and its terms. I do not know that any written memorandum was made; if it was, it has escaped my recollection.

The interest on the 5-20 bonds has been regularly collected and re-invested in the same issue of U. S. securities. The amount now held is \$58,000, with a small supply of money.

I should add that the statement in my memorandum of Jan. 24, 1868, that the 7-80's were converted into 5-20 bonds, though substantially correct, may not be exactly accurate. My present impression is, that the 7-80's were to be temporarily held by me until Mr. Huntington should obtain and deliver to me \$50,000 of registered bonds, and from what Mr. Cox said, I judge the coin check was delivered by him to Mr. Huntington.

And further deponent saith not.

R. W. TAYLER.

(Letter to Cox.)

WASHINGTON, February 19, 1867.

DEAR SIR: In accordance with the understanding between you and me in relation to the Texan indemnity bonds presented for payment by your client, Mr. Jno. A. Hardenberg, you deposited with me \$55,000 in 7-30 Treasury notes, and I advised the Secretary to pay you the bonds.

You were accordingly paid 84 bonds.. \$34,000
170 coupons..... 4,250

Total in gold..... \$38,250

The \$55,000 7-30 notes were deposited with, and are held by me, as indemnity for Mr. McCullough against any personal damage, loss and expense in which he may be involved by reason of the payment of the bonds.

On looking over the 7-80's this morning, I find \$51,000 the issue of August 15, 1864, without coupons, and \$4,000 of the issue of July 15, 1865, with two coupons to each bond.

I believe this states substantially the arrangement, and the cause and condition of the deposit.

I am, very sincerely, yours,

R. W. TAYLER.

Hon. S. S. Cox, 132 Broadway, New York.

(Letter to Huntington.)

WASHINGTON, February 26, 1867.

SIR: Herewith I hand you \$55,000 U. S. 7-30 notes, which were delivered to me by S. S. Cox, for a purpose explained in my letter to him of the 19th inst.

In lieu of these 7-80's, I have received from you \$55,000, 5-20 registered bonds of 1865, which are taken as advised by Mr. Cox, and are to be held for the purpose above referred to.

The bonds are registered in my name as trustee.

I am very respectfully,

R. W. TAYLER.

Wm. S. Huntington, Esq., Cas. 1st Nat'l. Bank, Washington.

(Letter to Cox.)

WASHINGTON, March 2, 1867.

DEAR SIR: Referring to my letter of the 19 February to your's of the 20th, and to our conversation a few days since, I have to inform

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you that William S. Huntington, Esq., Cash'r 1st Nat'l. Bank, Washington, placed in my hands \$50,000 registered 5-20 bonds of 1865, in lieu of the 7-30 mentioned in my letter, and that I handed the 7-80's to him. The bonds are registered in my name as trustee, and carry interest from January 1, 1867.

I am very respectfully,

R. W. TAYLER.

Hon. S. S. Cox, 133 Broadway, N. Y.

Mr. Cox's letter of Feb. 20., referred to in above letter, is mislaid and cannot be found. There was nothing in it varying from mine to him, as I recollect it.

R. W. TAYLER.

(Letter to the Chief Justice).

TREASURY DEPARTMENT,
WASHINGTON, January 22, 1868 }

SIR: In the answer of Mr. Hardenberg, in the case of *The State of Texas v. White et al.*, it is stated that "on the 16th day of February 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the same was paid on that day."

I am told the court think this action of the Secretary disrespectful toward them; but I am sure nothing disrespectful was intended, and I know that no Act of the Secretary in relation to these bonds disregarded any order or decree of the court.

In form the bonds were paid; in fact the proceeds have been withheld from Mr. Hardenberg, because of the legal proceedings, which the Secretary did not desire to defeat.

I am, very respectfully,

(Signed) R. W. TAYLER.

HON. S. P. CHASE, Chief Justice.

(Reply to the above.)

23d Jan'y, 1868.

SIR: I am instructed by the court to acknowledge the receipt of your communication of the 22d inst. in relation to the answer of Mr. Hardenberg, in the case of *The State of Texas v. White et al.*, and to say that it will be shown to the counsel in that case.

Very respectfully, your obed't serv't,

(Signed) D. W. MIDDLETON.

Clk Sup. Ct. U. S.

HON. R. W. TAYLER, Comptroller.

(Memorandum given to Counsel.)

WASHINGTON, January 24, 1868.

The particular form in which the matter of Hardenberg referred to in my letter of the 22d to the Chief Justice, was arranged, is as follows:

At the time the agent of Hardenberg claimed that the personal action against the Secretary having been withdrawn, and the decree enjoining the collection of the bonds not having been served upon Hardenberg, there was no legal objection against the payment of the bond. The Secretary, however, while not disputing this, was not inclined, under the circumstances, to pay them.

It was then insisted that the United States had no right to withhold the money, thus depriving the holder of interest upon it; and upon this suggestion it was arranged, that 7-30 notes, equivalent in value to the bonds in interest, should be deposited with an officer of the Department, to secure the Secretary against any

claim growing out of the litigation, in whatever shape it might come, and from any censure in the matter. The 7-30's were accordingly deposited, and then a check in coin, for the amount of the bonds and interest, was delivered. This arrangement was not made by Hardenberg in person, but by a gentlemen representing him.

The 7-30's were subsequently converted into 5-20 bonds, which are in the hands of the same officer.

(Signed)

R. W. TAYLER.

The case is further stated by the court.

For a report of the main case see (*ante*, 227).

Messrs. R. T. Merrick and R. J. Brent, for complainant.

Messrs. W. M. Beards and J. M. Carlisle, for Hardenberg.

Mr. Chief Justice Chase delivered the opinion of the court:

At a former day in this term a decree was entered in this cause, affirming the jurisdiction of the court, and finding that the contract of the 12th January, 1865, between White and Chiles and the Military Board of Texas, was null and void; and that the indemnity bonds and coupons received by the State from the United States, and transferred under that contract to White and Chiles, remained the property of the State, notwithstanding that transfer.

The decree further found that the State of Texas was entitled to recover any of those bonds and coupons, or any of the proceeds thereof, which had come to the possession of any of the defendants other than White and Chiles, with notice of the equity of the complainants; and perpetually enjoined John A. Hardenberg, Weston F. Birch and Byron Murray, Jr., with other defendants, from setting up any claim or title to any of the bonds or coupons which had come into their possession and control with such notice.

It was further decreed that certain defendants were accountable to make restitution of the bonds and the proceeds received by them; but it appearing that Birch and Murray had received from the United States the full amount of four bonds, and that Hardenberg, before the commencement of this suit, had deposited thirty-four bonds with the Secretary of the Treasury, and claimed to have received payment before the service of process, it was ordered that the counsel of those parties be further heard in respect to such payment and the effect of it.

No argument has been submitted under this order in behalf of Birch and Murray, but the counsel of Hardenberg have been heard, and we will now dispose of the matter reserved.

It is claimed in behalf of Hardenberg, that he can, in no event, upon the pleadings in this suit, be held to account for the proceeds of the bonds which came to his possession, because the bill prays only relief by injunction against receiving payment of the bonds or coupons, and by decree for delivery of them specifically to the State.

It is not denied that the bill also prays for such other and further relief as to the court shall seem just and proper, but it is insisted that there is nothing in the frame of the bill which will support a claim for relief as to proceeds

where payment of the bonds and coupons had been actually received before service of process.

It is undoubtedly true, that no relief can be granted under the general payer except such as is agreeable to the case made by the bill. Story, Eq. Pl., sec. 40; *English v. Fecall*, 2 Pet., 595.

It is plain enough that the principal object of the bill in this case was to prevent the collection of the bonds by the defendant, and to compel the surrender of them to the State of Texas. But there are averments and interrogatories which look to the proceeds as well as to the bonds themselves. For example, it is charged that the bonds were placed in the hands of the defendants holding them, for the purpose of collecting the proceeds from the United States; and again, that the defendants design to collect the proceeds and apply the same to their own use, in disregard of the just rights, and to the great loss and injury of the complainant. And one of the interrogatories requires from each defendant, except White and Chiles, to whom somewhat different interrogatories are addressed, a statement whether any other person is interested in any and if any, in which of the bonds, or the proceeds thereof.

It may be admitted that these allegations and interrogatories do not assert the right of the complainant to the proceeds with absolute directness and distinctness. The bill might have been better drawn. But we think it would savor of extreme technicality to refuse to see in the bill enough in relation to the proceeds of the bonds to warrant relief in this respect under the general prayer.

It is proper to observe here that this objection to relief, in respect to the proceeds of the bonds, was not taken on the former hearing, and that the decree heretofore made, distinctly finds that the State of Texas is entitled to restitution of such of the bonds and coupons and proceeds as have come into the possession or control of the defendants—among whom Hardenberg is expressly named—with notice of the equity of the State. It might well be held, therefore, that this question is concluded by the former decree; but willing to allow this defendant the benefit of any defense consistent with the rules which govern proceedings in equity, we have looked into the question as if it were still open. Having thus looked into it, we find no sufficient ground for altering the conclusion embodied in the decree.

We come then to the real question upon which further hearing was allowed, namely: what was the nature and effect of the payment received by Hardenberg from the Secretary of the Treasury, before service of process in this suit?

The bill was filed on the 15th of February, 1867, in pursuance of leave granted by the court. On the same day a motion for injunction was made, and it was ordered that this motion be set down for hearing on the 2d of May, 1867, and that copies of the order be served on the defendants at least ten days previously. Process was ordered, and subpoenas were issued on the same day, and copies of the subpoena and of the motion for injunction were served on Hardenberg on the 27th of February. The answer of Hardenberg was filed May 15th, and on the following day the motion for injunction was allowed, with leave to defendants to move for its dissolution at the next term.

In the interval between the filing of the bill and the service of process, as Hardenberg avers in his answer, the Secretary of the Treasury ordered the payment to him of all his bonds and coupons deposited for redemption, being the same bonds and coupons alleged in the bill to be the property of the State of Texas, and they were paid accordingly on that day.

What was this payment? On the 17th of December, 1866, Hardenberg had been advised by Comptroller Tayler that payment was delayed for information from Texas. On the 8th of February he was further advised by the same official that the bonds and coupons had been reported to the Secretary of the Treasury for payment, but that payment had been postponed in consequence of a personal action in the name of the State of Texas against the Secretary for their detention.

It is clear that Hardenberg was now informed that the bonds and coupons, deposited by him for redemption, were claimed by the State of Texas.

Subsequently, on the 16th of February, \$88,250, being the amount of the bonds and coupons, was paid to the agent of Hardenberg in a coin check, and at the same time Treasury 7-80 notes to the amount of \$55,000 were deposited with Comptroller Tayler, according to his statement, made in a letter to the agent, dated February 19th, "as indemnity for Mr. McCullough" (the Secretary of the Treasury) "against any personal damage, loss and expense in which he might be involved by reason of the payment of the bonds."

This payment was made on the day after the bill of the State was filed in this court and subpoenas issued. That the institution of the suit, thus began, was known to the Secretary at the time, is apparent from the letter of Mr. Tayler to the *Chief Justice*, dated January 23d, 1868, in which he says: "In form the bonds were paid; in fact the proceeds have been withheld from Mr. Hardenberg because of the legal proceedings, which the Secretary did not desire to defeat."

And all this is still further apparent from a memorandum statement made by Mr. Tayler on the 24th, and handed to one of the counsel in the cause.

These statements Mr. Tayler in his deposition re-affirms; but for additional particulars refers to his letter to the agent, already quoted, and to a letter addressed by him on the same day to the cashier of the First National Bank.

From these letters, this memorandum, and the deposition of Mr. Tayler, we do not think it difficult to collect the substantial facts of the transaction. Hardenberg was naturally solicitous to collect the amount of his bonds and coupons, which had ceased to bear interest; or, at any rate, to make some arrangement by which the loss of interest pending the liquidation might be avoided. The Comptroller seems to have thought that he was entitled to payment, and the Secretary was willing to order payment to be made, but not willing to incur any risk of consequential loss or injury. It was his duty, in any arrangement that might be made, to protect the government, and through the government the parties really entitled to the bonds, as well as himself. And the statements of Mr. Tayler, taken together, satisfy us fully that it

was the intention of the Secretary, and his own, that these objects should be accomplished.

With these views it was arranged that Hardenberg should deposit with the Comptroller the 7-30 Treasury notes, and receive the amount of the bonds and coupons in coin, as already mentioned. And further, that on the deposit with the Comptroller of \$50,000 in registered 5-20 bonds upon the same trust, the 7-30 bonds should be delivered to him or his agent.

That this arrangement was carried into effect appears from Mr. Tayler's letter of March 2d, 1867, addressed to Hardenberg's agent at New York. The letter concludes with these words: "The bonds are registered in my name as trustee, and carry interest from January 1, 1867."

Trustee for whom? Equity looks through forms to substance; and the substance of this transaction clearly was the substitution of one set of securities in the hands of the Comptroller of the Treasury for another, for the benefit of the parties really entitled. In no other way could the object of the trust, namely: the security of the government and Secretary against loss be attained. At the beginning, he held bonds or coupons of the United States issued as indemnity to Texas. At the end, he held registered bonds of the United States in their place. And he held both for Hardenberg, subject to the same equities. The net result of the transaction to Hardenberg was the putting of the debt in a shape to bear interest. If the coin received for the indemnity bonds exceeded the amount invested in the 5-20 bonds deposited in their stead, he may have also gained that excess.

In this view of the case, it is not important to inquire whether the delivery of the coin check to Hardenberg took place before or after the service of process. That transaction was correctly described as "a payment in form," the proceeds having been, in fact, withheld. It was not designed, on the part of the Secretary of the Treasury, to defeat the legal proceedings already commenced by filing the bill and issuing the subpoenas in the cause. We will not presume that anyone else entertained such a design. Certainly no such effect, if designed, can be accomplished through the aid of a court of equity. We are obliged, therefore, to say that the delivery of the coin check to the agent of Hardenberg was not payment. There was, indeed, no real payment at all. There was a transaction beginning with the delivery of the coin check, and ending with the substitution of the 5-20 bonds in place of the indemnity bonds, which was to be perfected into actual payment by the delivery to Hardenberg of the substituted bonds whenever this could be safely done. During the progress of this transaction, process in this suit was served on Hardenberg. No real payment, therefore, was made before service of process.

Our conclusion on this part of the case is: that the so called payment on the 16th of February, 1867, did not affect the equities of the complainant, except by transferring them from the indemnity bonds to the 5-20 bonds substituted in their place, so far as may be necessary to satisfy to the complainant the amount then due upon the former.

This conclusion leaves but one question for consideration, namely: whether Hardenberg, at See 10 WALL.

the time he purchased the bonds, had notice of the equity of the State of Texas. This question was not concluded by the decree, but it was fully considered by the court upon the former argument, and our conclusion was stated in the opinion then delivered, that Hardenberg, as well as the other purchasers of indemnity bonds about the same time, was affected by such notice. We will not restate what we then said. It is only necessary to say that we have reconsidered the grounds of that decision, and are still satisfied with it.

It follows that, upon the whole case, our decree must be for the complainant as to the bonds claimed by Hardenberg.

As to Birch and Murray, we find on looking into the bill, no allegation of interest in complaint as to the four bonds in respect to which further hearing was allowed.

As to these bonds, therefore, the bill against these defendants must be dismissed.

DECREE.

This cause coming up to be further heard on questions reserved in and by the decree formerly made, and these questions having been argued by counsel and fully considered by the court, it is now found and declared that the thirty-four bonds, commonly called indemnity bonds, and one hundred and seventy coupons, parcel of the bonds and coupons transferred to White and Chiles, under their contract with the Military Board of Texas, and presented for redemption at the Treasury Department by the defendant, Hardenberg, were, in fact, the property of the claimant, the State of Texas; and it is further found and declared that the bonds commonly known as the 5-20 bonds, amounting at their face value to \$50,000, deposited by the defendant, Hardenberg, with R. W. Tayler, are liable in equity to the said complainant State, to the extent of the value of the indemnity bonds originally presented for payment by said defendants, which value is found to have been \$38,250 in coin. And, therefore, it is ordered, adjudged and decreed, that the said R. W. Tayler, who is hereby appointed a special master for this purpose, proceed to sell so many of said 5-20 bonds as may be necessary to produce the said sum of \$38,250, together with one fourth of one per cent. as his commission, and one fourth of costs of this suit; and that retaining the said commission for his compensation, he pay the fourth of said costs to the clerk of this court, and the said principal sum to the complainant, or to her lawful agent, and that he deliver the residue of said bonds or proceeds to the said defendant, Hardenberg, and report his proceedings herein, within ten days from the first day of the next term of this court.

And it further appearing to the court that no allegation is made by the complainant's bill of any interest in the State of Texas in the four bonds in respect to which further hearing was allowed to Weston F. Birch and Byron Murray, it is ordered that the bill of the complainant as to the said bonds, namely: numbers 4897, 4898, 4914 and 4915, be dismissed.

And for the coming of the master's report and order thereon, this cause is continued.

Cited—16 Wall., 410; 20 Wall., 88; 10 Blatchf., 288, 289; 39 Am. Rep., 229 (75 Ky., 332).

THE PEOPLE'S PASSENGER RAILROAD
COMPANY OF MEMPHIS, *Pff. in Err.*,

v.

THE MEMPHIS CITY RAILROAD COM-
PANY, JOHN PARK, Mayor, AND THE
BOARD OF MAYOR AND ALDER-
MEN OF THE CITY OF MEMPHIS.

(See S. C., 10 Wall., 38-56.)

*Railway in streets—condition in company's char-
ter—new charter.*

Municipal authorities of a city cannot grant to an association the right to construct and maintain for a term of years a railroad in one of the streets of the municipality for the transportation of passengers for private gain.

Where a charter of a railroad company was on the condition that it should secure the consent of the city before it could exercise the franchise in question, it is not at liberty to act without such consent.

Where such consent was never obtained, a charter to a new company giving authority to construct such railroad is not a law impairing the obligation of a contract.

[No. 87.]

Argued Nov. 25, 1869. Decided Dec. 13, 1869.

IN ERROR to the Supreme Court of Tennessee.

This case arose upon a cross-bill filed in a Common Law and Chancery Court of the City of Memphis sitting in equity, by the plaintiff in error as respondent in that court. Upon a demurrer thereto, that court entered a decree dismissing the said cross-bill, and thereupon the said respondent took an appeal to the Supreme Court of Tennessee. That court having affirmed the decree, the said respondent sued out this writ of error.

The case is fully stated by the court.

Messrs. J. M. Carlisle, John D. McPherson and D. K. McRae, for plaintiff in error:

The first question to which this court will look is that of jurisdiction. It is the old question, "Whether the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States was drawn in question, and the decision is in favor of such validity." Act, 1789, sec. 25.

If so, the final decree of the state court may be examined here on writ of error and reversed.

The pleadings in this case unquestionably claim that the validity of the Act of June 7, 1865, incorporating the Memphis City Railroad Company, is drawn in question as being repugnant to the Constitution of the United States, because it impairs the contract contained in the charter of the plaintiff in error.

And the validity of the Act of 1865, the defendants' charter, was as unquestionably maintained.

But the Supreme Court of Tennessee, by so construing the Act of 1860 as to declare that there is no valid contract therein, and that plaintiff had acquired no corporate rights, assumes that the question of such validity had not arisen and was not decided, while in the same breath declaring that the Act in question was valid because there was no contract to be impaired.

This court is not controlled by the *ipse dixit* that there was no contract when it may be altogether of a different opinion.

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Bridge Props. v. Hoboken Co., 1 Wall., 118 (68 U. S., XVII., 571); *Bk. v. Skelly*, 1 Black, 436 (66 U. S., XVII., 178); *R. R. Co. v. Rock*, 4 Wall., 177 (71 U. S., XVIII., 381).

We claim that the advertisement for proposals by the Board of Mayor and Aldermen, Nov. 22, 1859; the propositions of Kirk & Small and their associates, offered 'on the 29th; their acceptance with the alterations in the resolution of that date by the Board, and the after acceptance by the associates, constituted a perfect and full agreement, a *congregatio mentium* wherein the terms, stipulations, conditions and obligations were decided and mutually adopted, and from that moment became binding on all the parties; of which a court of equity would require the specific performance, notwithstanding that the formal contract was to be reduced to writing and confirmed, and the bonds confirmed.

This very point was decided in a Tennessee case with reference to the Board of Mayor and Aldermen of Memphis.

Levering v. The Mayor, 7 Humph., 553.

It is even so in contracts with the government.

1 Nott. & H., 192; *Blight v. Ashley*, 1 Pet. (C. C.), 15; 1 Bald., 464.

But it is said that the Board had no authority to make such a contract and, therefore, it was null and void, and incapable of ratification by the Legislature, because the municipal Corporation had no power to grant the franchise to use the streets.

This claim is based on the decisions in the State of New York. *Davis v. The Mayor*, 14 N. Y., 506; *Milbau v. Sharp*, 27 N. Y., 611.

Without admitting that the New York decisions have gone to this extent, we may rely on the weight of authority on the other side.

Brown v. N. O., 14 La. Ann., 854; *Hamilton v. R. R.*, 9 Paige, 171; *R. R. Co. v. Applegate*, 8 Dana, 290; *Drake v. R. R. Co.*, 7 Barb., 524; 10 Barb., 365.

By the amended charter of the City, the Corporation was authorized "to regulate the laying of the railroad iron and the passage of railroad cars through the City."

Act, 1854, ch. 195, art. 4, sec. 30; see Book of Ordinances of the City, p. 205, sec. 11, which is evidence in all the courts by Act of 1854.

It has also power to license vehicles and generally to improve the streets.

The general law of municipal corporations authorizes them to "grant privileges in the use and enjoyment of the streets."

Code, sec. 1859, sub. 6.

By a late Act of the Legislature, the Corporation of Memphis is vested with complete and perfect control over all the streets.

Act, 1866, Ordinance 5, p. 144; *Hazen v. Bk.*, 1 Sneed, 115; *Mabry v. Tarver*, 1 Humph., 94.

Without doubt the Legislature could have chartered the Company with a grant of the streets, irrespective of its consent. *R. R. Co. v. Adams*, 8 Head, 596.

And by consequence it might bestow the grant in a charter drawn conformably to this consent. In this point of view the action of the City Corporation would be regular, and the legislative action in conformity with it would ratify and adopt it.

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In our case, besides the right to regulate the laying of iron, etc., the City was the owner of the soil of the streets, and capable of avoiding or necessitating the exercise of eminent domain by giving or withholding its consent to their use. And this was all the effect of its action. It entered into an agreement with an Association of individuals about the terms on which the use of the streets would be allowed to be sanctioned by the charter from the Legislature, and when the Legislature, in conformity with the agreement, granted the charter, empowering the Association, now become a Corporation, to "Complete and execute all agreements entered into with the City of Memphis for the use of the streets of said City or building said railroad."

Its confirmation reached back of and beyond the mere instrument by which the permission of grant was conveyed to the substance of the grant or permission itself, and became, in very deed and fact, a legislative grant to the thing itself on the terms and stipulations of the agreement referred to.

People v. Law, 34 Barb., 495.

That is, the Legislature conferred an original grant of power to use the streets and construct the road, not unconditionally it is true, but in a specified mode, upon terms to be found in an agreement definitely specified in the Act, which was to be completed and executed.

The tenor of the Act shows this; the words chosen are apt to convey this meaning, and are inapt to convey any other.

In order to make this clear, it is necessary to examine the Act of incorporation of the plaintiff's Company. Section 1 constitutes H. D. Small, William Kirk and others, the very persons who had agreed with the City to be the body politic, to have succession for twenty-five years, the very time named in the agreement.

Section 4 authorizes said Company "to complete and execute all contracts and agreements entered into with the City of Memphis for the use of the streets of said City or building said railroad."

But this agreement, as is evident from the future words, did not include all the streets nor other road to be run on the excluded streets, not yet the subject of any agreement.

Section 5 shows still further this meaning: "Said Company may extend said road or roads outside the corporate limits," etc.

All that is needed to show forth the powers and privileges of the franchise, is to set up the agreement with the City which, by specific reference, is engrafted into the charter.

Hunt v. Ulica, 23 Barb., 890; *Wilkinson v. Leland*, 3 Pet., 627.

If it were no more than a confirmation, it is such a one where words are so mingled with the confirmation as to create an estate.

Gilb. Ten., 69; *People v. Law*, 34 Barb., 511.

But it is submitted that the court will derive aid in the construction of the Act, not merely from the words used, but from extrinsic facts used, in order that the intention of the parties to the contract may be ascertained.

Leasieur v. Pries, 12 How., 59; *Can. Co. v. R. R. Co.*, 4 Gill & J., 1; *Preston v. Bowder*, 1 Wheat., 115; *The Binghamton Bridge*, 3 Wall., 51 (70 U. S., XVIII., 137); *Nash v. Towne*, 5 See 10 WALL.

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Wall., 689 (72 U. S., XVIII., 527); *Smith v. Helmer*, 7 Barb., 416; 2 Sneed, 88.

If reference then be had to these extrinsic facts, there will appear—

1. The ordinance promising the award of the contract.

2. The bid of the associates.

3. The expressed award of the contract on the terms specified in the resolution of Nov. 29, 1859.

4. The acceptance by the associates, Dec. 2.

5. The reception and filing of exceptions, Dec. 8.

6. The mutual agreement that an Act of incorporation should be obtained, Dec. 8.

It will be found from all these that certain street were awarded, and as to the rest, the associates had agreed not to get a charter without the consent of the City.

The consent of the City had already been given as to the streets agreed on that the charter should be obtained. The consent yet to be obtained was for all the streets about which they may enter into all necessary contracts.

It is said, however, that if the agreement and the award of the contract were duly made with the associates, it cannot inure to the Corporation, because there is no mutuality between the latter and the City.

The Act of the Legislature passed on the consent of the City to the individuals, is a novation of the Corporation on its acceptance.

Dunshoe v. Hill, 20 Ill., 499; *Blaney v. Hoke*, 14 Ohio St., 292; *McCarty v. Blevins*, 5 Yerg., 195.

It was upon the principle, in part, on which the cases of *The Can. Co. v. R. R. Co.* 4 Gill & J., 185, turned; see, also, *Gleaves v. Brick Ch. T. Pike Co.*, 1 Sneed, 491; *Mobile & O. R. R. Co. v. Yandal*, 5 Sneed, 294; *Eastern Pt. R. Co. v. Vaughan*, 14 N. Y., 546.

Besides, the City ratified or acquiesced in the substitution after the charter was passed.

It was contended below that the charter of the plaintiff ceased or was forfeited under the Code of Tennessee.

Code, sec. 1480.

The reply is:

1. The Corporation did organize and commence the transaction of its business.

2. The negotiations with the City was the transaction of business within the Act. But the charter cannot be assailed collaterally. The failure to perform the condition was only cause of forfeiture.

1 Dev. & Bat., 306; *People v. Manhattan Co.*, 9 Wend., 378; *People v. Hillsdale Turnpike R. Co.*, 23 Wend., 257; *Mickles v. Bk.*, 11 Paige, 124; Ang. & Ames, Corp., sec. 686.

The repeal of our charter will hardly be insisted on.

Ferguson v. Bk., 3 Sneed, 609.

Messrs. Albert Pike, Robert W. Johnson and Thos. Wilson, for defendants in error:

In order to give this court jurisdiction of the case, it must appear: first, that there was a contract between the Mayor and Aldermen and the incorporated Company complaining, complete and binding on both; and second, that the grant to the Memphis City Railroad Company, of the privilege of building street railroads, impairs the obligation of that contract.

The Supreme Court of Tennessee declares,

in its decree, that the charter of incorporation of the People's Passenger Railroad Company was made to depend upon the consent of the Mayor and Aldermen, and that such consent had not been obtained; by failing to obtain which, the Company had acquired no corporate rights; and that, therefore, the question of whether the obligation of a contract had been impaired, did not arise in the cause and was not decided by the court.

By which the Supreme Court of the State seems to have intended to decide that there was no such Corporation as the People's Passenger Railroad Company, as on a plea of *nul tiel corporation* but it, nevertheless, decrees that that Company shall pay the costs.

Of course, if it decided that there was never any such Corporation, it could not reach the question whether that Corporation had made the contract alleged; as, if it decided that no contract had been made, it could not reach the question whether a contract had been violated and its obligation impaired by subsequent legislation.

But, nevertheless, all these questions are presented by the record; and the first as well as the two others depends for its solution upon the determination of the court as to certain facts alleged in the pleadings and established or denied by the proof.

The charter of the Company creates certain persons a body politic and corporate, to have succession for twenty-five years, with capacity to sue and be sued, etc. Special powers to build and operate street railroads, in completion and execution of previous contracts entered into with the City by individuals, are conferred by the 4th section; and these are to be exercised only with the consent of the City.

But the existence of the Corporation was not made dependent on that consent. Without that, the Company would exist, but would not possess these especial powers, the exercise of which, like the power of banking of a bank, was the whole object and purpose of its creation and incorporation.

It must be, therefore, the meaning of the Supreme Court of Tennessee, that the corporate powers specifically mentioned in the 4th section did not vest. If that court had meant that there was so such Corporation, it could not have decreed payment of costs by it.

The question whether the powers given by the 4th section ever vested is, virtually; whether the Mayor and Aldermen ever accepted the incorporated Company in the place and stead of Small & Kirk and their associates as individuals.

Supposing the parties the same, the Corporation, nevertheless, was a person in law totally separate and distinct from these corporators; and a contract made with the latter by the City could not become a contract with the Corporation, except by virtue of a previous stipulation or a new contract between the City and Corporation. If there exists a complete contract between Kirk & Smith and their associates as individuals on the one side, and the Mayor and Aldermen on the other, and the other have violated it, the only remedy of the former is by an action for damages. It is not a case for specific performance; and the Corporation is not aggrieved.

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The City could not invest individuals with the franchise in question, nor by a contract with them deprive the Legislature of the power of granting the franchise to others. The City authorities had no power to make such a contract.

Davis v. Mayor, etc., 14 N. Y., 506; *Milham v. Sharp*, 27 N. Y., 611.

In Tennessee, it is not even possible for the Legislature to delegate the power to create a corporation.

State v. Armstrong, 3 Sneed, 634; *Mayor, etc., v. Shelton*, 1 Head, 24.

What if there were a contract and it were not void?

Was the consent of the City, required by the Act of incorporation, ever given?

Dec. 8, 1859, Kirk & Small, for the persons composing the Company, accepted by letter the terms proposed by the Board, and declared themselves ready to sign a contract embodying those terms.

The Mayor and Aldermen, by resolution, gave Kirk, Small and their associates permission to become incorporated; the purpose of the proposed incorporation being declared to be "To secure the rights, and the more effectually to preserve the remedies, of parties against each other respectively, in case of any violation of contract to be hereafter entered into;" and also, that the incorporation should not prevent the organization or incorporation of any other company to build street railways or for other street improvements, if thereafter found desirable; and finally, that the Act of incorporation should require the consent of the City of Memphis.

Mar. 22, 1860, resolutions were offered to accept the charter of the People's Passenger Railway Company, and to authorize the closing of the contract with that Company; but the Mayor and Aldermen finally, after much debate, resolved, by nine votes against three, that it receded from its undertaking to have a street railway on Main Street, because of the great opposition of the property holders upon that street thereto; and by a vote of seven to six, they proposed to settle with the persons who had been incorporated (not with the Corporation), any damages they might have sustained by the change of purpose on the part of the Mayor and Aldermen; denying, however, that they were under any legal obligation to do so.

The court certainly cannot look to "surrounding circumstances," to ascertain the intention of the Legislature and the extent of the rights of the Corporation. To ascertain such intention, no extrinsic facts prior to the passage of a law, and which is of itself not a rule of law or legislation, can be inquired into or considered.

Sedg. Const. L., 247.

There was a written contract to be signed before the individuals or the Corporation could be bound. It is the very case of *The Gov. Guardians, etc., v. Petch*, 10 Exch., 610, and 24 L. J., Exch., 28.

In *Musser v. Fairmount & Arch St. R. Co.*, 7 Am. Law Reg., 284, in the Supreme Court of Pennsylvania in equity, the Act incorporating the Company provided that the consent of the City Council to use or occupy the street should be obtained before the Company should construct the tracks. The court said that the question was, whether the Company had a valid

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charter. In this case the consent of the City to the charter itself is expressly required. In that case the court held that the grant depended for vitality on the consent of the City Council; that this was necessary to give vitality.

If a matter is left to the discretion of any individual or body of men who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not.

King v. London, 8 Barn. & Ad., 271; *King v. Norfolk*, 1 Nev. & M., 67; *Walker v. Devereaux*, 4 Paige, 251.

The "consent" of the City, of course, means its free and full and not a forced consent. The City had stipulated with Kirk, Small and others that the Act of incorporation should require its consent and thereby reserved the right to make, or to refuse to make the proposed contract with the Corporation, as it might see fit. What else could the stipulation mean? And how could the Legislature, or how can any court, compel the City to give that consent?

Mr. Justice Clifford delivered the opinion of the court:

Express authority was vested in the Memphis City Railroad Company, by the 4th section of their Act of incorporation, to "construct, maintain, use and operate street railway by animal power, on all or any of the streets in the City of Memphis, using for that purpose all necessary machinery and equipments," and "to make, complete and execute all contracts and agreements" made with the City or other parties for any purpose connected directly or indirectly with the construction, maintaining or operating such railway, and to alter or enlarge the terms of the same with the said parties. *Sees. Laws, 1865, p. 88.*

Evidently the Legislature assumed to confer the franchise of the Company without regard to the consent or action of the City, and upon the assumption that there was no valid subsisting contract between any other parties and the City for constructing the described railroad and putting the same in operation. Confirmation of that proposition, if anything else is needed, is found in the 9th section of the Act of incorporation, which provides that the Act entitled an Act to Incorporate the People's Passenger Railway Company of the City of Memphis, passed February 1, 1860, be, and the same is hereby repealed.

Pursuant to the Act of incorporation the Company was duly organized, and the stock necessary to construct ten miles of the railway track, and to equip, run and maintain the same, was duly subscribed, and the contract awarded to responsible persons to construct and equip that part of the railway as authorized by the terms of the charter.

Regularly organized and ready and willing to comply with all the requirements of their charter, the Corporation complainants allege that their contractor, employees and agents commenced to construct the railroad with the intention of fulfilling all their obligations, and would have completed the undertaking if they had not been interrupted and obstructed in the work; that the Mayor and Aldermen of the City,

or some of them, in disregard of the franchise of the Company, forcibly and with violence caused the work to be discontinued and stopped.

Based upon these and similar allegations the prayer of the bill of complaint is, that John Park, Mayor and the Board of Mayor and Aldermen, may be made parties respondents in the suit, and for an injunction. They were accordingly made parties, and the complainants having executed a bond, with the usual conditions, in the sum of \$20,000, the writ of injunction was duly issued.

Service of the writ of injunction having been made, the People's Passenger Railroad Company filed a petition in the case, representing that they were authorized by their charter, with the consent of the City, to execute all contracts made with the City or other parties, for the use of the streets of the City for operating street railroads thereon by animal power, and praying to be made a party respondent to the bill of complaint. Hearing was had on the petition, and it appearing that the petitioners were interested in the issue, it was ordered by the court that the prayer of the petition be granted.

Being the original respondents, the city authorities filed a separate answer, in which they admit that the complainants made the offer in writing, as required by their charter, to construct the railroad, and that they took possession of one or more of the streets of the City for that purpose; that they commenced the work and that the Mayor of the City interrupted the work as alleged and caused it to be discontinued.

Extended answer was also filed by the other Corporation respondents, in which they set up their Act of incorporation granted February 1, 1860, and especially the 4th section thereof, which provides that they "shall have power to complete and execute all contracts and agreements entered into with the City of Memphis, or other parties, for the use of the streets of said City for building said railroad, and may alter or enlarge the terms of the same with said parties, and may operate street railroads by animal power on all the streets in the City of Memphis, with the consent of said City."

They also allege that the city authorities, prior thereto, invited bids for the construction of such railroad on certain streets in the City, including those mentioned in the bill of the complaint; that on the 29th of November, 1859, the bids made for that object were reported to the Mayor and Aldermen, and that they awarded the contract to William Kirk and H. D. Small, whose bid was made in their own behalf, and as agents of certain associates since constituted the People's Passenger Railroad Company of Memphis; that the said contractors and their associates were subsequently, with the consent of the city authorities, incorporated by the Legislature of the State, and with the understanding that the conditions of the contract as made and accepted should not be changed; and the respondents aver that they are advised and insist that the consent of the City given as stated and subsequently ratified by the Legislature, as by their charter appears, is a contract between the parties which no subsequent Legislature can constitutionally alter or impair without their consent.

By virtue of those proceedings they claim

that they are invested with a franchise which neither the City Council nor the Legislature, nor any other party, can constitutionally invade; and that the 9th section of the complainants' charter, by which their Act of incorporation was repealed, is null and void, because it was passed in contravention of that clause of the Constitution which forbids the States from passing any law impairing the obligation of contracts, and the respondents, in conclusion, submit to the court that the matters set forth in the answer call for the interposition of the court to protect their rights as though they were complainants asking relief in the premises, and they pray that the answer may stand as a cross-bill, and that the Mayor and Board of Aldermen, as well as the complainants, may be required to answer the allegations, and that the injunction may be dissolved.

Complainants demurred to the cross-bill, and the demurrer was sustained, and the cross bill was dismissed. On appeal to the Supreme Court of the State the decree was affirmed, and the respondents in the original bill of complaint appealed to this court.

Two things must clearly appear in order to justify the court in adopting the views of the respondents: (1) That there was a contract between the respondents and the city authorities, which was complete in itself, and which was binding on both parties. (2) That the charter subsequently granted to the Memphis City Railroad Company, impairs the obligation of that contract.

I. Prior in date as the charter of the respondents is, it is clear that the charter granted to the complainants invades the rights of the respondents, if the exclusive rights which they claim were ever perfected by a binding contract made between them and the city authorities, unless it be assumed that the charter under which they claim such exclusive right could be repealed by a subsequent Legislature. Viewed in that light the case presents two questions for decision, both of which must be decided in favor of the respondents, or the decree of the Supreme Court of the State must be affirmed: (1) Whether the city authorities ever entered into a binding contract with the respondents that the respondents might complete and execute all contracts and agreements previously made with the City, or other parties, for the use of the streets of the City for building and operating said railroad; and if they did make such a contract, then (2), whether the Act of the Legislature repealing their Act of incorporation is or is not a valid law.

Apparently, it was a question in the state court whether the respondents were ever legally incorporated; but there does not appear to be any substantial ground of doubt upon that subject, as the persons named in the Act, and their associates, are expressly constituted a body politic and corporate under the name therein set forth, and the 1st section also provides that they may have succession for the term of twenty-five years; may sue and be sued, plead and be impleaded; may have and use a common seal, purchase and hold real and personal estate, create stock, elect directors and other officers; and may make all necessary by-laws, subject to the usual condition that they shall not be inconsistent with the laws of the State. Un-

founded as the objection is in any view of the case, it may be dismissed without further consideration.

II. Apart from that topic, however, the real question is, whether the special powers described in the 4th section of their charter ever actually vested in the respondents, as they allege in their answer. They insist that the exclusive right to construct railroads for the transportation of passengers over the streets of that City, and to use the streets of the City for that purpose, was granted by the city authorities to certain individuals as contractors before the respondents were incorporated, and that they, the respondents, with the consent of the City, subsequently became the assignees of that contract and agreement, and as such were and are invested with the authority to complete and execute that contract and agreement as ratified and confirmed by the Legislature.

None of the elements of that proposition are admitted by the complainants; but they insist that municipal corporations have no power to grant such a franchise to individuals or other corporations, unless thereto specially authorized by the Legislature; and they also insist that no such power is shown to have been conferred in this case.

III. Serious doubts are entertained whether the Mayor and Aldermen of the City of Memphis possessed any authority to make such a contract as that set up in the answer as having been made by them with the persons under whom the respondents claim, as it obviously amounts to a franchise for twenty-five years; and if so, then it is clear that it could not be granted by those authorities in virtue of the ordinary powers possessed by such municipalities.

Power to make laws is vested in the Legislature, under the Constitution of the State, and it is very doubtful whether the Legislative Department can delegate to any other body or authority the power to grant such a franchise, as the exercise of that power involves a high trust created and conferred for the benefit of those who granted it, and as the trust is confided to the Legislature, it must remain where it is vested until the Constitution of the State is changed. *Cooley, Const. Lim.*, 117; *Thorne v. Cramer*, 15 Barb., 113; *Barto v. Himrod*, 8 N. Y., 488; *Parker v. Com.*, 6 Pa., 607; *Sedgw. Const.*, 165; *Wayman v. Southard*, 10 Wheat., 46.

Franchises, it is conceded, cannot, as a general rule, be granted by such a corporation, and it is clear that the privilege of making a railway or turnpike, or establishing a ferry and taking tolls for the use of the same, is a franchise, as the public have an interest in the same, and the owners of the privilege are liable to answer in damages if they refuse the use of the same, without any reasonable excuse, upon being paid or tendered the usual fare. 3 Kent, Com. (11th ed.), 590; *Willoughby v. Horridge*, 16 Eng. L. & E., 487; *Beekman v. S. & T. R. R. Co.*, 8 Paige, 45.

IV. Consonant with that view this court held, in the case of *Bk. of Augusta v. Earle*, 13 Pet., 595, that franchises are special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right; and that in this country no franchise can be held which is not

derived from the law of the State. Ang. & Ames, Corp. (8th ed.), 2; *State v. Armstrong*, 3 Sneed, 684; *Mayor v. Shelton*, 1 Head, 24.

Contracts, undoubtedly, may be made by such municipalities to the extent of the authority conferred for that purpose by the Legislature, but the granting of a franchise is not the same thing as a contract, and the exercise of such a power cannot be upheld or vindicated as falling within the same rule as the power to make contracts.

By the amendment to their charter, passed February 18th, 1854, the authorities of the City were empowered to regulate the laying of railroad iron and the passage of railroad cars through the City; but the better opinion is, that the provision in that behalf relates to the construction of railroad tracks and the running of railroad cars through the City by incorporated companies whose cars are propelled by steam, and that it has no reference whatever to the construction or authorization of a street passenger railway within the corporate limits, as claimed by the respondents in their answer. Sess. Laws (1854), p. 294; *Moss v. R. R. Co.*, 21 Ill., 522.

Authority is also conferred on municipal corporations by the Code of that State "to grant privileges in the use and enjoyment of the streets" of the municipality; but it would be a very forced construction to hold that the power to grant such a franchise for twenty-five years is included in that provision. Code (1858), p. 808.

V. Independently of those provisions, it is quite clear that the municipal authorities of the City possessed no such power as is supposed by the respondents. Such corporations are usually invested with the power to lay out, open, alter, repair and amend streets within the corporate limits; but the rule is well settled that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void. *Davis v. Mayor N. Y.*, 14 N. Y., 514.

Special powers are given to such corporations to lay out, open and repair streets, as a trust to be held and exercised for the benefit of the public, from time to time, as occasion may require, and the general rule is, that those powers cannot be delegated to others, nor be effectually abridged by any act of the municipal corporation without the express authority of the Legislature. *Milau v. Sharp*, 27 N. Y., 611; *People v. Kerr*, 27 N. Y., 188; *Elliott v. F. & W. R. R.*, 32 Conn., 579; *Wager v. R. R.*, 25 N. Y., 526; *People v. R. R.*, 45 Barb., 63; *Street Railway v. Cummingsville*, 14 Ohio St., 523; *State v. Hoboken*, 1 Vroom, 225.

Municipal corporations are, doubtless, invested with subordinate legislative powers, to be exercised in the passage of ordinances for local purposes connected with the public good, but they are merely derivative, and are subject at all times to the legislative control. 2 Kent, Com., 11th ed., 817; *Rogers v. Burlington*, 3 Wall., 663 [70 U. S., XVIII., 82].

VI. Suppose, however, the authority to make the contract set up in the answer of the respondents may be derived from the statutory

provisions to which reference is made, still the court is of the opinion that the decree of the state court should be affirmed upon two grounds, which will be separately and briefly explained.

(1) Because the supposed contract with the persons under whom the respondents claim, was never perfected between those persons and the city authorities. (2) Because the respondents fail to show, even if it be admitted that the contract between those parties was perfected, that the city authorities ever consented to accept the respondents as the successors of the supposed prior contracting party.

1. Examined carefully, the evidence will show that, at every stage of the negotiations, something remained to be done to complete the contemplated arrangement.

Prior to the 22d of November, 1859, the proper authorities of the City passed an ordinance proposing to grant the right to construct and operate street railroads for the transportation of passengers in cars to be drawn by horses or mules, for twenty-five years from the passage of the ordinance. Bids were subsequently invited for that purpose, and the persons before named submitted four propositions as bids for the contract. On the 29th of the same month, the City Council authorized the Mayor and Corporation attorney to close a contract with those persons to construct such a railway on certain streets and on certain prescribed terms—they to pay to the City the sum of \$127,500, at the times and on the terms named in their second proposition. But the city authorities reserved the right to determine what description of rails and weight of iron should be used by the contractors, and the stipulation was that they should give a bond to the City in the sum of \$25,000, to indemnify the City and individuals against damage. Subsequent proceedings intervened before any further action was taken under that resolution.

Kirk and Small, professing to act in behalf of the Association called the People's Passenger Railroad Company of Memphis, December 2, 1859, addressed a letter to the Mayor and Aldermen of the City, accepting the grant of the streets named as set forth in the "general railroad ordinance" and in the aforesaid resolution, subject to the terms, conditions, privileges and restrictions of said ordinance and resolution, and expressing their readiness to sign a contract embodying those terms and conditions.

Permission was given by the city authorities to those persons, on the 8th of the same month, to procure for themselves an Act of incorporation, provided it did not change the conditions of their proposition, and was granted subject to the consent of the City, and was so framed as not to prevent any other company from building street railroads. They were accordingly incorporated February 11, 1860, and the Act of incorporation provides, as before explained, that the respondents, "with the consent of said City," may exercise the powers described in the 4th section of the charter. No contract was ever executed between the persons before named and the city authorities, and no further efforts were made to complete the proposed arrangement until after the Act of incorporation was passed.

Granted and accepted, as the charter was, on the condition that the respondents should secure

the consent of the City before they could exercise the franchise in question, they are not at liberty to set up any other theory. Conclusive proof that the original arrangement was not concluded, is exhibited in the letter of the president and secretary of the respondent Corporation, written after the respondents were organized, and addressed to the Board of Mayor and Aldermen, in which they refer to a contract as one prepared by the Corporation attorney, and say that they are authorized to sign the contract on the part of the Corporation. They say they are prepared to give the required bonds as soon as the contract is executed, but they do not pretend that any draft of a contract was ever before presented to the city authorities.

Nothing of the kind is suggested in the communication, but they speak of the contract as one prepared "for our signature," and the bid as "our bid," assuming throughout that the persons who made the bid and conducted the negotiations and the Corporation respondents are identical, which is a fatal mistake. They are not the same, and it is clear that the proposed contract between those who made the bid and the City was never completed. *Governor v. Petch*, 10 H. & G., 610; *Musser v. Street R. R. Co.*, 7 Am. L. Reg., 284.

2. Attempt is made by the respondents to give a restricted construction to the phrase "with the consent of the said City," as contained in the 4th section of their charter, but the court is not able to concur in that suggestion. Briefly stated, the suggestion is that the phrase, as properly construed, only requires that the consent of the City should be obtained in case the Company should desire to construct railways on streets other than those designated in the contract, but it is not possible to adopt that construction of the phrase. On the contrary, it seems clear that the franchise described in the 4th section was granted subject to the condition precedent that the respondents should obtain the consent of the City to use the streets for the purpose therein described. *Walker v. Devereaux*, 4 Paige, Ch., 251. Granted on that condition, the charter would not avail the respondents in this case even if it appeared that the consent to that effect had been given to the two persons who made the bid and conducted the negotiations antecedent to the Act of incorporation. *King v. Mayor of Lond.*, 8 Barn. & Adol., 271; *King v. Justices*, 1 Nev. & Man., 67.

Consent to those individuals, even if given as supposed, did not bind the City to accept an incorporated company in their stead, as the Legislature might, for good reasons, require that such consent should be again given after the franchise was granted; and as such consent was never obtained, it is quite clear that the decree of the state court must be affirmed. Influenced by that view of the case, the court does not think it necessary to refer to the subsequent proceedings between the parties, as it is clear that none of them are of a character to give any different aspect to the controversy.

Decree affirmed.

Mr. Justice Davis dissenting:

I cannot assent to the opinion just delivered. I think there is in this case a contract between the People's Passenger Railway Company and

the City of Memphis, which cannot be impaired by state legislation.

I have not thought it necessary to examine the question at length, as it is only of importance to the parties to the suit, and not of general interest.

I am instructed to say that the *Chief Justice* and *Mr. Justice Nelson* concur in this dissent.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, *Plff. in Err.*,

DAVID R. RISLEY AND SARAH R. RISLEY, by her Curator, GEORGE D. HUMPHREYS, Legal Representative of WILLIAM RISLEY, Deceased, AND

SAME

MARY FRITZ, formerly MARY SCHOENTHALER, AND GEORGE BAYHA, Administrator of G. SCHOENTHALER, Deceased.

(See S. C., 10 Wall., 91-116.)

Riparian rights—boundary of St. Louis—riparian proprietors—Act of Congress—instructions to jury—Chouteau's map.

Calls for a river, in conveyances, do not give nor create riparian rights.

The eastern boundary of the City of St. Louis and the eastern line of the out-boundary extended to the middle of the channel of the Mississippi River.

Where a street, towpath or passageway or other open space, was permanently established for the public use, between the river and a block of land, when the town was founded and laid out, the owner or owners of that block were not riparian proprietors of the land between that block and the river.

The Act of Congress of June 13, 1812, did not have the effect to change the boundaries of the block.

Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that prayers for instructions not given by the court were correct in the abstract.

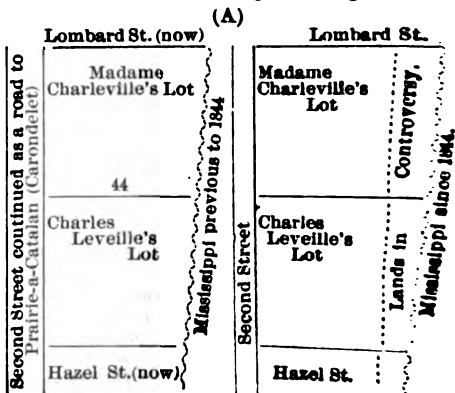
Chouteau's map is evidence of title, but is not, as a muniment of title, conclusive in itself.

[Nos. 27, 28.]

Argued Jan. 19, 1870. Decided Feb. 7, 1870.

IN ERROR to the Supreme Court of the State of Missouri.

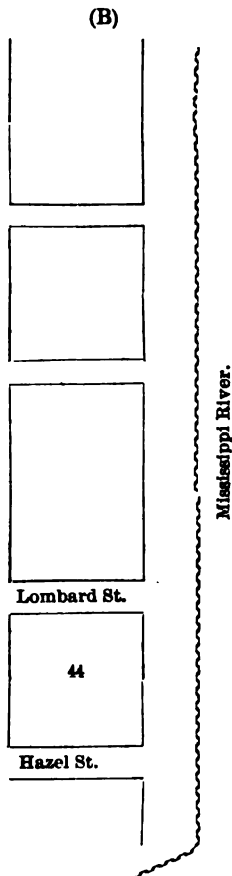
The petitions in these cases were filed in the St. Louis Land Court by the plaintiff in error, for the recovery of certain lands. The lands in question were formed by alluvial accretion on the bank of the Mississippi River by the flood of 1844, as shown by this diagram:



The defendants claimed title thereto by accretion, on the ground that the river was a boundary to their lots. The plaintiff, on the contrary, claimed that the lots of the defendants had never extended quite to the river and, consequently, could not receive this augmentation.

The plaintiff, as evidence on this point, offered a certain map called "Chouteau's map," and claimed it to be conclusive.

This represented a strip of land between the said lots and the river as follows:



Other evidence on this point was offered by both parties. The plaintiff's title was conceded to be good, unless the defendants could establish their claim above mentioned.

The instructions to the jury were as follows:

The jury are instructed that the calls for the Mississippi River, in the deeds of conveyance read in evidence from one private individual to another private individual, do not create riparian rights.

The eastern boundary line of the Corporation of St. Louis of 1809, read in evidence, and the eastern line of the out boundary of Dec. 8, 1840, read in evidence, both extend to the eastern boundary of Missouri, which is the middle of the main channel of the Mississippi River.—Given.

If the jury believe from the evidence, that a street, or tow-path, or passway or other open space was permanently established for the pub-

lic use between the Mississippi River and the most eastern row of lots, of which block 44 was one, in the former Town of St. Louis, when said town was first laid out or established or founded there, and in that case the owners or claimants of said lots or blocks are not riparian proprietors of the lands between said lots or blocks and said river.—Given.

If the jury believe from the evidence that a street, or towpath, or passway, or other open space was permanently established for the use of the public between the Mississippi River and the most eastern row of lots or blocks (of which block 44 was one), in the former Town of St. Louis, then said town was first laid out or established or founded, and that the river after that time washed away the land so that the western edge or bank thereof was west of said road, or towpath, or passway, or other open space, and west of the eastern boundary line of said lot or block; and that afterwards the river receded so that the present western edge or bank thereof is no further west than when said town was first laid out, established or founded, the owners of said lots are not entitled to riparian rights.—Given.

If the jury believe from the evidence that a street, or towpath, or passway or other open space was permanently established for public use between the Mississippi River and the eastern row of lots or blocks (of which block 44 was one), as said town existed prior to Dec. 20, 1808, then and in that case, the owners or claimants of said lots or blocks are not riparian proprietors of the land between said block or blocks and said river.—Given.

Plaintiff also asked the court to give the following instructions to the jury, which the court refused to give:

If the jury believe from the evidence that block 44 in the former Town of St. Louis was by the United States survey surrounded on all sides by streets, and that said survey has from the time of the recording and approving of the same, stood as an approved survey without appeal, the owners of the lot in said block thus surrounded are estopped from claiming any ground beyond the street which is by said survey made its eastern boundary.

The jury will find for the plaintiffs, if they believe from the evidence that all the maps, plats, surveys, deeds and other documents and instruments read in evidence by the plaintiff are genuine, and that the premises in controversy are not within the boundaries of any land confirmed by any person or persons, but are within the boundaries of the Corporation of 1809, read in evidence, and within the out-boundary of Dec. 8, 1840, read in evidence, and within the school assignment, being survey No. 400, read in evidence, and within the boundaries of the land described in the deed from the City of St. Louis to the plaintiff, read in evidence.—Refused.

All streets, walls, avenues, alleys, passways and other thoroughfares in towns and cities are presumed to have been established for the public use, and those who wish to show the contrary must prove it. If, therefore, the jury believe from the evidence that there was a street, tow-path, passway or other open space in the former Town of St. Louis, between the Mississippi River and the more eastern row of lots or

blocks (of which 44 was one), such street, tow-path, passway or other open space, the jury will presume was established for the use of the public, and not affected, impaired or interfered with by riparian rights, unless the contrary be proven to their satisfaction.—Refused.

If the jury believe from the evidence that in accordance with the plan of the former Town of St. Louis, as the same was first laid out, established or founded, there was between the most eastern row of blocks and the Mississippi River from Plum Street to Hazel Street a space of ground left for a street, road, tow-path or levee, or dedicated to any other use common to the inhabitants thereof, or to the public use, then the lots in said blocks are not riparian and not entitled to alluvion.—Refused.

If the jury believe from the maps and plans and all the other evidence in the case that the Spanish authorities intended to leave a space from Plum Street to Hazel Street in the former Town of St. Louis, between the most eastern tier of blocks (of which block 44 is one) and the Mississippi River, for a continuation of Main Street or Front Street, or for any other public purpose, then the lots in said block have no riparian rights.—Refused.

The jury are instructed to disregard all parol evidence failing to establish a boundary of a lot varying from that of the other lots in the same tier, if they are satisfied from all the other evidence in the cause that such uniformity was a part of the plan of the Spanish Town of St. Louis.—Refused.

The jury are instructed that, as a question of law, the owners of lots in the Town of St. Louis, as the said town existed prior to Dec. 20, 1803, have never had any riparian rights.—Refused.

If the jury believe from the evidence that the defendants claim under a confirmation, and that the survey of such confirmation does not call for the river as a boundary, they are estopped by said survey, and cannot claim any rights as a riparian proprietor.—Refused.

If both the confirmations and the surveys of the United States to private individuals for the most eastern row of lots west of the premises in controversy do not call for the Mississippi River as a boundary, then the owners of said lots are not entitled to said premises as riparian proprietors.—Refused.

If the jury believe from the evidence that prior to Dec. 20, 1823, there was a road or passway between the front row of the lots in the former Town of St. Louis and Mississippi River, and that the river after that time washed away the land so that the western edge or bank thereof was west of said road or passway, and west of the eastern boundary line of said lots, and that afterwards the river receded, so that the present western edge or bank thereof is no farther west than where it was prior to Dec. 20, 1803, the owners of said lots are not entitled to riparian rights.—Refused.

As the concession, confirmation and survey to Louis Ride or his representatives call for a permanent road on the east, neither the said Ride, nor his representatives, nor anyone claiming by, through or under him or them, can claim any riparian rights.—Refused.

It is only the Acts and proceedings of the Spanish Government which have been con-

firmed by the United States, the Acts and proceedings of the United States itself that can give or create riparian rights or any other rights in or to the land in dispute. No Act or proceeding of the Corporation of the City of St. Louis, or of any private individual, can give or create any such right or rights.—Refused.

The whole or any part of a Spanish concession, which has not been confirmed by the United States, does not grant or convey any right, title or interest in or to any lands.—Refused.

The defendant in the cause has set up no title in himself, or those whom he represents, or under whom he claims; but seeks to maintain his possession as a mere intruder, by setting up a title in third persons with whom he has no privity. In such a case it is incumbent upon the party setting up the defense, to establish the existence of such an outstanding title beyond all controversy. It is not sufficient for him to show that there may possibly be such a title; if he leaves it in doubt, that is enough for the plaintiff. Where the plaintiff has a *prima facie* good title, he has a right to rely on such title, and is not bound to furnish any evidence to assist the defense. It is not incumbent on him negatively to establish the non-existence of such an outstanding title, but it is the duty of the defendant to make its existence certain.—Refused.

To the refusal of the court to give the said last mentioned instructions, the plaintiff at the time excepted.

Defendant's instructions.

At the request of the defendant the court gave the following instructions to the jury:

1. If the jury find from the evidence that prior to and on Dec. 20, 1803, Madame Charleville inhabited, cultivated and possessed a lot of ground in the Town of St. Louis, being part of the present City, block 44, and bounded on the west by the present Second Street, on the north by the present Lombard Street, on the east by the Mississippi River, and on the south by the north line of the lot of Leveille which was parallel to Lombard Street, that said Madame Charleville claimed title to said lot, and she and those deriving title under her continued to inhabit, cultivate and possess said lot, down to June 13, 1812, that river accretions have been made to said lot along its eastern line, and the premises sued for are a part of such accretions, lying between the north and the south lines of said lot, extended to the river in its present position, then the plaintiff cannot recover, and the jury must return a verdict for the defendant.—Given.

2. The circumstances that a passageway or tow-path existed along the river bank will not affect the right of the parties, if the jury believe that the same was kept up at the charge and risk of the proprietor of the lot; that it followed the changes of the river, going to the east or west as the river receded from or encroached upon the lot, and that the eastern inclosure of the proprietor was advanced or set back with such changes.—Given.

3. If the jury believe from the evidence that the claim confirmed to and surveyed for the representatives of Louis Ride, as shown in evidence by the plaintiff, was another and different claim from that under which Madame Charleville inherited, cultivated and possessed

her lot in block 44, and that said lot claimed by and confirmed to the representatives of Ride was, in truth, locally situated in another and different block, then the jury ought wholly to reject the confirmation and survey for the representatives of Ride, as being irrelevant to the matter in controversy in this suit.—Given.

To the giving of which said instructions due the defendant, the plaintiff at the time objected and excepted.

Judgment having been given for the defendants, the plaintiff took an appeal to the Supreme Court of the United States, by which the said judgment was affirmed.

Whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. M. Blair and F. A. Dick, for plaintiff in error:

The legal effect of plaintiff's evidence of title being the assignment to the schools, is fully stated in the case of *Kissell v. The Schools*, 18 How., 21 (59 U. S., XV., 324). This court says: "We are of the opinion that the certificate of the Surveyor-General * * * is record evidence of title," * * * and it is not open to the courts "to inquire whether the lands set apart were or were not lots of the description referred to in the statutes. The parties interested have agreed that this land was a school lot, and here the matter must rest, unless some third person can show a better title."

In *Jones v. Boulard*, 24 How., 41 (65 U. S., XVI., 604), the school title was again sustained by this court, and also in very many cases by the Supreme Court of Missouri. See *Kissell v. The Schools*, 16 Mo., 553, 552, where the court says: "And where the party produces the designation to the schools of a particular lot, * * * he has shown a legal title complete in form, and it devolves on the opposing claimant to defend himself by showing a better title."

The defendant, therefore, had the burden of proof thrown upon him.

His title was under the same Act of Congress that gave plaintiff title.

An Act passed May 26, 1824, made it the duty of the Surveyor-General "to convey, designate and set apart to the said town so many of the vacant lots for the support of schools" (as were reserved in the Act of 1812), and not exceeding one twentieth of the whole lands included in the general survey of such town, according to the provisions of the 2d section of the Act of 1812.

This Act is, in all its provisions, binding upon individual owners, and they must take their titles subject to the survey it calls for; what it reversed to the United States was, and continued to be, public land, and the surveys it required became, when made, muniments of title.

Although the Act is deficient in not providing for surveys to designate for individual owners the lots granted to them, as stated in *Gustard v. Stoddard*, 16 How., 494, yet it does require surveys which shall show the boundaries of the towns and, with the Act of 1824, surveys designating what portion of the public lands are granted to the schools. These surveys, when made, are conclusive evidence under the Acts of Congress, of what are public lands. The

See 10 WALL,

United States reserved the power to designate what it so granted to the schools, and when designated, the title passed. This is settled in *Kissell v. The Schools*, 18 How., 19 (59 U. S., XV., 324), and there is nothing in the Act to except the individual claimants under it from the proper legal effect of the survey.

The plan of the town established by Chouteau's map, and which is stated as authoritative by the Supreme Court of Missouri, in *Smith v. The City* (see 21 Mo., 86), excludes any individual owner from the river, and thus cuts off private riparian rights. 30 Mo., 304.

The defendants, to avoid this result, attempt to prove another plan of the town, by showing that the street along the rear of their lots shifted east and west, as the river receded or encroached.

But the little passage way spoken of by the witnesses was not the public space marked on Chouteau's map.

The court below also refused all instructions which declared that the United States confirmations and surveys were the best evidence in location.

The reservation in the 2d section of the Act of 1812 is as complete a bar to the accrual of any adverse title as a direct grant of title would be, on the principle settled in *Wilcox v. Jackson*, 18 Pet., 498.

The Act of 1812 operates on the possession prior to December, 1808. Testimony to prove such possession, with a view to the establishment of title under the Act, should have been restricted to that date. It was a misconstruction of the Act, to admit testimony referring to a later date, to establish riparian rights in the defendants.

The first instruction given for defendant said that Madame Charleville, prior to Dec. 20, 1808, possessed a lot, part of present block 44, bounded east by the river, and claimed title to it, and that river accretions have been made to said lots, embracing the premises in dispute, the jury must find for the defendant.

This instruction overlooks the consideration that it was proper for the court to declare that the plan of the Town of St. Louis was evidence of the limits of the lot. It is a matter of law which the jury may or may not know, that the rightful occupancy of a lot could not apply to public ground; and it is also a matter of law that a public map or plan of the town, and documentary evidence, consisting in the archives of the government, which are the proof of authoritative public proceedings, are binding upon the entire State, including all the individuals thereof.

The position of the plaintiff is, that there could have been no "rightful claim" to the public space on Chouteau's map, in front of this block; and that even if there was proof of its occupation (which there is not), such occupation would have given no title, and *a fortiori* there could be no title founded on possession to the water's edge, after the submersion of this public street or space.

The jury were further misled by the second instruction given (No. 147), which directed their minds to the shifting passageway along the shore, on the top of the bank, as one of the features of the case.

Mr. Thos. T. Gantt, for defendants in error:

The first instruction for the defendant merely tells the jury that a lot bounded on the river goes to the middle of its channel.

The second instruction is in full conformity with the most approved authorities.

See *Smith v. Schools*, 80 Mo., 290; *Municipality v. Cotton Press*, 18 La., 236.

This rule is perfectly consistent with what is laid down by Sir Matthew Hale in his celebrated treatise. He says distinctly (ch. 11), that if the streams to which lands adjoin be navigable, then "Whether they be fresh or salt; whether they flow or reflow or not, they are *prima facie publici juris*." "Not in respect to the propriety (proprietaryship, we would say now), but to the public use." That is to say, the public has the right to float boats or vessels on the waters of such streams. This is an easement, the exercise of which is no trespass to the proprietor of the adjoining land.

The third instruction to the jury was, that if the lot occupied by Madame Charleville was a different lot from that which had been granted to Louis Ride by the concession given in evidence, then the boundaries of Louis Ride's lot were of no consequence in the present controversy.

The defendants in error gave evidence showing plainly that the lot described in the concession to Ride lay in a different and distant part of the town from that where Madame Charleville's land lay.

But besides these, the plaintiff below asked in one batch fourteen other instructions, all of which the court refused, and to this refusal the plaintiff excepted.

The undersigned is doubtful of the propriety of saying anything by way of comment on this ruling. It has been declared by this court to be a "settled rule that if a series of propositions be embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions be correct, the exception must be overruled."

Johnston v. Jones, 1 Black, 210 (66 U. S., XVII., 117).

This was a case in which the whole series of instructions had been given to the jury. Some one of them (it seems to be assumed), may have been open to criticism; but because of the vagueness of the exception, the criticism cannot be heard. It is much within this rule to hold that, if a series of propositions be embodied in instructions tendered and refused, the exception to the refusal of the mass will be overruled, if a single faulty instruction be found among them.

The first of these instructions declares that, if the land now known as block 44 was at any time designated by a "United States survey," in which it was surrounded on all sides by streets, and that the owners of lands therein have not appealed against the approval of that survey, then they are estopped from claiming any land beyond those streets.

It is difficult to say what legal principle was in the mind of the framer of this instruction. Possibly the case of *Smith v. The Schools*, 80 Mo., 301, was what he was thinking of. But if so, the point of that decision was entirely missed. It must be remembered that there are no United States surveys of city blocks as such. What does occur, when a United States sur-

veyor speaks of a city block, is simply this: When United States surveys are made of confirmations within the city, the surveyor represents on his plats the exterior lines of the block as established by municipal authority; but this is only for convenience of reference and the easy ascertainment of the position of the property. In many cases, the confirmations surveyed extend beyond the block. In the instance of block 44, however, the surveys of the confirmation do not, as made, reach to the exterior lines. The utmost that can be inferred from a surveyor's plat is, that when he made his surveys a few years ago (for aught that appears in this instruction, it may have been immediately before the commencement of this action), he found that the city had projected a street, and he represented this street on his plat. According to the instructions, if the city projects a street traversing or separating into two parts land belonging to any person, and the United States surveyor at any time represents the street so projected on a plat of survey, the owner loses so much of his land as lies beyond the street—and this without any notice to him of the making of such a survey. This proposition is monstrous and absurd.

The second instruction refused was admirably calculated to puzzle the jury.

The third instruction refused is confusing and misleading. The presumption of which it speaks would, in every case, be one of fact, not law.

The fourth, fifth and sixth instructions refused rested upon the assumption that the authorities of the Spanish Government had a fixed and ascertained plan for laying off the Town of St. Louis in 1764, and that this plan was not only immutable, but that a paper called "Chouteau's map," which was first filed in the office of the Recorder of Land Titles in St. Louis in 1825, was the authentic, exclusive and infallible evidence of this scheme. All of these assumptions are wholly unwarranted.

The seventh instruction refused needs no comment; and the eighth loses sight of the repeated decisions of this court and of the courts of Missouri.

Guitard v. Stoddard, 16 How., 494.

Confirmations made by the 1st section of the Act of June 18, 1812, are the legal consequences of the judicial proof of the conditions stated in that section, and they require no survey. The ninth instruction refused is clearly inapplicable and irrelevant. And whatever has a semblance of propriety in the tenth, had already been given to the jury in the fourth instruction asked by the plaintiff and given by the court.

As to the eleventh, the proof was plain that the land in controversy was not held under Louis Ride, and the proper instruction on that head had been given. The twelfth and thirteenth are irrelevant and misleading abstractions, the giving of which could have been of no sort of guidance to the jury.

The fourteenth (and last) instruction of this refused batch, assumes as a fact what the record plainly disproves.

It must always appear when such a refusal is assigned for error, that for want of the instruction which was refused, the jury was either certainly or possibly misled, to the injury

of the party excepting. It would be difficult to do this in the case at bar in respect to any of the whole list of the fourteen instructions refused.

The city conveyed to the schools such title title as it had, and it will be seen that the inquiry reduces itself to this:

"Did Madame Charleville's lot in 1803 extend to the middle of the river?" If it did, then the other questions fall, and the lot in controversy is an alluvial accretion to it.

Mr. Justice Clifford delivered the opinion of the court:

Possession of the Colony or Province of Louisiana, ceded by France to the United States under the Treaty of Cession of the 30th of April, 1803, was formally delivered to the United States on the 20th of December of that year; and on the 13th of June, 1812, Congress passed the Act making further provision for settling the claims to land in the Territory of Missouri, the 1st section of which provides to the effect that the rights, titles and claims to town or village lots, out lots, common field lots and commons in, adjoining and belonging to the several towns or villages therein named, including St. Louis, in that Territory, "and which had been inhabited, cultivated or possessed" prior to the date of that formal delivery, "shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto," 2 Stat. at L. 748.

Lands confirmed by the Board of Commissioners were not included in that section, and the further provision is, that the principal deputy-surveyor of the Territory shall survey or cause to be surveyed and marked, where the same has not been legally done, the out-boundary lines of the said towns or villages, so as to include the out-lots, common field lots, and commons thereto respectively belonging.

Provision having been made in the 1st section for such surveys, the 2d section provides that all town or village lots, out-lots or common field lots included in such surveys, which are not rightfully owned or claimed by private individuals or held as commons belonging to such towns or villages, or selected by the President for military purposes, "shall be, and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid," not to exceed, however, one twentieth part of the whole lands included in such general survey.

Part of block numbered eight hundred and fifty-six, situated in the City of St. Louis, is claimed by the plaintiffs in this case under the 2d section of that Act, as appears in the description of the tract set forth in the petition, which is in the nature of an action of ejectment to recover possession of the premises. Process was duly issued and served, and the defendant appeared and filed an answer in which he denied that the plaintiffs, at the commencement of the suit, were entitled to the immediate possession of the same, and he also denied that he, the defendant, did, at the time mentioned, unlawfully withhold from the plaintiffs the possession thereof as alleged in the petition.

Application for change of venue was subsequently made by the plaintiffs, and the cause,

in pursuance of such application, was transferred into the St. Louis Circuit Court, where the parties went to trial, and the verdict and judgment were for the defendant, and the plaintiffs excepted and removed the cause into the Supreme Court of the State.

Subsequent to the removal of the cause into the Supreme Court, the defendant deceased and his legal representatives became parties to the suit, and after hearing, the judgment of the Circuit Court of the State was in all things affirmed, and the plaintiffs sued out a writ of error under the 25th section of the Judiciary Act, and removed the cause into this court.

By the bill of exceptions it appears that the plaintiffs in the trial before the jury in the Circuit Court of the State introduced the following evidences of title in support of their claim to the immediate possession of the premises: (1) A copy of the ordinance dated November 9, 1809, incorporating the Town of St. Louis. (2) Survey and plat of the boundary of the town, which purport to have been made in conformity to the requirements of the 1st section of the before mentioned Act of Congress. (3) School assignment numbered four hundred, and dated December 10, 1855, as more fully set forth in the transcript. (4) An Act of the State Legislature, approved November 23, 1857, which it is agreed may be read from the printed volume. (5) Copy of the deed from the City of St. Louis to the plaintiffs relinquishing to them the land in controversy. (6) Quitclaim deed from the plaintiffs to the City of St. Louis relinquishing their title to certain tracts therein specified. (7) An Act of the Legislature of the State, approved March 3, 1851, entitled "An Act respecting Swamp Lands in St. Louis County." (8) Three Acts of Congress upon the subject, to wit: the Act passed June 13, 1812, also the Act passed May 26, 1824, and the Act passed January 27, 1831, to which reference is made. 2 Stat. at L. 748; 4 Stat. at L. 65, 435. (9) A stipulation waiving objections to certain depositions, and agreeing that the defendant was in the possession of the premises at the commencement of the suit.

Separate examination of the respective evidences of title introduced by the plaintiffs will not be necessary, for two reasons: (1) Because the defendant concedes that the assignment of the land to the schools under the Act of May 26, 1824, vested a good title in the plaintiffs, unless the title to the same was confirmed by the 1st section of the prior Act to those under whom the defendant claims a superior title. (2) Because the questions to be determined are presented in the exceptions to the refusals of the court to give the instructions as requested by the plaintiffs and to the instructions given by the court to the jury.

Both parties agree that the land in controversy adjoins block forty-four, which belongs in part, at least, to the defendant and is not claimed by the plaintiffs. They also agree that prior to 1844 block forty-four was the front block facing the river, and that the land of the entire block in controversy has been formed since that time by alluvial deposits, but the theory of the plaintiffs is that block forty-four, as originally located and marked on the plan of the town, never extended to the river, that there was, in fact, a margin of shore be-

tween that block and the river, which was reserved for public use as a way for voyagers or a towpath for persons engaged in propelling boats, and that such way or towpath never was a part of the block possessed and claimed by the defendant and his associates.

Suppose the fact to be so, then it is not pretended by the defendant that the land described in the petition was confirmed by the 1st section of the Act of June 18, 1812, but he denies the entire theory of the plaintiffs and insists that there never was any such public reservation between the block possessed and claimed by him and the river, as is supposed by the plaintiffs; that the use of the supposed margin by voyagers and other persons as a way or towpath, if any, permissive and by consent of the owners of the block, and that the block as laid out, inhabited, cultivated and possessed was always understood to extend to the river and, consequently, that the same was confirmed by the 1st section of the before mentioned Act of Congress, as contended by the defendant.

Conceded, as the fact is, that the title to block forty-four was in those under whom the defendant claims; prior to the alluvial deposits which formed the land described in the petition, the principal contest in the state court was and still is as to the extent and boundaries of that block antecedent to the time when the land in controversy was formed by such alluvial deposits and accretions. Beyond doubt, block forty-four, if it was inhabited, cultivated and possessed prior to December 20, 1808, as claimed by the defendant, was confirmed by the 1st section of the Act of June 18, 1812; and if it extended to the river at that time it is clear that the owners thereof were riparian owners; and if so, it is equally clear that they were entitled, as such to all the accretion thereto occasioned by alluvial deposits or by the gradual recession of the waters of the river from the usual water mark. *Kissell v. The Schools*, 18 How., 31 [59 U. S., XV., 325].

On the other hand, unless that block extended to the river, as supposed by the defendant, it is certain that he has no title to the land in controversy, as those under whom he claims in that state of the case were not riparian proprietors, and the Act of Congress referred to as confirming the title to that block could not and did not have the effect to enlarge its boundaries. *R. R. Co. v. Schurmeir* [ante, 74]; 8 Kent, Com., 11th ed., 427.

Evidence, written and oral, was introduced by the defendant to show that the northern half of block forty-four was inhabited, cultivated and possessed by Madame Charleville and her children several years before the Treaty of Cession was ratified, and the witnesses testify that there was a house and barn on the lot and other improvements, and that it extended to the river. She and her family occupied and cultivated the northern half of the block, and the witnesses also testified that it was fenced in on all sides excepting the side bordering on the river, and the evidence to that effect is full and satisfactory. They admit, however, that there was a passageway on the shore or bank of the river kept by the owner for her own convenience, where people used to pass as on a street or alley, but they generally agree that it was not a public way, and that it was frequently

interrupted by fences built by the owner of the premises.

Parol evidence was also introduced by the defendant, showing that Charles Leveille inhabited, cultivated and possessed the southern half of that block prior to the ratification of the Treaty of Cession, and the defendant introduced the original concession to him of that part of the block, dated March 1, 1788, and also a translation of the same, and the proofs show that his lot was sixty by one hundred and fifty feet, and that it was inhabited, cultivated and possessed by the donee of the tract some eight years before the date of the concession.

As there described, the lot is "bounded on one side by the land of Louis Ride; on the other by His Majesty's domain; on the rear by the Mississippi; and on the main front by the road which follows from the second main street to the Prairie-à-Catalan." He also introduced a concession from the Governor to Augustine Amiot, dated September 2, 1788, of a lot in the southern part of St. Louis, described in the concession as follows, to wit: "120 feet front by 150 feet deep, bounded on the north side by the lot of the free negro called Charles; on the other side by the royal domain; on the rear by the Mississippi; and on the principal front by the royal road leading to the Prairie-à-Catalan." Other exhibits were also introduced by the defendant as fully set forth in the record, and the parties agreed that Prairie-à-Catalan and Carondelet, as used in the record, mean the same thing.

Defendant also introduced a resolution and ordinance of the City, adopted in 1823, in relation to the survey of the City, and also a lithographic copy of the map made by the city surveyor in accordance with that ordinance; also the revised ordinances of 1848, concerning streets. Proof was also introduced by him to show that the original map was lost and that the copy was correct, and it appears that it was put in evidence to show that Main Street, at that date, extended no further south than Plum Street, and that the eastern part of block forty-four, as now claimed, was a part of the bed of the river.

By the record it also appears that the defendant introduced a tax sale of the lot occupied by the colored man, Charles Leveille, for the non-payment of the taxes for the year 1826, and the assessment shows that the lot was therein described as bounded east by the river. Tax receipts for ten or fifteen years, given for the taxes paid by the defendant, as assessed on his property, commencing in the year 1837 and ending in the year 1857, were also introduced by the defendant, and it appears that prior to the year 1858 he was taxed for a lot in block forty-four, described as bounded on the east by the river.

Rebutting evidence, written and oral, was then introduced by the plaintiffs, tending to show that there was a public passageway or street between block forty-four and the river, and that no part of that block ever extended easterly beyond that passageway. Chouteau's map is one of the written evidences referred to as having been introduced by the plaintiffs, and they insisted, and still insist, that their title to the land in controversy is conclusively shown by that document.

When the plaintiffs rested, the defendant was permitted to rejoin, and he introduced new evidence to show that the block, as originally inhabited, cultivated and possessed did extend to the river, and that there never was any such public passageway or street as that described by the plaintiff's witnesses.

Both parties resting, instructions were given by the court to the jury, first at the request of the plaintiffs, and secondly at the request of the defendant, but the finding of the jury was adverse to the plaintiffs, affirming the theory of the defendant, that there was not any such public passageway or street between the river and block forty-four, as is supposed by the plaintiffs, and that the block referred to, as originally located, did extend to the river, as claimed by the defendant.

Five instructions presented by the plaintiffs were given by the court to the jury as requested, and three presented by the defendant were also given without any qualification, but the plaintiffs presented at the same time fourteen other prayers for instruction which were refused by the court. Reference is made to the record for the precise form of the instructions as requested and given or refused, as they fill too much space to be reproduced without abbreviation. Those given at the request of the plaintiffs are, in substance and effect, as follows: 1. That calls for the river, in the conveyances read in evidence, do not give or create riparian rights. 2. That the eastern boundary of the City and the eastern line of the out-boundary, as read in evidence, extended to the middle of the channel of the river. 3. That if the jury believe from the evidence that a street, tow-path or passageway, or other open space, was permanently established, for the public use, between the river and block forty-four when the town was founded and laid out, then, and in that case, the owner or owners of that block were not riparian proprietors of the land between that block and the river. Two other instructions were given at the request of the plaintiffs, but they are omitted as not material in this investigation, because they are the same in principle as those already reproduced.

Instructions were then given to the jury as requested by the defendant, which are, in substance and effect, as follows: 1. That if the jury believe from the evidence that the original claimant, prior to December 20, 1803, inhabited, cultivated and possessed the land described in the petition, claiming title to the same, and that she and those claiming title under her continued to inhabit, cultivate and possess the premises to the passage of the Act of June 18, 1812, and that the land in controversy is a part of the accretions made to that lot along the eastern line extending to the river in its present position, then the plaintiffs cannot recover, and the verdict must be for the defendant. 2. That the evidence that a passageway or towpath existed along the river bank will not affect the rights of the parties if the jury find from the evidence that the same was kept up at the charge and risk of the proprietor of the lot, and that it followed the changes of the river, going to the east or west as the river receded from or encroached upon the lot, and that the inclosure of the proprietor was advanced or set back with such changes. 3. That the claim confirmed to Louis Riche cannot affect the rights of the parties if

the jury find from the evidence that the claim was located in another and different block from that inhabited, cultivated and possessed by Madame Charleville.

Obviously, the third instruction given at the request of the plaintiffs is, in substance and effect, the same as the first instruction given at the request of the defendant, and it is clear that those instructions fairly presented the whole merits of the controversy to the jury as it is exhibited in the pleadings and evidence. *The Schools v. Risley*, 40 Mo., 865.

No attempt is made by the plaintiffs to call in question the instructions given at their own request, nor could they be permitted to do so if the attempt was made, as such errors, if any, are to be imputed to the party making the request rather than to the court. *Buis v. Buis*, 2 Ired., 87.

They do insist, however, that the instructions given at the request of the defendant are inconsistent with those given at their request, but the court, after having carefully examined and compared the respective instructions referred to, is of the opinion that the proposition finds no support in the record.

Where the instructions given to the jury are sufficient to present the whole controversy to their consideration, and they are framed in clear and unambiguous terms, it is no cause for the reversal of a judgment to show that one or more of the prayers for instruction presented by the losing party and not given by the court were correct in the abstract, as the refusal of the court to give the instructions as requested, under those circumstances, would not work any injury to the party making the request and, therefore, cannot be regarded as error. *Law v. Cross*, 1 Black, 536 [66 U. S., XVII., 187]; *Hall v. Hall*, 6 G. & J., 386.

Apply that rule to the present case and it is not necessary to add another observation in respect to the prayers for instruction presented by the plaintiffs, and which were not given by the court. Certainly the instructions given, as well as those given for the plaintiffs as those given for the defendant, are clear and unambiguous, and they expressly concede that the plaintiffs must recover if block forty-four was bounded on the east by a street, passageway or tow-path, which is all that the plaintiffs now ask, if the case is one to be submitted to the determination of a jury. They contend that Chouteau's map is conclusive in their favor, but the court is of a different opinion, and accordingly affirms the correctness of the other branch of the instructions, in which the jury were told that their verdict must be for the defendant if they found from the evidence that there was no such street, passageway or tow-path between that block and the river, and that the river, when the town was laid out and when the Act of confirmation was passed, constituted the eastern boundary of that block. *Jones v. Soulard*, 24 How., 41 [65 U. S., XVI., 604]; *Smith v. Public Schools*, 30 Mo., 301; *Le Beau v. Gaven*, 87 Mo., 556; *Doeaston v. Payne*, 2 Sm. L. Cas. (7th ed.), 142 (2 H. Bl., 527).

Suffice it to say, without pursuing the argument further, that the court is of the opinion that the instructions were, in all respects, proper, and that they were clear and unambiguous, and amply sufficient to enable the jury to dispose of

the whole controversy as exhibited in the pleadings and evidence. *Savignac v. Garrison*, 18 How., 136 [59 U. S., XV., 290]; *N. O. v. U. S.*, 10 Pet., 662; *R. R. Co. v. Schurmeier* [ante, 74].

Complaint is also made by the plaintiffs that the court erred in not regarding Chouteau's map as a muniment of title conclusive in their favor; but the court is of the opinion that the view taken of it by the state court is correct, and that it was properly regarded as evidence of title, and not as a muniment of title conclusive in itself, and that as such it was regular to submit it to the jury with the other evidence introduced by the parties. Neither party can justly complain, as the action of the court in giving the instructions was in accordance with their respective requests.

Ejectment was also brought by these plaintiffs in the same court, at the same time, against Mary Fritz, to recover possession of the southern part of the same block. Before trial the venue was changed, as in the preceding case, to the same circuit court, where the parties went to trial, and the verdict and judgment were for the defendant or her legal representatives. Appeal was taken by the plaintiffs to the Supreme Court of the State, and the judgment in that court was affirmed. They then removed the case into this court, where it is numbered twenty-eight on the calendar, and it was argued and submitted to the court here at the same time with the case just decided. Since that time it has been carefully examined, and it should be remarked that the facts of the case are, in many respects, different from the case just decided, but the differences are not of a character to affect the result in this court, and as both parties agree that the decision of the case must follow that in the preceding case, it is not thought necessary to point out those differences.

Decree in each case affirmed.

Cited—16 Wall., 517; 23 Wall., 68; 111 U. S., 196; 61 Mo., 351.

CHRISTOPHER REILLY, *Plff. in Err.*,
v.

WILLIAM GOLDING.

(See S. C., 10 Wall., 56-58.)

Jurisdiction as to parties—answer on merits waives objection.

When a proceeding is merely incidental to the principal suit, as a rule to show cause against a surety, the circuit court has jurisdiction, although the parties to the proceeding are citizens of the same State.

Where the surety put in an answer on the merits which was tried, this is also an answer to the objection to the jurisdiction.

[No. 125.]

Argued Mar. 15, 1870. Decided Mar. 21, 1870.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This suit was brought in one of the courts of the State of Louisiana by the defendant in error, to recover on an account.

The history of the case and a statement of facts appear in the opinion of the court.

Messrs. Miles Taylor, Lacey & Butler, for plaintiff in error.

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Mr. Thomas J. Durant, for defendant in error:

1. The defendants in the suit in the 5th district court, Milne & Co., themselves moved for a transfer, as they had a right to do by the 12th section of the Act of Sep. 24, 1789.

1 Stat. at L., 79.

No one but the plaintiff in that suit, William Golding, had a right to complain of the transfer.

2. The second objection is equally futile. In the first place, there are no facts found on which this court can act to show the citizenship of the plaintiff in error.

The 12th section of the Act of 1789, already quoted, provides that "Any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such State, they would have been holden to answer final judgment had it been rendered by the court in which it commenced."

3. The bond given for the release of the property attached and on which plaintiff in error is surety, stands in place of the property and goes with the suit.

See, *Dorr v. Kershaw*, 18 La., 57.

4. The practice in Louisiana adopted by the United States courts there, is to proceed against such a surety on simple motion and a ten day rule.

Act of La., Mar. 20, 1839, No. 53; *Love v. Voorhies*, 13 La. Ann., 549.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Louisiana.

The suit was brought by Golding against H. Milne & Co., to recover the sum of \$5,594.08, due for certain boilers and machinery furnished them for a saw-mill. The plaintiff was a citizen of Louisiana; and the defendants, of the State of Mississippi.

The suit was commenced by an attachment against the property of the defendants, situate within the former State. The factors of the defendants, Jerome Bradley & Co., who were in possession of the property, intervened and obtained the redelivery of it to them, on executing a forthcoming bond, Christopher Reilly being the surety. Afterwards the defendants, H. Milne & Co., appeared and removed the cause to the Circuit Court of the United States, and put in an answer to the suit. Judgment was subsequently rendered in favor of the plaintiff against the defendant, for the amount claimed, and execution issued, which was returned unsatisfied. Afterwards judgment was rendered against the intervenors by default, dismissing the proceedings with costs, reserving the plaintiff's right under the forthcoming bond. Subsequently a rule was entered against Reilly, the surety on the forthcoming bond, to show cause why he should not be condemned to pay the debt of the plaintiff according to the condition of the bond. Reilly appeared, and excepted to the jurisdiction of the court, on the ground that the proceedings to enforce payment of the bond was a new suit, and the plaintiff and defendant were both citizens of Louisiana.

The answer to the exception to the jurisdiction of the court is, according to the practice of

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the courts in Louisiana, and which has been adopted by the Circuit Court of the United States, the court proceeds against the surety on a forthcoming bond by a rule to show cause, as in the present case. The proceeding is merely incidental to the principal suit.

Reilly, also, put in an answer on the merits which was tried. The court made the rule absolute, and rendered judgment against the surety for the whole amount of the claim of the plaintiff.

There is no finding of the facts in this case, and no reason for taking it out of the general rule on the subject, which, under like circumstances, as is well settled, is to affirm the judgment.

Judgment affirmed.

JAMES B. BOYLAN, *Plff. in Err.*,

UNITED STATES.

(See S. C., 10 Wall., 58-63.)

Tax on ready-made clothing—increased value.

Under the 96th section of the Act of June 30, 1864, imposing a tax on ready-made clothing, the rule by which the increased value is to be ascertained, is by comparison between the market value of the materials at the time the tax on them was paid, with the market value of the manufactured goods at the time of the assessment of the tax upon them.

The increased value means the value augmented since the original payment of the duties, and the five per cent. is to be computed on the value of the materials when those duties were paid.

[No. 66.]

Argued Feb. 16, 1870. Decided Mar. 22, 1870.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was begun in the court below, by the voluntary appearance of the parties, and the submission of an agreed statement of facts upon the claim of the plaintiff in error for an alleged wrongful collection of taxes. Section 96 of the Excise Law of June 30, 1864, provides that when goods are manufactured from materials that have paid the tax, and the increased value of the manufactures does not exceed five per centum *ad valorem*, they shall be exempt from duty. The cost of manufacturing the goods in question was more than five per cent. of the value of the materials, but the price received for the goods under contract with the United States, was even less than the market value of the materials at the time of completing the contract.

The court below gave judgment for the defendants, whereupon the plaintiff sued out this writ of error.

The case is further stated by the court.

Messrs. Wm. M. Evarts and S. S. Cox, for plaintiff in error:

The taxable value of the manufactured goods in this case is the price obtained by actual sale; that is, the contract price. The value of the materials for the purposes of this law is the average of the market value of the like materials at the time of these sales; and the "increased value," if any, is unquestionably the excess of the former over the latter.

See 10 WALL.

The contract fixed the price, and at this price the goods were sold in October. The actual sale is the standard of the value, and nothing else can be substituted for it. Nothing is better settled than that "An agreement to sell is not a sale; and, therefore, no mere promise to sell hereafter amounts to a present sale."

Pars. Cont., 528.

In the present case, the materials used by defendants in October were his property, and had a recognized market value. He manufactured them for the Government and received for them a certain price by "actual sales;" this price being less than the value of the materials. Were the goods increased in value more than five per cent. by the manufacture?

It must be estimated according to the intent of the law, and by some method at once reasonable and capable of practical application. There is but one such method possible; it is to deduct from the price received for the completed goods, the market value of the materials at the time of the delivery.

This method alone is definite, affording a fixed standard readily intelligible and accessible in all commercial newspapers. It admits of no disguise, concealment or fraud.

This method alone is practicable. It avoids the necessity of tracking out, by the evidence of interested parties, the dates of contracts, the actual cost of different lots of materials, and other accidents of business.

This method alone is just. The exemption turns upon the increased value of the goods by the process of manufacture, not their increased value by time. And to obtain this we must compare the value of the completed article with the value of its materials at the same time.

Messrs. E. R. Hoar, Atty-Gen., W. A. Field, Asst. Atty-Gen., and J. Hubley Ashton, for defendant in error:

If any person is entitled to be exempt from the payment of this tax, he must plead and prove facts that bring him within the provisions that grant him this exemption.

The agreed facts do not show that Boylan is exempted from paying this tax under the 96th section, because they do not show that the pantaloons were manufactured from materials "which have been subject to, and upon which internal duties have been actually paid, or materials imported, upon which duties have been paid, or upon which no duties have been imposed by law," because it does not appear that the value of the pantaloons was not greater, by more than five per cent. *ad valorem*, than the value of the materials out of which they were made.

What the market value of the pantaloons when manufactured was, and whether this market value was greater than the market value of the materials by more than five per cent. *ad valorem*, does not appear; nor does it appear what the actual cost to Boylan of the materials was, or whether the agreed price of the pantaloons was greater than this actual cost by more than five per cent. *ad valorem*. If any presumption can be drawn from the agreed facts, it is that the increased value of the pantaloons over the value of the materials out of which they were made, was more than five per cent. *ad valorem*.

Mr. Chief Justice Chase delivered the opinion of the court:

The writ in this case was prosecuted to reverse a judgment rendered by the circuit court against Boylan, the plaintiff in error, for the amount of certain duties assessed on ready-made clothing manufactured by him for the United States under a contract dated May 10, 1864. The goods were manufactured and delivered during the month of October, 1864. The materials of the manufactured goods had been previously assessed under the internal revenue law, and the tax upon them had been duly paid. The suit was amicably brought for the purpose of ascertaining the real extent of the liability, if any, of the plaintiff in error to taxation under the law.

By the 95th section of the Act of June 30, 1864, a tax of five per cent. was imposed on ready-made clothing, and sundry other articles of dress. 13 Stat. at L., 269. But the 96th section of the same Act exempted from the tax, goods manufactured of materials on which duties had been paid, unless the increased value of such goods exceeded five per centum *ad valorem* (18 Stat. at L., 272, and the general question in this case is: by what rule is the increased value to be ascertained?

It was insisted in argument that the true mode of ascertaining the amount of increase is, to deduct from the price of the manufactured goods sold and delivered the market value of the materials at the time of the delivery.

And we think it reasonable that in a case where the sale and delivery is to the Government which imposes and collects the tax, that the market value of the goods shall be taken as determined by the price which the Government agrees to pay and the contractor agrees to receive. But it is not so clear that the value of the materials is to be determined by their market value at the time of the delivery of the manufactured goods.

On the contrary, it seems to us that when the Legislature made the degree of increased value after the payment of the tax on materials the criterion by which to determine whether the manufactured goods should be liable to or exempt from taxation, its intention was to require a comparison between the market value of the materials at the time the tax on them was paid, with the market value of the manufactured goods at the time of the assessment of the tax upon them. The time of this assessment in the case before us was in October, 1864, and the market value on that day must, as we have just said, be taken as determined by the contract price.

When the duties on the materials were paid is not shown; but it is agreed that they were paid, and that the market value of the clothing at the time of the delivery to the United States was greater than the market value of the materials when made or sold by the manufacturers, or purchased by the plaintiff in error, by more than five per cent. *ad valorem*. We infer that the duties on the materials were paid when or before they became the property of the plaintiff in error.

And these circumstances, as it seems to us, take the manufactured goods out of the category of exemption established by the law.

The language of the Act seems, indeed,

hardly to admit of any other interpretation. In terms stripped of superfluous words, it provides that goods manufactured from materials upon which duties have been paid, when the increased value shall not exceed the amount of five per cent. *ad valorem*, shall be exempt. The obvious construction of this language is, that increased value means the value augmented since the original payment of the duties; and that the five per cent. is to be computed on the value of the materials when those duties were paid.

This construction requires the affirmance of the judgment of the Circuit Court, and it is accordingly affirmed.

JOHN H. MCKEE ET AL., *Piffs. in Err.*,

v.

M. A. C. RAINS.

(See S. C., 10 Wall., 22-26.)

Suits against Marshal, when removable from state court—rebellion was closed Aug. 7, 1866—ten per cent. damages.

A suit in a state court against a Marshal for selling the goods of one person for the satisfaction of the debts of another, is not one which can be removed into the Circuit Court of the United States, under the Act of Congress of Mar. 2, 1863, or Apr. 9, 1866.

It is a fatal objection to the attempted removal, that no application was made until after verdict.

The rebellion was closed, in all cases where private rights are affected by the time of its termination, Aug. 2, 1866.

Where the writ of error was prosecuted in good faith, the motion for ten per cent. damages on affirmance must be denied.

[No. 180.]

Argued Mar. 17, 1870. Decided Apr. 4, 1870.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. Thomas J. Durant and E. C. Billings, for plaintiff in error:

The plaintiffs in error complied fully with the requirements of the Acts of May 11, 1866, and of March 8, 1868, 12 Stat. at L., pp. 756, 757, and their right to go to the circuit court was complete, as the act for which they were prosecuted in the state court was done during the rebellion, to wit: about Nov. 12, 1866.

See Act of Congress of Mar. 2, 1867, p. 426; Acts of Congress of July 19, 1867, p. 14.

These declarations by the Political Departments of the Government, that Louisiana and other States, were in rebellion in 1867, are conclusive as to the applicability of the Act of Mar. 8, 1868, and of May 11, 1866, to the present case.

The right of removal guaranteed by the Acts of Mar. 8, 1868, and May 11, 1866, is also recognized by the provisions of "An Act to Protect all Persons in the United States," etc., etc., approved Apr. 9, 1866. See, Acts of that year, p. 27.

The plaintiffs in error made oath that by the reason of the prejudice of the jury and jurors against the official character of J. H. McKee, United States Marshal, they had not the full equal benefit of the laws and proceedings and,

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therefore, that they were denied and could not enforce their legal rights.

This was sufficient to give the United States Circuit Court in Louisiana jurisdiction of the case, and it was error in the court below to dispose of the questions involved, before a trial on the merits.

Dennisoun v. Draper, 5 Blatchf., 336; *Murray v. Patrie*, 5 Blatchf., 348; *The Mayor v. Cooper*, 6 Wall., 247 (78 U. S.; XVIII., 851).

Mr. P. Phillips, for appellee:

It will be borne in mind that the sole ground for removal is claimed by the petitioner, under the provisions of the Act of Apr. 9, 1866. 14 Stat. at L., 27.

The worthlessness of this ground is shown by the slightest attention to the provisions of the Act. It is unworthy a serious discussion, and the ground has been virtually abandoned by the learned counsel who files a brief in this court.

The 5th section of the Act of 1863, March 3, 12 Stat. at L., 756, is now relied on.

The acts intended to be covered by the 5th section, were arrests, imprisonments or trespasses, "during the present rebellion." But this limitation of time is subject to another. They must also have been committed "Under or by color of authority derived from the President of the United States, or from an Act of Congress."

The effort on the part of executive officers to shield themselves from trespasses by invoking the authority of the United States, and thus transferring their cases to federal jurisdiction, is not a novel one in this court. It has been denounced whenever made.

Day v. Gallup, 2 Wall., 97 (69 U. S., XVII., 855); *Buck v. Colbath*, 8 Wall., 834 (70 U. S., XVII., 357); *Millingar v. Hartup*, 6 Wall., 259 (78 U. S., XVIII., 839).

The object of the removal to the circuit court and its removal from the circuit court to this court, is merely to baffle and delay the plaintiff below, in the collection of its judgment. It justifies the application now made for an affirmation of the judgment with damages, at the rate of ten per cent. per annum, under the 23d Rule.

Lathrop v. Judson, 19 How., 68 (60 U. S., XV., 554); *Prentice v. Pickersgill*, 6 Wall., 511 (78 U. S., XVIII., 790).

Mr. Chief Justice Chase delivered the opinion of the court:

This case comes here upon a writ of error to the Circuit Court of the United States for the District of Louisiana.

The original suit was trespass by the defendant in error, brought in the Fifth District Court of New Orleans, in the State of Louisiana.

There was a petition and supplemental petition, which alleged in substance: forcible entry into the dwelling-house of the petitioner, by the defendants McKee and Cady; violent eviction and exclusion from a great part of it, and seizure of a large lot of valuable furniture, with special circumstances of aggravation; all of which unlawful acts were perpetrated by McKee under the pretense of lawful authority as United States Marshal. The petitioner claimed damages against the defendants McKee and

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Cady, and against the sureties of the former, to the amount of \$50,000.

The defendants answered, alleging that the seizure was lawful and authorized by writ of execution out of the Circuit Court of the United States for the District of Louisiana, directed to the defendant McKee, as Marshal, and commanding him to make out of the property of his co defendant, Cady, the sum of \$3,841.98, and upwards; and that the property seized was the property of Cady.

Upon these pleadings the case went to the jury, who found for the plaintiff \$7,500, and judgment was entered upon the verdict.

Afterwards a petition was filed by the defendants in the state court, for the removal of the cause into the Circuit Court of the United States, which was granted and an order for removal made accordingly.

Upon the filing, under this order, of the record from the state court in the National Court, an order was made, upon a rule to show cause to the contrary, for remanding the case to the state court.

And it is this order which is brought before us by the writ of error.

We perceive no error in the order. The case made by the pleadings was clearly within the jurisdiction of the state court where the suit was brought (*Buck v. Colbath*, 8 Wall., 840 [70 U. S., XVIII., 360]), and the parties being all citizens of the same State, was not within the original jurisdiction of any National Court.

Nor was the case one which could at any stage be removed into the Circuit Court of the United States under the Act of Congress of March 3, 1863 (12 Stat. at L., 756, 775), or April 9, 1866 (14 Stat. at L., 28).

The first of these Acts provided for the removal, before or after judgment, of any suit or prosecution commenced in a state court against any officer or other person for any arrest or imprisonment, or other trespass or wrong, made or committed during the rebellion, by authority derived from any Act of Congress, on application of the defendant at the time of entering his appearance.

It is very plain that this Act does not apply to the case before us. It was not a suit or prosecution described by the Act. No Act of Congress has been cited from which authority can be derived to the Marshal of any court of the United States to seize the goods of one person for the satisfaction of the debts of another. *Bigelow v. Forrest* [ante, 696]. Nor was the suit brought during the Rebellion; for the Rebellion must be regarded as having closed, in all cases where private rights are affected by the time of its termination, on the 2d of August, 1866. *U. S. v. Anderson* [ante, 615].

And if neither of these points were decisive, the fatal objection to the attempted removal would remain; that no application was made until after verdict; and the Constitution provides (*Justices v. Murray*, ante, 658) that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law." All these propositions have been so recently determined by this court that nothing more is now necessary than to state them as settled.

Nor does it seem necessary to consider the right to remove this case claimed under the

Act of April 9, 1866. The counsel for the plaintiffs did not insist upon it in argument; and it is evident, upon looking into the Act, that the suits, for the removal of which it provides, are such as have arisen or may arise under that Act; and it is quite clear that the suit before us is not of that description.

The order of the Circuit Court remanding the case to the state court must, therefore, be affirmed.

The counsel for the defendant in error asks, under the 23d Rule, that the order may be affirmed with damages at the rate of ten per cent. per annum on the amount of the judgment in the state court. If, upon the application for removal, the decisions of this court recently made had been announced, there might be ground for argument that the writ of error was sued out merely for delay. But it must be remembered that at the time of suing out the writ of error in this case, all the questions settled by those decisions were seriously controverted.

We cannot say, therefore, that the writ was not prosecuted in good faith, and in the expectation of obtaining a reversal of the order.

The motion for affirmance, with ten per cent. damages, must be denied.

Cited—100 U. S., 206; 109 U. S., 452; 9 Ben., 184; 38 Am. Rep., 275 (44 Mich., 332).

DIODATE CLARK, JOSIAH C. GRAHAM
AND JOHN B. WHITE, *Piffs.*,

v.

JOHN G. BOUSFIELD AND JOHN POOLE.

(See S. C., 10 Wall., 133-141.)

Second claim in letters patent.

A second claim in letters patent, which is an indispensable part of the machine, cannot be considered a *design* merely, under the Patent Acts, so as to render the patent void.

[No. 159.]

Argued Apr. 1, 1870. Decided Apr. 11, 1870.

CERTIFICATE of division of opinion between the judges of the Circuit Court of the United States for the Northern District of Ohio.

The history and facts of the case fully appear in the opinion.

Messrs. A. G. Riddle and Jason Canfield, for plaintiffs:

The first question which arises is this:

Whether the second claim is, in substance, a claim for a design, instead of a claim for a principle, in an apparatus for graining pails, and other analogous uses.

If it is a design, it should have been patented under section 11 of an Act of Mar. 3, 1861 (12 Stat. at L., 246), entitled, "An Act in Addition to an Act to Promote the Progress of the Useful Arts."

If the second claim is for a principle, in an apparatus for graining pails and other analogous uses, then it does not come under said section 11 of the Act of 1861, but under the Act of July 4, 1836, known as "An Act to Promote the Progress of the Useful Arts, and to Repeal all Acts and Parts of Acts Heretofore Made for That Purpose."

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5 Stat. at L., 117; *Corning v. Burden*, 15 How., 268.

Now, in this case our second claim in our patent is for the machine which produces the effect, and not for the effect itself; in other words, it is for a machine which grains a pail in staves, which staves represent different kinds of wood, and not for the impressions put upon the pails representing staves of different kinds of wood.

The means of producing this effect on the pails is our machine, which comes under the Act of 1836; the effect as produced is a design, which comes under the 11th section of the Act of 1861, for which we claim nothing.

In *Whitmore v. Outter*, 1 Gall., p. 480, Judge Story has defined the principle of the machine which applies to the Act of 1836.

2. Whether said letters patent were not void for ambiguity.

On this subject we refer the court to the decision of Judge Story in the case of *Ames v. Howard*, 1 Sumn., 485; *Ryan v. Goodwin*, 3 Sumn., 520.

As to what is required by the Act of 1836 on this point, see *Hogg v. Emerson*, 6 How., 484.

Whether there is ambiguity in the description, is a question for the jury, under the testimony of experts. *Washburn v. Gould*, 3 Story, 188.

The court, in construing this patent, should look at it in the light of the law as laid down by Judge Story in the case of *Ames v. Howard*, before referred to, in which he says:

"Patents for inventions are not to be treated as mere monopolies, odious in the eyes of the law and, therefore, not to be favored; nor are they to be construed with the utmost rigor as *strictissimi juris*. * * * * * The object is to ascertain what, from the fair sense of the words of the specification, is the nature and extent of the invention claimed by the party; and when the nature and extent of that claim are apparent, not to fritter away his rights upon formal or subtle objections of a purely technical character."

But, in the language of the same learned judge (*Ryan v. Goodwin*, 3 Sumn., 520), to give a liberal construction to the language of all patents and specifications, *ut res magis valeat quam pereat*, so as to protect and not to destroy the rights of real inventors.

Messrs. George Willy, John E. Cary and H. S. Sherman, for defendants:

1. The second claim is not void for ambiguity; is a claim for a design merely and only patentable as such, under section 11 of the Act referred to in the question.

If the first claim is good as a claim for a device of a given form, there is no necessity for the second claim, unless it was intended to cover the stave design as such; for the first claim covered the construction of the bed as to form, and whether constructed of separate blocks or one entire block.

It cannot be presumed that the second claim was intended to again cover the use of distinct blocks; for the subdividing of a mass or plate into parts which were still to be used together as a mass or as one plate, would be obviously void for want of invention.

The terms "in a series of distinct staves or designs," are evidently used synonymously or as convertible terms in this relation. If so, they

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mean stave shaped designs, or designs as "set forth." If not, then the claim would be void for ambiguity, or for combining two classes of subjects in one claim. But in either case it embraces a claim for a design which destroys the patent for incongruity, or rather by destroying its unity.

Curt. Pat., secs. 107, 110; 1 Mas., 475.

2. The second question presented is, "Whether said letters patent were not void for ambiguity in the specification."

That the first claim, taken in connection with the description, is uncertain as to whether the curved or rectangular form is intended or both. Both forms are spoken of in the specification, and both, and perhaps other forms, required by the subjects enumerated to be grained.

As to what is to be embraced in the term "for the purposes specified," whether simply the graining of pails, requiring a curved form or bed, or other subjects requiring or admitting a rectangular bed.

Ambiguity is not distinguishing by definite terms of description and exclusion the extent of the ground covered by the patent, in order that the public may know just what is claimed and what is not claimed.

Mr. Justice Nelson delivered the opinion of the court:

This is a certificate of division of opinion between the Judges of the Circuit Court of the United States for the Northern District of Ohio.

The suit was brought by the plaintiffs, assignees of letters patent to J. R. and A. J. Cross, dated 27th December, 1864, against the defendants, for an infringement.

The patent is for a new and useful improvement in machines for graining pails, and other analogous uses. The nature of it consists in constructing an elastic bed containing the impression or impressions of the device to be engraved upon the pail in separate panels, each panel to be of different design, so that by moving the pail over the same, the various designs will be stamped upon the pail, thus producing a pail whose staves are painted in imitation of different kinds of wood. The patentees then described the instrument or machine, which is a box into which the elastic material, with the required designs to be grained upon the pail, is placed, and may be constructed of wood or iron or any other suitable material, and so shaped (describing the shape minutely) that when the pail is adjusted properly upon the bed, and rolled upon and over it, the upper or larger end of the pail shall follow the outer curve of the bed, and the lower or smaller shall follow the interior or smaller curve, with exactness and precision. The elastic bed may present one continuous or uniform design if desired, or it may be arranged in blocks or staves, each of different designs, so that the pails grained shall present the appearance of being constructed of different kinds of wood. The elastic bed may be composed of any suitable impressible material, as rubber or leather, but a compound of glue and molasses, such as is used for printer's rollers, is preferred. The patentees then describe the contrivances for working the elastic bed in connection with the pail, so as to effect the graining of the latter. By this contrivance the pail is readily rolled by hand across the bed,

leaving upon it the desired design or figure; or the pail may be suspended on handles and the elastic bed may be moved beneath it, in a suitably arranged groove or track, producing the same result. The patentees then set forth their claims, the first two of which only are material: First. "We claim constructing the bed of elastic material used in graining machines, in the form herein shown, substantially as and for the purposes specified." Second. "We claim arranging the elastic material aforesaid, whether curved or rectangular in form, in a series of distinct staves or designs, substantially as and for the purposes herein shown and set forth."

The learned judges of the circuit divided upon the question whether this second claim in said letters patent was for anything patentable other than under section 11 of the Act of March 2, 1861, entitled "An Act in Addition to an Act to Promote the Progress of the Useful Arts;" if not, whether the patent was not void. This 11th section secures the inventor or producer of any original design, etc.; or any new and original impression or ornament to be placed on any article of manufacture, etc., or any new and useful pattern or print or picture, either to be worked on, or printed or painted on any article of manufacture; or any new and original shape or configuration of any article of manufacture not known or used before, etc., a patent for the exclusive property therein. 12 Stat. at L., 246

It will be seen, if this second claim is patentable under this 11th section, it must be a claim to an original design, or impression, or ornament, or pattern, or picture, or the like, wholly irrespective of the means of producing it.

The patent is simply for the design, etc., itself.

In order to understand the full meaning of this second claim, it will be useful to settle the meaning of the first, as the two are intimately connected.

The first, as we have seen, is for constructing the bed for the elastic material used in graining machines in the form shown and for the purposes specified. The patentees describe it as a box or bed, and which may be constructed of wood or iron, or any other suitable material. This box or bed is made for the purpose of holding the elastic material, whether of rubber or leather, or the compound of glue and molasses, which is preferred. Now, the second claim is for arranging the elastic material, when placed in this box or bed, whether curved or rectangular in form, "in a series of distinct staves or designs," for the purpose specified; that is, for the purpose of graining pails in the variety of colors or figures described. The elastic bed may be arranged, as is stated in the specification, so as to present one continuous or uniform design, or it may be arranged in blocks or staves, each of different designs, so that the vessel shall present the appearance of different kinds of wood, as rosewood, oak, walnut and others. It may also be constructed of separate pieces or blocks, as shown in the drawing, or the material may be a single united mass, impressed by different designs arranged in staves, so as to produce the same effect as when constructed in separate blocks. The two claims, as we see, are closely connected, and each essential to the complete construction of the in-

strument or apparatus, which, when put into practical operation by the contrivances pointed out in the specification, can accomplish the desired result, which result is the graining of the exterior body of the pail with a variety of colors and figures.

The learned counsel for the defendants below insists that this second claim is only an arrangement of designs and, in a limited sense, he is no doubt right, but in its connection with the first claim, and with the machine for transferring the design to pails, it is more; it is a part of the machine or instrument, and an indispensable part; it is the elastic bed of rubber, or of leather, or compound of glue and molasses, of any arranged figure or design, that constitutes an element in the machine, and which, with the curved box and contrivances for working the instrument, produces the desired result. The figure or design is but incidental, and, as such, has no other protection than that which the patent secures to the inventor of the machine. The right to the use of the machine carries along with it the right to use the designs.

The arranged figure in the elastic bed is not the one protected by the 11th section of the Act of 1861; that is, the one which is transferred to the pail or wares, where its beauty is first visible to the eye. While it remains in the elastic material it exhibits no more beauty than if engraved on stone or metal.

It may be that the inventors of the machine for impressing figures or designs upon pails or other wares would not be protected from using figures or designs the right of property in which had been secured to the original inventor under this 11th section, but they may clearly use any and all not thus protected. The machine in question is invented for reducing to practical use these figures and designs, and will make them profitable to the original inventors or owners of them, if they choose to employ it.

We are of opinion that the first question should be answered in the affirmative and the second in the negative.

JOHN J. MAHONEY, *Appt.*,

UNITED STATES.

(See S. C., 10 Wall., 62-68.)

Consul at Algiers—salary of.

After Algiers became a province of France, no provision is anywhere made for a salary of the Consul at that place.

Under the Act of Aug. 18, 1856, Consuls to the City of Algiers are entitled to such fees only as they may collect, as compensation for their services.

[No. 160.]

Argued Apr. 1, 1870. Decided Apr. 25, 1870.

APPEAL from the Court of Claims.

The history and facts appear in the opinion of the court.

Mr. T. J. D. Fuller, for appellant:

The uniform construction given to the words in the Act of 1810, "That not more than the sum mentioned shall be paid," means that the sum named shall be paid, it is supposed will not be controverted; for such is the uniform and uninterrupted construction given to it. See *Ops. Attys-Gen.*, Vol. 4, pp. 295, 506.

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The main question is: what effect does the conquest of Algiers and its surrender to France July 18, 1830, have upon the Statute of 1810? Does it repeal it, annul it, or impair it? Do the statute laws of the United States rest upon any such basis? Can they be repealed or annulled or impaired by any other power than the one which enacted them? I can readily perceive that a changed condition of the subject-matter, to which the legislation has been applied, may constitute a very good reason why the law making power shall alter the law to suit the changed condition of the subject-matter; but until it does so act, the law must necessarily continue the same.

The Consular Treaty of 1853, between the United States and France, does not, in terms, nor by the remotest implication even, repeal the Act of 1810, or any of its provisions touching the compensation, for the reason that it is silent upon the subject of compensation altogether.

It regulates the duties and powers of consuls; but that is a question quite distinct from the one of compensation.

As a physical fact, it cannot be pretended that the City of Algiers, with its 120,000 inhabitants, had disappeared from the face of the earth; that its Mahometan religious faith had become changed; that its harbor had ceased or its production of wool and hides and fruits had ceased, or that it was not frequented by our merchants and ships for commerce and trade. All there is about it is, that it had ceased from being an independent power, or nominally subject to Turkey, and had become a vice-royalty or dependency of France.

The President or his Secretary of State could not repeal the law.

Neither would it be lawful for either of them to enter into a special contract with their appointee, that he should discharge the duties of an office, the compensation of which was established by law, for a less sum than the law allowed. That would be immoral and degrading. If the contract system is to prevail, a better and a fairer system would be to advertise to receive proposals, to award the contract to the lowest bidder, on the best terms the duties of the office could be discharged, and where a fair competition would be invited. Neither is there anything unreasonable or unconscionable in the amount of compensation claimed in this case, in the actual condition of things. For in the Consular Acts of 1855, \$2,500 was allowed to the Consuls of each of the Ports of Tangiers, Tripoli and Tunis; and in the Act of 1856, the salaries of these consuls was increased to \$3,000 per year; and under both Acts the consuls were prohibited from trading on the Barbary coast. Circumstances and propriety conspire to show that the compensation of the Consul at Algiers could not be below that of any other interior ports on the south shore of the Mediterranean. If there could be no legal stipulation between the Government and the claimant, for the reasons named, much less will the law imply a contract.

Mr. Thomas H. Talbot, *Asst. Atty Gen.*, for appellee:

(The court declined to hear an oral argument for appellee.)

The defense relies upon this point, namely:

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The Act of May 1, 1810, contemplated Algiers as a part of the Barbary powers, and in fixing the salary for a Consul at that city, became inoperative for want of a proper subject by the transfer of that city to France.

The State Department has uniformly acted upon this construction, in all consular appointments made since such transfer. All such appointments have been accepted and held upon the same construction for the same period.

The following statutes are cited as supporting this claim: July 6, 1797, Vol. I., p. 533, ch. xii; May 1, 1810, Vol. II., p. 608, sec. 1; Mar. 2, 1833, Vol. IV., p. 626; Mar. 1, 1855, Vol. X., p. 621, sec. 1; Aug. 2, 1861, Vol. XII., p. 285; also p. 336.

These statutes show a legislative sanction of the construction given to the Act of May 1, 1810, by the State Department, namely: that it was, as to Algiers, repealed by the transfer of that city from a Mahometan power to the dominion of a Christian Nation and old ally of the United States, the Nation of France.

Mr. Justice Field delivered the opinion of the court:

In March, 1854, the appellant was appointed Consul of the United States in the City of Algiers in the north of Africa. He soon afterwards entered upon the discharge of this duty, and continued in office until November, 1859, when he resigned. During this period he received no salary from the Government, nor did he make any return to the Government of fees received by him as Consul; but he was paid the necessary expenses of his office, and was allowed by the Department of State to transact business as a merchant. While in office, he preferred no claim for any salary or compensation for his services, nor did he afterwards advance any such claim until July, 1865; he then presented his claim for \$4,000 a year as salary, to the Treasury Department. That department referred the matter to the State Department, and Mr. Seward, then Secretary of State, informed the appellant that his claim could not be allowed, and its payment was accordingly refused. He then instituted the present action to recover the amount.

His claim is founded upon the Act of Congress "fixing the compensation of public ministers and of consuls residing on the coast of Barbary and for other purposes," passed on the 1st of May, 1810. That Act provides that the President shall not allow "To any Consul who shall be appointed to reside at Algiers, a greater sum than at the rate of \$4,000 per annum, as a compensation for all his personal services, and expenses." The language of this Act would seem to indicate that the extent of the compensation to be made to the Consul was, within the limits prescribed, subject to the control of the President, and that the amount specified was not payable absolutely to the person appointed.

But assuming, for the purposes of this case, that the Act fixes absolutely the rate of compensation, we do not think it sustains the claim of the appellant.

When that Act was passed Algiers was a part of one of the Barbary States of that name, and it is evident, from an examination of its provisions, that the Act was intended to apply to a consulate at that place only so long as it

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belonged to one of the Barbary powers. Years before the appointment of the appellant, Algiers, and the country of which it was the principal city, had become a province of France.

A great distinction has always been made between consuls to Mahometan and consuls to Christian countries, both in the powers intrusted to them and in the duties with which they are charged. The full reciprocity which, by the general rule of international law, prevails between Christian States in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian State and a Mahometan State in the same circumstances; and in our treaties with Mahometan powers, express stipulations are made for the enjoyment by our citizens of certain extraterritorial rights with respect to their persons and property. Whilst, therefore, in Christian countries consuls are little more than mere commercial agents, in Mahometan countries they are clothed with diplomatic and even with judicial powers. Consuls to Christian countries are often allowed to engage in business; but consuls to Mahometan countries are restricted to the duties of their offices, are paid a stated salary, and are prohibited from entering into commercial transactions. Halleck, *Inter. Law*, ch. 10, secs. 21, 22; 7 *Ops. Attys-Gen.*, 346-348.

Thus, in the Treaty with the Dey of Algiers, made in 1816 (8 *Stat. at L.*, 244), it was stipulated that disputes between citizens of the United States should be decided by the Consul and in case a citizen of the United States should kill, wound or strike a subject of Algiers, or, on the contrary, a subject of Algiers should kill, wound or strike a citizen of the United States, the law of the country should "take place, and equal justice" be rendered, the Consul assisting at the trial; and that the property of a citizen of the United States dying in Algiers should be under the immediate direction of the Consul, unless otherwise disposed of by will.

Provisions like these are not generally made in treaties between Christian nations; and they impose duties upon consuls which are not exacted of those officers when acting as mere commercial agents. It is plain that the duties for which a consul, inhibited from engaging in commerce, and charged with diplomatic and judicial functions, was required at Algiers, whilst that place formed part of a Mahometan power, and this Treaty was in force, ceased when that country passed under the jurisdiction of a Christian Nation, and the Treaty with the Dey thus expired. The Department of State from that time has treated the consulate there as one without salary, to which the provisions of the Act of May, 1810, were no longer applicable; one which allowed the incumbent, as consuls in the countries subject to France are allowed, to engage in business, and only entitled to receive as compensation for his services such fees as he might collect, besides the necessary expenses of his office. 8 *Stat. at L.*, 106; 10 *Stat. at L.*, 992.

The construction thus given by the Secretary was impliedly sanctioned by the Act of Congress of March 1, 1855, "to remodel the diplomatic and consular systems of the United States" (10 *Stat. at L.*, 621), and was expressly

sanctioned by the Act of August 18, 1856, to regulate those systems. 11 Stat. at L., 52.

The Act of 1810, after specifying the compensation which might be allowed to the Consul appointed to reside at Algiers, designated the sum which might be allowed to other consuls appointed to reside in any other of the States on the coast of Barbary, thus making provision for all the Barbary States. The ports of these States, where consuls were appointed to reside, were Tangiers, Algiers, Tripoli and Tunis. Now, in the Act of March 1, 1855, compensation is fixed, under the head of "Barbary States," for consuls to all those places except Algiers, and no provision is anywhere made for the appointment of a consul at that place, or for compensation to one there, showing that Congress did not then think that a consul with a salary there existed, or was there required.

The Act of August 18, 1856, enumerates the same places, under the same head of Barbary States, at which consuls are to be appointed to reside, and designates their compensation, omitting, as in the Act of 1855, the City of Algiers, and provides that consuls not thus enumerated shall be entitled, as compensation for their services, to such fees as they may collect, a provision which in effect declares, when read in connection with the preceding clauses of the Act, that they shall receive no other compensation. And this latter Act repeals all Acts and parts of Acts inconsistent with its provisions.

We find no error in the judgment of the Court of Claims and it is, accordingly, affirmed.

JAMES C. STIMPSON, *Plff. in Err.*,

v.

CHARLES T. WOODMAN.

(See S. C., 10 Wall., 117-126.)

Patent right—what not patentable.

Where plaintiff's machine, for which a patent had been granted, had been anticipated in every part of its construction except the figures or designs on the roller, which roller was old, he was not entitled to recover for its infringement.

The engraving of the figure upon the surface of the smooth roller, or the substitution of the old figured roller for the purpose, required no invention.

Simply mechanical skill is not patentable.

[No. 164.]

Argued Apr. 5, 1870. Decided Apr. 25, 1870.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This action was brought in the court below by the defendant in error, to recover damages for the alleged infringement of certain letters patent.

The trial resulted in a verdict and judgment for \$4.17, with costs, taxed at \$214.75 in favor of the plaintiff. Whereupon the defendant sued out this writ of error.

A very full statement of the case appears in the opinion of the court.

Messrs. B. E. Curtis and Geo. L. Roberts, for plaintiff in error:

The introduction of the pebbling roller into the Green machine, in the same mode and for the same purpose that it had been previously introduced into the analogous Garnar machines,

is not such a new combination as is patentable, but is rather a double use of the pebbling roller, or a double use of the Green machine.

It was, therefore, proper and material to submit to the determination of the jury in this case the following questions of fact:

1. Whether the pebbling roller itself was old and had been used in the Garnar machine.

2. Whether the Green machine, apart from the pebbling roller, was old.

3. Whether the Garnar machine, as leather finishing machines, was analogous to the Green machine.

4. Whether the mode of introduction of the pebbling roller into the Green machine was substantially the same as in the Garnar machine, and was within the common knowledge and skill of mechanics.

5. Whether the purpose and effect of the use of the pebbling roller in the Green machine was substantially the same as the purpose and effect of its prior use in the Garnar machines, or in the hand devices.

Such, in substance, is what the court below was prayed to instruct the jury; and if the jury had found all the facts in the affirmative, then the court should have ruled, as matter of law, that the first claim of the patent of the plaintiff below was void, under any construction that did not include, as an essential part of the combination therein claimed, the mechanical devices for alternately raising and lowering the table, by which alone it is made to differ from the Green machine; and that the defendant below could not be restrained by the patent of the plaintiff below from using the said Green machine or any other machine substantially like it, for operating the pebbling roller.

This doctrine is uniformly held in England, and it appears to be the settled law of this country, although the decisions upon the subject in our courts are not so recent nor so numerous as in the English courts; the obvious reason being, that the scrutiny of the United States Patent Office has been so great that patents have rarely issued for supposed inventions of this character, as will readily be perceived by reference to the cases appealed from the Commissioner of Patents.

Cochrane v. Waterman, Law's Dig., 488, sec. 6; *Hazard v. Green*, Law's Dig., 488, sec. 8; *Rawson, ex parte*, Law's Dig., 490, sec. 26; *Wheeler, ex parte*, Law's Dig., 490, sec. 29; *Orr, ex parte*, Law's Dig., 475, sec. 13; *Blandy, ex parte*, Law's Dig., 254, sec. 6; 490, sec. 23; *Allen, ex parte*, Law's Dig., 254, sec. 8; 490, sec. 26; *Marsh, ex parte*, Law's Dig., 254, sec. 9; 490, sec. 27; *Berry, ex parte*, Law's Dig., 254, sec. 10; *Bean v. Smallwood*, 2 Story, 408; *Winans v. R. R.*, 2 Story, 412; *Loeh v. Hague*, Web. Pat. Cas., 203; *Harwood v. Railway*, 11 H. of L. Cas., 654; *Regina v. Cutler*, 3 Car. & Kir., 215; *Parkes v. Stevens*, L. R., 8 Eq., 588; *Jordan v. Moore*, L. R., 1 C. P., 624; *Horton v. Mabon*, 12 C. B. (N. S.), 497; 16 C. B. (N. S.), 141; *Hotchkiss v. Greenwood*, 11 How., 248; *Kay v. Marshall*, 5 Bing. (N. C.), 492; *Hous v. Abbott*, 2 Story, 190; *Phillips v. Page*, 24 How., 164 (65 U. S., XVI., 689); *Bush v. Fox*, 5 H. of L. Cas., 707; *Bottle Envelops Co. v. Seymour*, 5 C. B. (N. S.), 164.

Mr. T. L. Wakefield, for defendant in error:

Patents are to be construed liberally in favor of the patentee; so construed, if possible, that the inventor shall have the benefit of what he has actually invented, if he has invented anything.

Corning v. Burden, 15 How., 269; *Pitts v. Whitman*, 2 Story, 621; *Carver v. Braintree Mfg. Co.*, 2 Story, 446; *Ames v. Howard*, 1 Sumn., 485; *Ryan v. Goodwin*, 3 Sumn., 520.

1. A patent for a combination of elements or parts previously known in a machine is valid, if the result produced by such combination is either a new article or a better article, or a cheaper article to the public, either an old effect, better or cheaper or a new one.

Curt., 67; *Crane v. Pries*, 5 Scott (N. R.), 339; *Buck v. Hermance*, 1 Blatchf., 404; *Pitts v. Whitman*, 2 Story, 618, &c.; *O'Reilly v. Morse*, 15 How., 123; *McCormick v. Seymour*, 2 Blatchf., 246; *Furbush v. Cook*, 2 Fish., 672; *Foster v. Moore*, 1 Curt., 291; *Wilson v. Barnum*, 2 Fish., 635.

It is not important whether it required much or little thought, study or experience, to make the combination, or much or little expense to devise and execute it; and it is decisive that a new mode of operation has been introduced, if either a new effect, or a better effect, or as good an effect more economically attained, is produced by the change.

Furbush v. Cook (*supra*); *Earle v. Sawyer*, 4 Mas., 1; *Davoll v. Brown*, 1 Wood. & M., 58; *Russell v. Cowley*, Web. Pat. Cas., 464.

The effect or result produced by the two combinations is a practical test of the identity of the combinations, and the patentability of the plaintiff's invention.

Curt. Pat., secs. 8, 9, 14, 15, and *notes*; secs. 380, 381, and *notes*; *Hall v. Wiles*, 2 Blatchf., 200; *Law's Dig.*, 423.

A useful new result implies invention in the machine to produce the effect. *Furbush v. Cook*, 2 Fish., 672.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts. The suit was brought in the court below, by Woodman against Stimpson, to recover damages for an infringement of a patent granted on the 29th March, 1864, for "a new and useful machine for ornamenting leather," as stated in the letters patent. In the specification the plaintiff states he has "invented a new and useful improvement in boarding or pebbling leather," and describes how this process was formerly carried on. He says:

"What is known as a boarded or pebbled grain or finish has hitherto been given to leather by what is called the boarding operation, which consists in doubling the skin over on to itself on a table so that the flesh side shall be out, and then forcing or rucking one part over the other, in different directions, by means of a flat cork board, which breaks or wrinkles the grain and gives it a rough, checkered or pebbled appearance. This operation is performed by hand, and is very slow and laborious, and produces only one particular kind of finish." He then observes: "The nature of my invention, therefore, consists in producing this 'pebbled' or 'boarded' grain or finish on

leather, by subjecting it to the pressure of a short revolving cylinder or roller of steel, or other suitable metal, having the required design or figure engraved or sunk on its periphery. My improvement further consists in combining with said roller, a new and useful combination of mechanical devices for carrying my invention into practical operation, so as to accomplish the object desired with great rapidity and cheapness."

He further observes: "It is obvious that my pebble roller may be combined with various mechanical devices whereby it can be rolled with sufficient pressure over a skin of leather. I will now, however, describe a combination of devices which I find to answer every purpose required." The plaintiff then described with great minuteness the machine and every part of it, and closes with his claims.

First. "Boarding or pebbling skin or leather by means of a single short cylinder with the requisite pressure, substantially as described."

Second. "I also claim raising and lowering the table, 'A,' by means of the toggles, 'Q,' arm, 'S,' springs, 'U,' arm, 'T,' and cam, 'P,' or their equivalent, substantially as set forth and for the purposes described."

The second claim is not in the case, as the arrangement or contrivance is not found in the defendant's machine. The first is the only one in question.

That is, as we have seen, "boarding or pebbling" skins or leather by means of a single short cylinder rolling over a table with the requisite pressure, substantially as described; which means, as we understand the claim, finishing or figuring the leather by means of a revolving roller, the design or figure engraved or sunk in its periphery, and worked over the grain of the leather by the use of the machinery described, or by machinery substantially like it.

Now, it is admitted in the bill of exceptions, that evidence was given on the trial by the defendants, tending to show that prior to the plaintiff's invention, board or pebble grain or finish, described in his patent as produced by him, had been produced on leather by subjecting it to the pressure of a short revolving cylinder of steel or other metal, having the required design or figure engraved or sunk on its periphery, and rolling over a table on which the leather was placed; and that the said revolving figured cylinders, which are known in the case as "pebbling rollers," were operated with the requisite pressure by means of hand devices.

It is also admitted the defendant gave evidence tending to show that, prior to the plaintiff's improvement, there was known and used a machine which, in its substantial combination or arrangement of its parts, co-operating together for the purpose of impressing the surface of leather, differed in no material respect from the machine described in the letters patent, whereof a model was produced, except in respect to the mechanism for raising and lowering a table (not in the defendant's machine), and except that, instead of operating a short revolving roller like the plaintiff's, having a fissured surface for the purpose of producing the pebbled grain on leather, it operates a short revolving metallic roller having a smooth surface, for the purpose of giving to the leather a closer

natural grain; that this was the only diversity between the two machines, and that having the smooth roller, instead of the roller with the ornamental surface, made no difference in the substantial combination or arrangement of the machinery co-operating together in said machines for the purpose of doing the work. Now, taking this evidence as thus stated in the bill of exceptions, it will be seen that the only difference between the prior machine and the plaintiff's, in its combination and arrangement and in its working and effect upon the leather is, that the metallic roller in the former had a smooth, and in the latter a figured surface. In all other respects, the two machines were the same. But, as also appears in the bill of exceptions, this figured revolving roller was old, and the use of it in pebbling leather was also old and well known. Neither the plaintiff nor the defendant could claim any right to it as inventors.

The same pebbled grain and finish as described in plaintiff's patent had already been produced on leather by subjecting it to a pressure while rolling over the table on which the leather was placed; but this pressure was produced by means of hand devices.

The field of invention was open to any person to construct new devices or machinery by means of which to operate this old instrument in "pebbling leather," in the language of the patentee in this case, "so as to accomplish the object desired, with greater rapidity and cheapness." And this the plaintiff would have accomplished by his machine, if he had not been anticipated. But the case admits that the evidence was given, tending to show that the device or machine he has patented for the purpose, so far as used by the defendant, was the same as the Green machine, which was prior in date.

We are now prepared to look at the second instruction to the jury, prayed for by the defendant, which is: "If they find that the form of the surface of the roller in the plaintiff's machine is not material to the mechanical action of the roller in combination with the other devices, and their arrangements by which the roller is moved, the leather supported, and the pressure made; and if they find that before the plaintiff's invention a machine was known and used, not differing substantially from the plaintiff's machine in any other respect, but having a roller for giving a finish to the leather, the surface of this roller was different from that specifically shown and described in plaintiff's patent; and if they find that before the plaintiff's invention, rollers having such a surface as the plaintiff's substantially, were known and used in other machines for the same purpose, the plaintiff's patent for the first claim is void."

This prayer is somewhat involved and obscured by too much verbiage; but when analyzed and understood, it was clearly warranted and supported by the evidence, and should have been given.

In substance it is, if the jury should find that the figured roller in the plaintiff's machine was not material to the mechanical action of the roller in the combination and arrangement of the machinery by which it was moved, the leather supported, and the pressure made; and if they find that before the plaintiff's a machine

was known and in use similar to his, except that the surface of the roller was smooth; and if they find that before the plaintiff's invention figured rollers were known and used in other machines for the same purpose, then the plaintiff's first claim was void. In other words and, in short, if the plaintiff's machine had been anticipated in every part of its construction except the figures or designs on the roller, which roller was old, he was not entitled to recover. This instruction was refused, which, for the reasons already stated, we think was error.

There is, also, another ground upon which we think this instruction should have been given. Assuming the plaintiff to have been anticipated in the construction of his machine in every part of it, except that the prior machine used a smooth revolving roller, and the plaintiff a figured one, but which figured roller had been used for pebbling leather by pressure, and was well known, all of which the jury would have been warranted in finding, the engraving, or stamping of the figure upon the surface of the smooth roller, or the substitution of the old figured roller for the purpose, required no invention; the change with the existing knowledge in the art involved simply mechanical skill, which is not patentable.

Judgment reversed. Venire de novo.

Mr. Justice Clifford, dissenting:

Inventions secured by letters patent are property and, as such, they are under the protection of the Constitution of the United States and the laws of Congress. When duly secured in that way the patentee acquires the exclusive right, if the invention is a machine, to make and use the same and to vend it to others to be used during the entire term for which it was granted, as provided by law. Vested with that exclusive right he may have an action on the case to recover damages against any person who infringes his exclusive right; and on the trial of the case, to the jury he may introduce his letters patent in evidence, and when so introduced the letters patent afford a *prima facie* presumption that the patentee is the original and first inventor of what is therein described as his improvement; and the defendant, if he denies that proposition, takes the burden to establish the affirmative of the general issue or of the notices filed in that behalf. *Agawam Co. v. Jordan* [ante, 178].

Letters patent bearing date the 29th of March, 1864, were granted to the plaintiff for a new and useful improvement in boarding and pebbling leather, which, as described, consists in giving to the surface of the leather a checkered or pebbled appearance by subjecting the leather on the finished side to the pressure of a short, engraved revolving cylinder or roller, made of steel or other suitable metal, having the required design or figure engraved on the periphery of the device. My improvement, says the patentee, consists in combining with said roller a certain new and useful combination of mechanical devices for carrying my invention into practical operation, so as to accomplish the object desired with great rapidity and cheapness.

Nothing can be plainer than is the meaning of those two passages in the specification, the substance of which is here reproduced. In the first passage he describes the result or effect which his invention will produce, and in the

second he gives a terse general description of the invention itself, alleging that it consists in combining with the roller a certain new and useful combination of devices to accomplish the work. Had the patentee stopped there the specification might perhaps have been regarded as wanting that full, clear and exact description of the invention which is required by the 6th section of the Patent Act. 5 Stat. at L., 119.

But the patentee did not stop there, as fully appears by what immediately follows in the specification. On the contrary, he gives a minute description of the roller, and then proceeds to describe the several mechanical devices to be combined with the roller, and which, as he says, will answer every purpose to produce the required effect; and in conclusion he gives a minute description of every element composing the organized machines described in the patent as it was issued.

Exact description is also given of the several devices composing the apparatus for raising and lowering the table on which the leather is placed as it is subjected to the operation of the pebbling instrument. Such an apparatus is essential to the effective operation of the machine, as the table must be raised in order that the leather may be subjected to the pressure of the roller or pebbling instrument as it passes over the upper surface, and it must also be lowered in order that the arm to which the pebbling instrument is attached may pass back, and it is obvious that the contrivance is ingenious and useful.

What the patentee claims is as follows: First, boarding or pebbling skins or leather by means of a single short cylinder rolling over a table with the requisite pressure substantially as described. Striking out the words "substantially as described," it might be contended that the claim is for the effect and not for the means by which the effect is produced, but such a construction cannot be maintained for a moment, as it would be contrary to the settled rules of law everywhere applied in such cases.

Patents for inventions are not to be treated as mere monopolies and, therefore, as odious in the law, but they are to receive a liberal construction, and under a fair application of the rule that they be construed *ut res magis valeat quam pereat*. Hence where the claim immediately follows the description, it may be construed, says Curtis, in connection with the explanations contained in the specification, and be enlarged or restricted accordingly. Curt. Pat., sec. 225; *Turrill v. R. R.*, 1 Wall., 510 [68 U. S., XVII., 672]; *Ryan v. Goodwin*, 3 Sumn., 520.

Construed in view of that rule, it is clear, to a demonstration, that the first claim of a patent is for the means described in the specification for accomplishing the effect, which is the exact view taken of the claim by the presiding justice in the court below.

Strike out the second claim and it might be contended that the first claim covers the whole invention, including the apparatus for raising and lowering the table as well as the combination of devices for pebbling the leather, but the whole specification must be construed together, and when so construed it is clear that the claims were intended to be distinct, as the second claim not only specifies the "raising and lowering of the table," but it also includes by name

every one of the described devices to perform that office.

Giving due weight to these considerations, it is as clear as anything can be that the first claim of the patent is a claim for a combination of the described mechanical devices, with a roller for carrying the invention into practical operation, and for accomplishing the described result by the described means, excluding the apparatus for raising and lowering the table, which is included in the second claim. *Le Roy v. Tatham*, 22 How., 132 [63 U. S., XVI., 866].

Influenced by these considerations, I dissent from the opinion of the court, because it adopts an erroneous construction of the patent, and one utterly at variance with the whole tenor of the specification and the language of the claim.

Some attempt was made at the trial to show that the invention of the plaintiff was superseded by the machine of Garnar, or by that of Green, but the attempt was an utter failure, and the jury found the issue in favor of the plaintiff. Questions of fact are certainly for the jury, and it is too plain for argument that the finding of the jury cannot be revised here under a bill of exceptions. Suppose, however, it were otherwise, still it would be impossible to come to any other conclusion than that their finding is right.

Take the Garnar machine, which is the first in order as the evidence is exhibited in the bill of exceptions. Evidence was introduced by the plaintiff, showing not only that the machine differed from the machine of the plaintiff, but that it operated in a substantially different manner, and produced a substantially different effect upon the leather, which must be obvious, upon comparing the two machines, to everyone having any acquaintance upon the subject. Equally decisive evidence was also introduced by the plaintiff showing that the Green machine did not supersede his patent. Among other things the plaintiff proved that the figuring instrument described in that patent was not a revolving instrument, but an instrument for rubbing the leather, as appears by the model; that the adaptation of the pebbling roller to that machine, so that the same could be practically used therein, would require invention and was not within the common knowledge and skill of mechanic, and that a figured, rotating cylinder, such as is described in the plaintiff's patent, had not, in fact, been introduced and operated in that machine prior to the plaintiff's invention.

Remark upon the question of infringement is not necessary, as that issue was found by the jury for the plaintiff, and there is no exception calling for any review of the instructions given by the court.

Suggestion is made in the opinion just read that perhaps the judgment might be reversed upon the ground that the invention was not patentable. *Many v. Jagger*, 1 Blatchf., 873; *Wilbur v. Beecher*, 2 Blatchf., 132. Patented inventions which are not new and useful, or which did not require any invention as compared with what existed, and was in use before, may, doubtless, be held invalid on that account, but the question whether a particular invention is new and useful, or whether it did require any invention to produce it, as compared with what existed before, are everywhere admitted to be questions of fact for the jury, and certainly no

such question is open here for the determination of this court under this bill of exceptions. *Curtis, Pat.*, sec. 41; *Lowell v. Lewis*, 1 Mas., 182; *Winans v. R. R. Co.*, 2 Blatchf., 297; *Bedford v. Hunt*, 1 Mas., 302; *Hall v. Wiles*, 2 Blatchf., 194. Such a remark cannot have been well considered, as the authorities are all the other way; but if it were otherwise the bill of exceptions shows that the finding of the jury was right, as it appears that the pebble finish can be made cheaper and better by the plaintiff's machine than by any other machine or instrument known in the trade, which is a complete answer to both suggestions.

Valuable as the property of the plaintiff in this invention is, I cannot concur in the judgment which assigns it to an infringer. Most modern patents are for new combinations of old elements, just like the present one, but many of them are of great utility, and they are as much within the protection of the patent law as those of any other class. *Union Sug. Ref. v. Mathieson*, 2 Fish., 605. Such patents being for the combination only, no one can be held liable for infringing the invention unless it be shown that the infringer uses all of the elements which compose the combination, showing that the public have the most ample security that nothing will be protected by the patent except what was, in fact, invented by the patentee. *Prouty v. Ruggles*, 16 Pet., 341; *Carver v. Hyde*, 16 Pet., 520; *Stimpson v. R. R.*, 10 How., 346; *Barrett v. Hall*, 1 Mas., 477; *Howe v. Abbott*, 2 Story, 194.

Where an invention is for distinct combinations which are separable, and where it embraces two distinct improvements, one having respect to the operative part of the machine and the other to the motive power, it is entirely competent for the commissioner to grant separate claims for the two combinations in the same patent, or he may, under existing laws, grant separate patents for each combination, if it is new and produces a new and useful result.

Two combinations are embraced in this patent: one consisting of a combination of certain described mechanical devices with the roller to do the work of pebbling the leather; the other consists of the described combination to raise and lower the table; and the one last named is admitted to be new and useful and, therefore, valid, but the opinion of court surrenders the first one to infringers, and of course the property of the inventor is rendered of no value.

Cited—23 Wall., 568; 92 U. S., 353; 94 U. S., 196; 105 U. S., 572; 107 U. S., 653; 111 U. S., 490; 4 Cliff., 186, 261; 9 Blatchf., 535; 16 Blatchf., 136.

THE SHIP BLACKWALL, HER TACKLE,
CARGO, ETC., JAMES CREAMY, Claimant,
Appt.,

v.

THE SANCELITO WATER AND STEAM
TUG COMPANY AND GEORGE CLARK.

(See S. C., "*The Blackwell*," 10 Wall., 1-15.)

*Salvage suits, who may bring—owners of tug—
corporation—action by part of salvors.*

Salvage suits may be promoted in the name of the master, or of the owners and master.

The owners of a tug, which assisted in extinguishing a fire on a ship, are entitled to salvage.

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All who engaged in the enterprise and materially contributed to the saving of the property, are entitled to share in the salvage.

Salvors are not deprived of a remedy, because another set of salvors neglect or refuse to join in the suit.

Owners of a vessel can maintain a salvage suit, although they do not personally participate in the salvage service.

Corporations, as the owners of vessels, whether sail vessels or steamers, may maintain a salvage suit.

Where the libelants were not the sole salvors, and the sum decreed is for the whole service, the decree will be reversed on that ground.

[No. 174.]

Argued Apr. 14, 1870. Decided Apr. 30, 1870.

APPEAL from the Circuit Court of the United States for the District of California.

This was a libel filed in the District Court of the United States for the District of California, by the owners and master of the steam tug *Goliah*, to recover for a salvage service rendered by the said steam tug. The facts as stated in the opinion of the district court were briefly as follows:

About three o'clock in the morning of Aug. 24, the British ship, *Blackwall*, then at anchor in this harbor, was discovered to be on fire. Shortly afterwards, the alarm was communicated to the shore and the fire department of the city called out.

As soon as the cause of the alarm was ascertained, the chief engineer of the fire department, with officer Gordon of the harbor police, proceeded to the steam tug, *Goliah*, then lying at Broadway wharf, and having roused the person in charge, requested him to fire up without delay, in order that the engines might be conveyed on the tug to the burning vessel.

This, after a few moment's hesitation, arising no doubt from reluctance to act without orders, he proceeded to do. Messengers were dispatched to the captain and engineers of the tug who were asleep at their houses, and every effort made to get steam on the tug as quickly as possible.

The captain and engineer were aroused and at once repaired to the wharf. It being found impracticable for the tug to go into the slip where the fire engines lay, two of the latter were brought around to Broadway wharf, and taken across the deck of the steamboat, *Antelope* and on the tug, with commendable promptitude and skill.

About six o'clock the tug, with two engines on board, together with the firemen, etc., attached to them, moved out of the slip and in a few minutes were alongside the ship. The fire had, by this time, made considerable progress. The house on deck between the fore and mizzen masts was on fire, and the flames were mounting nearly half way to the tops.

The ship was also burning between decks, where the fire originated. The officers and crew, though assisted by a party from the U. S. Ship *Lawrence*, having found all attempts to snub the flames abortive, had desisted from further efforts and had, a few moments before *The Goliah* arrived, left the vessel with their effects in small boats.

Without speedy assistance, the total destruction of the ship and cargo was inevitable. The measures of the firemen and officers of the tug were taken with great skill and energy.

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The hose of the engine was charged as the tug approached the vessel, and as soon as she was near enough four streams were directed upon her. The tug, without hesitation or delay, was made fast alongside The Blackwall. The firemen almost instantly mounted her rails, went thence to her forecabin, and from thence to her deck, sweeping the latter with four powerful streams, by which the fire was speedily controlled. They then descended to her between decks, and in a little more than half an hour the flames were entirely extinguished.

Her anchor was then weighed by the advice of the captain of the tug, and the vessel was towed to the flats near Vallejo Street wharf.

The value of the vessel and cargo saved, was about \$100,000.

The value of the tug was about \$50,000.

The value of the property was large. It was saved, not merely from imminent peril, but from certain destruction.

The service was rendered without hesitation and with energy and skill.

The chief risk incurred by the tug was from the falling of the masts or spars of the vessel. An accident of this kind might have proved disastrous to the tug, and perhaps to many on board.

The tug was not the sole salvor; without her assistance the fire engines would have been powerless to save the ship; but without them the tug's aid would have been ineffectual.

The district court decreed in favor of the libelants, and entered a judgment for \$10,000 and costs.

The decree having been affirmed, on appeal, by the circuit court, the case is now here on appeal.

Mr. E. B. Goodrich, for appellant:

The libel is propounded and signed by George Clark, master of The Goliah, who, as he testifies, does not claim for himself. He allows his name to be used for the benefit of the owners, who did not personally perform any service, and who cannot be regarded as salvors, although under some circumstances they may receive compensation for the use and risk of their property. Clark cannot, having no interest, maintain the suit for others who may have an interest in his name, or jointly with those with whom the interest may be.

Fulham v. McCarthy, 1 H. of L. Cas., 719.

See, also, *The Charles*, 1 Newb., 829, where some of the salvors declined asserting a claim for salvage compensation, their proportion will not accrue, either to the benefit of their co-salvors, or to the owners of the saving vessel. The decision in this case is fully sustained by the authorities.

The fire department does not claim for itself or its members. If the service of the department was performed in the execution of its public duty, no compensation as salvage can be made to it or for its use. In the case at bar, as shown in the record, the presumption is that the service was in the execution of its duty. There is nothing in the decree or in the opinion of the district judge to rebut this presumption. *Hubert v. Dragan*, 10 Pet., 120.

The decree of the district judge affirmed by the circuit court, is joint in favor of the master and owners of the tug, and cannot be sustained,

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unless both make claim and are entitled to recover. The master disclaims.

The service by which the fire was extinguished was performed by the fire department of San Francisco, in the discharge of its public official duties. The vessel was in a position to be under the surveillance of the harbor police, by one of which the fire was discovered. The engineer of the fire department seized upon the tug (no resistance nor objection being made), and used the same for the transportation of his engines and men, with and by which the service was accomplished.

All persons who are under any legal obligation, express or implied, to render assistance, are not entitled to salvage. Conkl. Adm. Jur., 274.

If the owners of The Goliah are entitled to compensation, they are so entitled, not as salvors, but owners of property, and for the use of the boat employed in a transportation service, taking into consideration in connection therewith, any actual loss which the boat may have sustained, and the risk of injury attending the service, in the ascertainment of which the court will not indulge mere possible conjectures or speculations. *Island City*, 1 Black, 129 (86 U. S., XVII., 73).

Where the owners of a vessel are entitled to participate in the compensation for a salvage service, the usual rule in admiralty is, to give them one third of the sum awarded for the entire service.

The owner's claim to participate in the salvage reward, rests always upon the risk and damage to which his property is or may be exposed, and on no other ground. Strictly speaking, salvage is the reward of those who engage in the salvage service, and is participated in only by those who actually effect the same. The owners of the vessel are admitted to participate in the reward by courts of admiralty, upon equitable considerations, both that the vessel is usually an efficient instrument in the service, and because of the risk to which his property may be thus subjected.

The Vine, 2 Hagg., 1; *The Charlotte*, 8 W. Rob., 72; *Mason v. Blaireau*, 2 Cranch, 240.

It is evident from the facts shown in the record, and from the opinion of the district judge, that the sum fixed as compensation for salvage includes the entire service which was granted by the fire department, as well as the transportation service of the tug. If this is not the fair import \$10,000 (ten per cent. upon the supposed value of the ship and cargo) is manifestly an erroneous and excessive allowance to the owners of the tug for the service which it performed.

The owners of the steam tug, in their libel, aver that the boat, its master and crew, performed the entire salvage service. They must prove this, or the libel, not having been amended or reformed, it is respectfully submitted, should be dismissed. As they do not aver themselves to have been co-salvors, they cannot recover as such. The issue presented by the pleadings is an entirety of service rendered by the libelants, when in fact only a slight proportion thereof was rendered by the steam tug, the value of which is not distinctly in issue, and there is nothing before the court by which it can be apportioned.

Malcomson v. Clayton, 13 Moore, P. C., 198; *Zugasti v. Lamer*, 12 Moore, P. C., 331.

These cases show that the rule requiring the allegation and proof to correspond, is rigidly adhered to in admiralty. They were cases of collision, but the principle is equally applicable to cases of salvage.

Orne v. Townsend, 4 Mas., 541; *The Sarah Ann*, 2 Sumn., 206; *The Towan*, 2 W. Rob., 259; *The Princess Alice*, 8 W. Rob., 142.

Messrs. H. A. Wise and J. S. Wise, for appellees:

Are we salvors?

A salvor is one who, without any particular relation to a vessel in distress, proffers useful service and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the vessel.

The Wave v. Hyer, 2 Paine, 131.

Had we any particular relation to the vessel in distress? Did we proffer useful service? Did we proffer it as a volunteer adventurer? Who could have compelled us to go, if we had refused? Were we compelled, or did we go voluntarily? Was there any pre-existing covenant that connected us with the duty of employing ourselves for the preservation of the vessel? If salvors, what is salvage? "Salvage is an allowance for goods or boat from danger, fire, pirates or enemies."

Lea v. The Alexander, 2 Paine, 466.

To entitle to salvage, there need not be risk of life, expenditure of money, or the application of any extraordinary means; but may be exclusively a case of skill.

Lea v. The Alexander (supra).

Was there ever a more skillful feat than that of taking land fire engines out to a burning vessel? A novel and efficient feat, which not only required forthought and skill, but involved risk of property and life, the expenditure of money in repair and was, assuredly, a resort to extraordinary means of succor.

As to proportion for derelicts, it is from one third to one half.

Rowe v. The Brig, 1 Mas., 377; *Hindry v. Priscilla*, Bee, 1; *L'Esperance*, 1 Dod., 46.

In the case of *The Baltimore*, 2 Dod., 136, £800 out of £1,900 was awarded. This would give us upwards of \$40,000. In the case of *The Aid*, 1 Hagg., 84, a tenth was allowed to boats. In *The Albion*, 8 Hagg., 255, nearly a fourth and costs was allowed, and other sums to other vessels. A fifth was allowed *The Branken Moor*, 3 Hagg., 378. In this case the court said the underwriters would not have underwritten the ship for fifty per cent. See, also, *The Medora*, 2 W. Rob., 69, which was a case of mere towage, where £600 was allowed. *The Isabella*, 3 Hagg., 437.

In the case of a derelict, where a claimant appears generally, from a third to a half is allowed. The modern cases give about a third. *The Thetis*, 2 Knapp, 410.

But in the case of *The Jonge Bastiaan*, 5 C. Rob., 322, two thirds were allowed. See, also, *The Isabella*, 8 Hagg., 427, which is a strong case. See, also, *The Thetis*, 3 Hagg., 228; 2 Knapp, 408, where expenses, £29,000 out of £187,000, were allowed. These cases make allowances far in excess of the allowance in this

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case, and that, too, where the destruction of the property was not so certain.

Carrying out the principle of encouraging enterprise as much as possible to save property, which is a great public benefit, the English Government encouraged steamers.

The Raikes, 1 Hagg., 246; *The London Merchant*, 8 Hagg., 401.

Steam vessels usually belong to great and opulent companies, and are fitted out at great cost, and they allow a larger reward to them.

The Perth, 8 Hagg., 416; *The Sussex*, 3 Hagg., 339.

It is a ruling principle, to give a large reward when the property is large, and *vice versa*.

3 Hagg., 331; *The William Beckford*, 8 C. Rob., 355; *The Clifton*, 3 Hagg., 120; *The Raikes*, 1 Hagg., 246.

If these ingredients, as stated above, are the essentials of salvage, are they not embraced in our claims for salvage, and are we not entitled to a good reward?

In considering salvage cases, the primary object is the danger of the property saved, its value, and the assistance actually rendered. The secondary object is, the risk to salvors and their property, the skill, time employed, and other collateral circumstances.

Vide The Traveler, 3 Hagg., 371; *The London Merchant*, 8 Hagg., 394.

Promptitude in rendering assistance is the principal ingredient.

The City of Edinburgh, 2 Hagg., 384; *The Spheriod*, 2 Monthly Mag., 285.

These cases would give much more than is allowed.

In salvage cases the exact reward is not the proper test; a considerable reward should be allowed.

The Sarah, 1 C. Rob., 313, n.

The proportion given depends on value. *The Blenden Hall*, 1 Dod., 423; *The Waterloo*, 2 Dod., 442; *The Raikes*, 1 Hagg., 246.

We have searched for salvage cases where ships were saved from fire, but have found but one. It is very strong for us, however. *The Dalphos*, 1 Newb., 412.

The reason perhaps is, that ships are usually at wharves when destroyed, in which cases they are not salvage cases; or when at sea, they are usually totally destroyed, when they would be salvage cases, if saved.

As to the amount of salvage; it rests in the sound discretion of the court. The appellate court will not incline to reverse the decree of the court below on the question of salvage, where the discretion has been fairly exercised, and no undue information of the rate of salvage has been received.

Tyson v. Pryor, 1 Gall., 133; see, also, *The Sybil*, 4 Wheat., 98.

As the allowance of salvage necessarily rests very much in the discretion of the court, it is hardly possible, in many cases, that different courts, exercising independent judgment, should arrive at precisely the same conclusion. Each may exercise the most enlightened discretion, and yet, from the necessary differences of the human mind, they may differently adjust the salvage to those circumstances. On this account it has always been the disposition of the appellate courts of the United States in salvage cases, to discourage appeals as mischievous and ex-

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pensive to all parties and, therefore, they generally adhere to the rate of salvage allowed in the court from which the appeal is taken, unless the evidence clearly calls for a different proportion. *The Emulous*, 1 Sumn., 214; *The Dalphos*, 1 Newb., 412.

As to proportion for salvage, see, also, *The Graces*, 2 W. Rob., 294; *The Meg Merrilies*, 8 Hagg., 346, n. 2; *The United Kingdom*, 3 Hagg., 401, n. 1; *Earl Gray*, 3 Hagg., 384; *The Isabella*, 8 Hagg., 428; *Industry*, 8 Hagg., 208; *Sussex*, 3 Hagg., 339; *Adventure*, 8 Cranch, 221; *Hand v. Elvira*, Gilp., 60-67.

Clark does not decline asserting his claim, even the awkward and unsuspecting reply given by him to an ingenious question of opposing counsel, to wit: "My name is used in the libel; it is for the use of the *Sancelito* Water Co.; I claim no interest." The record shows that he is asserting a claim as against The Blackwall. True, he says that he will not claim an interest in the salvage, as against his employers, but he, nevertheless, asserts a claim to him as salvor, both in the libel and in his testimony as against The Blackwall. He asserts that he is entitled, as against The Blackwall, to reward as salvor, and the question heretofore and still presented is: whether he is or not. If he was, judgment must have been for libelants. It is, indeed, strange that counsel deny the fact that he is asserting his claim as against their ship, when he appears on the record and states in the libel that he does assert it, and judgment has been twice rendered in his favor. As to the interest he will claim in claims asserted and allowed, the opposing counsel and court have nothing to do with it. His expression that he claimed no interest, arose from private obligations moving between him and his employers.

The Blackwall is, undoubtedly, indebted to George Clark, master, for salvage. He asserts the debt, but disclaims any interest in it, as it is assigned to the Company, as it were. He claims a recovery on his own account as against The Blackwall. This, therefore, is not the case contemplated in the charge, which referred to a case where some salvors do not appear to decline or assert a claim. Clark appears to assert as against The Blackwall. The libelants nowhere allege an entirety of salvage service, although they alone, on appellants' own state of facts, are entitled. If the fire department had wished to intervene for its interest, it might have done so in this suit. Appellants say it had no claim to salvage. If not, why join in this libel? If it had, were we compelled to wait for them to join us, and are we to be defeated in our suit because it did not? Perhaps it only did its duty, as appellants allege. Then it had no salvage claim. The tug certainly did more than its duty. No issue of entirety of service on part of libelants has been joined. Cases cited by appellants are not in point.

Mr. Justice Clifford delivered the opinion of the court:

Salvage is claimed by the libelants, as owners of the steam tug, *Goliath*, for services rendered by the steam tug, her master and crew, on the 24th of August, 1887, in saving the ship *Blackwall* and her cargo, then lying at anchor in the harbor of San Francisco. They allege that the ship was on fire; that the cargo as well

as the ship was in great danger, and that both would have been destroyed had it not been for the exertions of the steam tug, her master and crew; and the master and crew went with the steam tug to the assistance of the ship, and that they succeeded, after great trouble and great risk to the tug, in quelling and subduing the flames, and that they then towed the ship to a place of safety.

Information that the ship was on fire was communicated to the master of the steam tug by one of the deck hands of the tug, and he went immediately to the slip where she was lying, in order to give directions to the men on board to kindle up the fires and put on steam; but he found, on arriving there, that one of the harbor police had been there before him, and that he had made a similar request, and that the fireman of the tug had started the fires for the purpose of putting on steam.

Two persons were sent to the ship, which was lying at anchor in the harbor, some seven or eight hundred yards from the wharves, to see if there was any chance to extinguish the flames, and they reported that the ship might be saved. She was an English ship of twelve hundred tons burden, and she was ready to sail for her port of destination with a cargo consisting of thirty-eight thousand five hundred and one sacks of wheat, valued at \$60,000, and she was lying at anchor where the water was eight or ten fathoms in depth. They discovered the fire at four o'clock in the morning, and at six or a quarter past that hour, they proceeded to the ship in the steam tug, having previously taken on board two steam fire engines, each weighing five tons, with the engineer and several firemen belonging to each engine, and the chief engineer of the fire department, making twenty persons, including the master and crew of the steam tug. Both engines were well supplied with hose, and they had on board a considerable supply of fresh water. When the steam tug reached the ship those on board had become discouraged, and there were ten or twelve boats around the ship taking off the crew, but the boats were utterly unable to do anything towards extinguishing the fire.

Commanded, as all on board the steam tug were, by her master, the first act, after running alongside, was to fasten a stern line to the main chains of the ship, so as to lie across the tide on the port side of the ship. At that time the fire seemed to be between decks, but the houses of the ship on deck were also on fire. Great apprehension was felt lest the foremast should fall, as it was on fire between decks, and the flames had extended to the deck and twenty feet up the mast. Her bulwarks were also on fire, and the master of the tug deemed it necessary to cut away the port rigging attached to that mast to prevent it from falling across the steam tug. They put the engines in operation promptly, putting four streams of water on the ship, and by those means extinguished the fire in an hour, the firemen working the engines under the command of their respective engineers. Some of the persons present advised the master of the steam tug to unshackle and slip the anchor; but he insisted that it could be saved, and it was hoisted on board the ship by the windlass.

Promptness and efficiency characterized the

conduct of all engaged in performing the service throughout the transaction, and the steam tug, as soon as the fire was subdued and extinguished, took the ship in tow and proceeded with her to the adjacent flats, and left her there in safety in charge of her master and crew.

I. Certain preliminary objections are made by the appellants to the maintenance of the suit, which will be first considered before proceeding to examine the merits. Those objections are as follows: (1) That the master, having no interest in the claim, is improperly joined in the suit. (2) That the libelants have no just claim to compensation, as the salvage service was performed by the members of the fire department. (3) That the service having been performed by the members of the fire department, in pursuance of a public duty, they are not entitled to any compensation as salvage. (4) That the decree, inasmuch as it is joint, in favor of the master as well as the owners of the steam tug, is erroneous, because the master makes no claim to recover any compensation for his services.

1. Salvage suits are frequently promoted by the master alone, in behalf of himself and the owners and crew, or in behalf of the owners and crew, or the owners alone, without making any claim in his own behalf, and the practice has never led to any practical difficulty, as the whole subject, in case of controversy, is within the control of the court. Much examination was given to the question as to proper parties, in a salvage suit decided at the last term, in a case where the owners of the steamer rendering the service were an incorporated company, and by reference to the authorities cited in the opinion of the court in that case it will be found that the suit is frequently promoted in the name of the master, or of the company and master, as in this case. *The Camanche* [ante, 397].

Many other cases of like import might be referred to, but it must suffice to say that the court is of the opinion that the suit is well brought. *The Commander-in-Chief*, 1 Wall., 51 [68 U. S., XVII., 611]; *Houseman v. The N. Carolina*, 15 Pet., 49; *The Commerce*, 1 Black, 574 [66 U. S., XVII., 107]; *McKinlay v. Morrish*, 21 How., 343 [82 U. S., XVI., 100]; 2 Pars. Ship., 370.

2. Service, undoubtedly, was performed by the members of the fire department; but it is a mistake to suppose that service was not also performed by the steam tug, as it is clear that without the aid of the steam tug and the services of her master and crew the members of the fire company would never have been able to reach the ship with their engines and necessary apparatus, or to have subdued the flames and extinguished the fire. Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward.

Persons assisting to extinguish a fire on board a ship, or assisting to tow a ship from a dock where she is in imminent danger of catching fire, are as much entitled to salvage compensation as persons who render assistance to prevent a ship from being wrecked, or in securing a wreck, or protecting the cargo of a stranded vessel. *The Rosalie*, 1 Spinks, 188; *Eastern Monarch*, Lush., 81; *The Tees*, Lush., 505; Williams & Bruce. Adm. Prac., 92.

Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in case of shipwreck, derelict, or recapture. Success is essential to the claim; as if the property is not saved, or if it perish, or in case of capture if it is not retaken, no compensation can be allowed. More than one set of salvors, however, may contribute to the result, and in such cases all who engaged in the enterprise and materially contributed to the saving of the property, are entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered. *Norris v. Island City*, 1 Cliff., 220; *The Bartley*, Swab., 198; *The Pride of Canada*, Brown. & Lush., 209; 2 Pars. Ship., 279.

Salvors are not deprived of a remedy because another set of salvors neglect or refuse to join in the suit, nor will such neglect or refusal benefit the libelants by giving them any claim to a larger compensation, as the non-prosecution by one set of salvors inures, not to the libelants prosecuting the claim, but to the owners of the property saved. *Evans v. The Charles*, Newb., 329; 2 Pars. Ship., 301.

Cases may also be found where co-salvors who neglected to appear and become parties to the suit until the decree was pronounced, were allowed to petition the court for such compensation out of the fund in the registry of the court, and where their claim received a favorable adjudication. *The Henry Eubank*, 1 Sumn., 400; Rob. Adm., 85; *The Camanche* [ante, 397].

3. Important service, unquestionably, was performed by the members of the fire department, but as they are not parties to this suit it is not necessary to determine whether they would, under the circumstances of this case, be entitled to a salvage reward. Pilots, under some circumstances, may become salvors, and cases may be imagined where firemen perhaps might come within the same rule, but the question not being before the court no opinion is expressed upon the subject.

4. Comment upon the form of the decree is unnecessary, as it has already been determined that the joinder of the master with the owners of the ship was not error for which the decree should be reversed, as the distribution of the fund is within the control of the court. Exceptions of the kind, if the claimant intends to rely on the same, should be made in the district court, where the pleadings may be amended. *The Camanche* [supra].

Objection is also made that the owners of a vessel cannot promote a salvage suit unless they participate in the salvage service; nor if they promote such a suit, that they cannot participate in the reward decreed for the salvage service except for the risk and damage to which their property was exposed in rendering the salvage service. Such an objection was made in the case of *The Camanche*, before cited, but the court overruled the objection, and that ruling is adopted and applied in this case.

Beyond doubt remuneration for salvage service is awarded to the owners of vessels on account of the danger to which the service exposes their property, and the risk which they run of loss in suffering their vessels to engage

in such perilous undertakings, but it is not admitted that the amount of the allowance must be reduced on that ground. Corporations, as the owners of vessels, whether sail vessels or steamers, may promote a salvage suit, and it makes no difference in that respect whether they were present or absent, provided it appears that the vessel employed was well manned and equipped for the service. *The Island City*, 1 Black, 121 [66 U. S., XVII., 70]; *S. C.*, 1 Cliff., 210, 219, 221; *Rob. Adm.*, 104.

II. Nothing remains to be considered but the question whether the amount awarded in the court below to the libelants was correct. Steam vessels are always considered as entitled to a liberal reward, not only because the service is usually rendered by a costly instrumentality, but because the service is in general rendered with greater promptitude and is of a more effectual character. Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service: (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principal of a *quantum meruit*, or as a remuneration *pro opere et labore*, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. *Wma. & Bruce, Adm. Prac.*, 116; 2 *Pars. Ship.*, 292.

Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation. *Cromwell v. The Island City*, 1 Cliff., 228.

Minute description of the circumstances attending the service rendered by the libelants is given in the opinion of the district judge, which is exhibited in full in the record, and we refer to that as a satisfactory statement of all the material facts in the case, and we concur with him in the conclusion that, without speedy assistance the total destruction of the ship and cargo was inevitable; that the measures for relief taken by the officers of the steam tug, and by the firemen, were characterized by great skill and energy, but the repetition of the details of those measures beyond what has already been stated, is unnecessary. Suffice it to say the flames were extinguished in an hour or less, and the property to the value of \$100,000, including vessel and cargo, was saved. Success attended their efforts, and it is evident that the services were in a high degree meritorious, as a total loss of the ship and cargo must have been the consequence of any considerable additional delay. Those who embarked in the enterprise incurred considerable danger from the fire, in

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laying alongside of the burning vessel, and also from the risk that the mast would fall in consequence of the fire between decks. Dangers of the kind were apparent, and there were others apprehended which proved not to be real.

Viewed in the light of all the circumstances, as they are exhibited in the record, our conclusion is that the amount allowed is no more than a just salvage compensation for the entire service performed by the firemen and the steam tug, her officers and crew, but it must be remembered that the libelants, to wit: the steam tug, her officers and crew, were not the sole salvors, and it is clear that the sum decreed is for the whole service. Whether the fire department might or might not have been joined in the libel is not a question in this case. They were not made parties to the libel, and consequently their claim, if any, was not before the court, and the decree must be reversed on that ground.

Our conclusion is, that a moiety of the amount allowed as salvage belongs to the libelants, and we express no opinion whether the other moiety may or may not be claimed by the fire department; but if not, then it inures to the ship-owners.

Decree reversed, and the cause remanded, with directions to enter a decree for the libelants in the sum of five thousand dollars, with costs, in the District and Circuit Courts, and with interest from the date of the former decree.

Cited—101 U. S., 387; 108 U. S., 357; 2 Hughes, 43; 5 Hughes, 337, 447.

UNITED STATES, Claimant of 600 Bales of Cotton, the Cargo of the Schooner L. S. DAVIS, Appt.,

ALEXANDER M. DOUGLAS.

(See S. C., "The Davis," 10 Wall., 15-22.)

U. S. property subject to lien for salvage—lien cannot be enforced by suit.

Personal property of the United States on board a vessel for transportation from one point to another, is subject to a lien for salvage services rendered in saving the property.

Such a lien cannot be enforced where it is necessary, in order to do this, to bring a suit against the United States.

The lien for salvage can only be enforced by the courts in a proceeding which does not need a process against the United States and which does not require that the property shall be taken out of the possession of the United States.

A possession which protects the goods from the process of the court must be an actual possession and not a mere constructive possession.

Where goods were delivered to the master, and he contracted to deliver them to the agent of the United States in New York, the possession of the master of the vessel was not the possession of the United States.

[No. 189.]

Submitted Apr. 27, 1870. Decided Apr. 30, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

NOTE.—Lien for repairs and necessities, and for salvage and freight; proceedings in rem for. See note to *Blaine v. the Charles Carter*, 8 U. S. (4 Cranch), 328.

The libel in this case was filed in the court below by the appellee, on behalf of himself and others, to enforce a claim for salvage against six hundred bales of cotton, belonging to the United States and the schooner, *L. S. Davis*, in which said cotton was being transported to New York. The said court found that the services of the libellant were salvage services, and that he was entitled to the sum of \$19,750 therefor, of which sum \$18,750 should be paid on account of the cotton and \$1,000 on account of the schooner. The court held, however, that no lien in law existed against the cotton, as it was the property of the United States, and dismissed the libel except as to the schooner.

The circuit court, on appeal by the libellant, affirmed this decree as to the amount of salvage allowed, and reversed it as to the relief of the cotton from payment of salvage, holding the cotton as well as the schooner subject to a lien for the salvage decreed. Whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. E. R. Hoar, Atty Gen., and W. A. Field, Asst. Atty. Gen., for appellant:

The only question raised here is; whether cotton, the property of the United States, saved from peril when in the course of being transported on the high seas to its port of destination, to be delivered to an agent of the United States there, is liable to be proceeded against in the District Court of the United States by a libel in admiralty, for salvage contribution, without the consent of any officer of the United States having been obtained to such proceedings.

In the case of *The Siren* (ante, 129), this court, after saying that it is a familiar doctrine of the common law, that the salvor cannot be sued in his own court without his consent, that this doctrine is equally applicable to the supreme authority of the United States; that, therefore, they cannot be subjected to legal proceedings at law or in equity without their consent; and that whoever institutes such proceedings must bring his case within the authority of some Act of Congress, says: "The same exemption from judicial procedure extends to the property of the United States and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property."

The United States, in the fourth article of its answer to the libel, excepted to the jurisdiction of the district court over said cargo of cotton, because it was the property of the United States and could not be made subject to process in that court, nor to the compulsory exaction of salvage therefrom by the process or decree of that court; and that exception and claim in this suit the United States has never abandoned.

The cases on this question are all collected in the opinion of the Supreme Court of Massachusetts by *Mr. Justice Gray* in *Briggs v. Lightboats*, 11 Allen, 158, and they show by decisive weight of authority, that in the absence of any statute permitting it, the property of the United States is not liable to judicial process *in rem*.

To cite *The U. S. v. Wilder*, 3 Sumn., 308 as an authority, is to confound the lien with the remedy; or to confound the remedy by retaining a thing in possession when the possession

is lawfully acquired, with the remedy by judicial process against a thing not in possession; and in the English suits against government property, the Government authorized the court to take jurisdiction. Otherwise the court declined it, as fully appears in the opinion in *Briggs v. Lightboat*, 11 Allen, 158.

Messrs. Beebe and C. Donohue, for appellee:

The mere fact of the ownership of the cotton as merchandise, by the United States, in the act of carrying to the port of destination for the purpose of a market, does not exempt it from lien in case of salvage services. So held by the court below, and citing 8 Sumn., 308; 6 Hogan, 246; 1 Pars. Mar. L., 324; 2 Pars. Mar. L., 625; *Marv. Wreck*, sec. 122; *The Trinidad*, 7 Wheat., 283.

This cotton being in the possession of the carrier, and the service of saving the vessel and cargo being a joint one and to be apportioned between the vessel and cargo, it was legally necessary that such apportionment should be made before delivery, that being the only way it could be done.

No effort was made to take the cotton out of the possession of the United States, and to interfere with its ownership or title, when the court below was asked to adjust the salvage on general average principles. The United States required some act to get possession of the cotton, and had to apply to the court for it, and must do justice, before it is delivered and the court has the right, in handing the property to it, to annex the payment of salvage.

The judgment in this case in the circuit is referred to and affirmed by this court, already in the case of *The Siren* (ante, 129), where the court expressly refers to and adopts the decision as laid.

Mr. Justice Miller delivered the opinion of the court:

Two questions are raised by the record in this case, both of which are of importance.

The first is: whether personal property of the United States on board a vessel for transportation from one point to another, is subject to a lien for salvage services rendered in saving the property.

The second is: under what circumstances, if any, can the lien be enforced, if one exists?

Of the first proposition there does not seem to be any reasonable doubt, upon a view of the authorities. *Brown v. Stapleton*, 4 Bing., 119; *The Marquis of Huntley*, 8 Hagg., 246; *The Lord Nelson*, Edw. Adm., 79; *The U. S. v. Wilder*, 3 Sumn., 308; *The Siren* (ante, 129), are all cases in which maritime liens are recognized and enforced against the property of the Supreme Government, the liens having their inception while the ownership of the property was in the Government. The case of *Briggs v. Lightboat*, 7 Allen, 287; *S. C.*, 11 Allen, 157; is a case in which a lien is recognized on property of the United States, created before the title and possession passed to the United States, but in which it was finally held, by the Supreme Court of Massachusetts, that it could not be enforced because the United States could not be sued in a personal action, and their possession could not be disturbed by a suit *in rem*. The proposition is treated by the modern text writers

as settled. *Mar Wreck & Salv.*, sec. 122, 1 Pars. *Mar. Law*, 324; 2 *Ibid.*, 625. We are quite satisfied with the reasons on which the principle rests, and are of opinion that when the property of the Government has been saved from destruction by salvors, or by those sacrifices which are compensated by a contribution in general average, justice and sound policy require that it should be held to bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition.

The second of the questions above stated presents the more difficult problem.

Perhaps the two most authoritative and well-considered cases on that subject are *The Siren*, [ante, 129], and *Briggs v. The Light Boats*, 11 Allen, 157. Both these cases assert the doctrine, after a full review of the authorities, that such a lien cannot be enforced where, in order to do this successfully, it is necessary to bring a suit against the United States, because the doctrine is well established that no suit can be sustained in which the United States is made the original defendant, to be brought into court by process, without some Act of Congress expressly authorizing it to be done.

They also both assert the proposition that no suit *in rem* can be maintained against the property of the United States when it would be necessary to take such property out of the possession of the Government by any writ or process of the court.

There are some expressions in the opinion of this court in the case of *The Siren* [ante, 129], which seem to imply that no suit *in rem* can be instituted against property of the United States under any circumstances. But a critical examination of the case and the reasoning of the court, will show that that question was not involved in the suit, and that it was not intended to assert such a proposition without qualification. In that case a prize, after capture and before condemnation, had collided with another vessel and was in fault, and it was held that as the Government had brought the prize into the court for condemnation, and was before the court as plaintiff, and had placed the *res* in possession of the court, the lien for the damages growing out of the collision could be enforced against the United States. It was not, therefore, necessary to define all the circumstances under which the court, having control of the *res*, might enforce a lien on property of the United States; and the learned judge who delivered the opinion cites, with approval, the case of *The Light Boats* [supra], in which the doctrine is laid down and well supported that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court. With the principle as thus stated we agree, and do not see in it anything inconsistent with the case of *The Siren*.

In the English courts, when it is made to appear that property of the government ought, in justice, to contribute to a general average, or to salvage, it seems to be the usual course of proceeding for the proper officer of the government to consent in court that it may take jurisdiction of the matter. This consent is given

by the authority of the King, who thus submits to be sued in his own courts. The liberal exercise of this authority removes the difficulty presented here, where no power to do this exists in any officer of the government, and prevents any apprehension of gross injustice in such cases in England. *Marquis of Huntley* 3 Hagg., 246.

We are, therefore, compelled to inquire into the special circumstances of this case to ascertain whether the cotton, which was the subject of salvage, can be brought within the jurisdiction of the court without violating the principle we have stated. In doing this the absence of any such power to submit the case to the jurisdiction of the court, as that exercised in England, seems to justify a liberal construction of the rule on which we are to act, in favor of the promotion of justice. That rule, as we have already stated, recognizes the existence of the lien for salvage and admits that the lien can only be enforced by the courts in a proceeding which does not need a process against the United States, and which does not require that property shall be taken out of the possession of the United States. But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court? The possession which would do this must be an actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the Government, if the latter should choose to resist. The possession of the Government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the Government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the Government to prevent any unseemly conflict between the court and the other departments of the Government, and which is consistent with the principle which exempts the Government from suit and its possession from disturbance by virtue of judicial process.

Bringing the facts of the case before us to the test of these principles, we find, on examining the record, that the cotton in question was shipped from Savannah on board the schooner, *L. S. Davis*, of which Kempton was master, by Simeon Draper, U. S. Treasury Agent, to be carried and delivered to said Draper, U. S. cotton agent, or his assigns in New York. For this the master gave the usual bill of lading, and was to receive freight at the rate of 15 cents per ton per day. The case was the usual one of a common carrier contracting to deliver goods on his own responsibility, and not the case, as alleged by the United States, of a charter of the vessel. The goods were then delivered to the master, and he contracted to deliver them to the agent of the United States in New York. On the voyage the vessel met with a disaster, and she and her cargo were saved from total loss by the meritorious service of libelants. This fact, and the amount fixed by the court as salvage, are not controverted by the Government. The vessel was carried by

the captors to a place of safety, and left to find her way into the Port of New York. Immediately on her arrival, and before any of the cotton was delivered to the agent, the vessel and cargo were libeled and taken possession of by the Marshal under the writ which issued on the libel being filed. The United States appeared by attorney, as claimant of the cotton, and interposed the defense that it was not liable to salvage under the circumstances. The possession of the master of the vessel was not the possession of the United States. He was in no sense an officer of the Government. He was acting for himself, under a contract which placed the property in his possession and exclusive control for the voyage. His obligation was to deliver possession in New York to the agent of the Government. This he had not done when the process was served on the cotton. The Marshal served his writ and obtained possession without interfering with that of any officer or agent of the Government. The United States, without any violation of law by the Marshal, was reduced to the necessity of becoming claimant and actor in the court to assert her claim to the cotton. Under these circumstances, we think it was the duty of the court to enforce the lien of the libelants for the salvage before it restored the cotton to the custody of the officers of the Government.

The judgment of the court is, therefore, affirmed.

Cited—11 Wall., 201; 98 U. S., 437, 438, 439; 106 U. S., 205, 207, 215, 227, 247, 248; 109 U. S., 452; 9 Ben., 336; 16 Blatchf., 573, 575; 4 Sawy., 153, 154; 5 Sawy., 220; 3 Hughes, 63, 64, 79; 1 Bro., 186.

HENRY LITTLE, *Ptff. in Err.*,

v.

JOHN M. HERNDON.

(See S. C., 10 Wall., 29-33.)

Illinois tax sale—erasures in deed—acknowledgment in another State.

The Illinois Act of Feb. 21, 1861, does not dispense with the necessity of producing the judgment and precept as the foundation of a sale for taxes, and of the validity of the deed.

In the absence of any proof as to an erasure in a deed, the presumption is that the correction was made before the execution of the deed.

A deed executed and acknowledged in another State, the acknowledgment of which was taken in conformity with the laws of that State at the time the deed was executed, may be given in evidence.

[No. 195.]

Argued Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment brought in the court below by the defendant in error, to recover possession of a certain tract of land in Illinois.

The facts of the case fully appear in the opinion of the court.

The plaintiff having recovered judgment in

NOTE. Sale of land for taxes. Strict compliance with the statute necessary. See note to *Williams v. Peyton*, 17 U. S. (4 Wheat.), 77.

Proof of ancient document. Alteration of instruments. See note to *Coulson v. Walton*, 84 U. S. (9 Pet.), 62.

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the court below, the defendant brought the case here on a writ of error.

Mr. B. C. Cook, for plaintiff in error:

In the State of Illinois it has always been held that where interlineations or alterations occur in a deed, it is presumed that they were made after it was executed, and the party claiming under it must explain them.

Montag v. Linn, 23 Ill., 551; *Walters v. Short*, 5 Gilm., 252; *Hodge v. Gilman*, 20 Ill., 441; *Prevost v. Gratz*, Pet. (C. C.), 364; *Dewey v. Mayor*, 39 Barb., 169.

The circuit court erred in ruling that the defendant had not brought himself within the Statute of Feb. 21, 1861, so as to require the plaintiff to pay the amount of taxes and costs paid by the defendant and his grantors respectively upon the lands in controversy, before they should be allowed to question the validity of the sheriff's deed.

The question is not whether, independent of the statute, a legal title was vested in the grantee by virtue of the sheriff's deed, as is supposed in brief of defendant in error; but the question is as to the right of the plaintiff to question the sheriff's deed, until he had paid the taxes. Unless the statute is unconstitutional and void, it seems to cover the case. If there was a valid judgment and a valid execution, then the deed would make a valid and indefeasible title. And so if the plaintiff was not required to question the validity of the tax deed until a perfectly valid judgment and execution were shown, he would not be required to do so until it was shown to be perfectly useless.

The question seems to be narrowed down to this: is the validity of the collector's deed questioned by denying that there is any judgment and execution to support it? If it is, then the existence of such judgment and execution cannot be denied until the taxes are paid.

No case can be found in our state court that conflicts with the views here expressed.

The case of *Conway v. Cable*, 37 Ill., 82, cited by defendant, only decides that this law is not retrospective; but seems to admit that it does apply to all cases where the tax sales were made subsequent to the passage of the Act, as in these cases.

By a construction of this statute, such as I contend for, the owner of the land is simply required to pay his taxes to the person who has paid them to the State; and I submit that such construction is in accordance with the plain meaning of the statute, and that any other construction makes it wholly inoperative.

Mr. Conway Robinson, for defendant in error:

"Tis to be presumed that an interlining, if the contrary be not proved, was made at the time of making the deed."

Trowel v. Castle, 1 Keb., 22; 12 Vin. Abr., 58; 18 Id., 41; Note 136 of Harg. & B. to Co. Litt., 235 b.

This court said in 1815: "The fact that there is an erasure or interlineation apparent on the face of the deed, does not of itself avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant."

Speake v. U. S., 9 Cranch, 37; *Wisher v. Caulk*, 5 Har. & J., 41; *Coulson v. Walton*, 9 Pet., 78; *Bailey v. Taylor*, 11 Conn., 534.

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In 1851, Lord Campbell, *Ch. J.*, referring to *Note 136 of Harg. & B. to Co. Litt.*, 235 *b*, said: "This doctrine seems to us to rest upon principle. A deed cannot be altered after it is executed, without fraud or wrong; and the presumption is against fraud or wrong." *Doe v. Catmore*, 16 Ad. & El. (N. S.), 745.

The plaintiff has certainly no right to complain that the court, while admitting the patent in evidence, left it to the jury to determine whether there was any alteration of it. In Lord Coke's day, judges left it to the jurors to try whether the erasure or interlining were before their delivery.

Co. Litt., 225 *b*; *Bull. N. P.*, 267.

And judges have so done in this country when they saw any occasion for so doing.

Hatch v. Hatch, 9 Mass., 312; *Barrington v. Bank*, 14 S. & R., 405; *Heffelfinger v. Shutz*, 16 S. & R., 44; *Lewis v. Payn*, 8 Cow., 71; *Jackson v. Jacoby*, 9 Cow., 126; *Jackson v. Osborn*, 2 Wend., 555; *Smith v. McGowan*, 3 Barb., 408; *Acker v. Ledyard*, 8 Barb., 516.

By reference to the first volume of the Revised Code of Virginia of 1819, 363, ch. 99, sec. 7, it appears that the acknowledgment of a deed from Hood is in exact conformity with the laws of Virginia at the time when the acknowledgment purports to have been made.

Under the Statute of Illinois, it is enough that the deed was acknowledged in conformity with the laws of the State in which the deed was executed, to authorize it to be admitted to record in the county where the land was situated; and authorize it after being so recorded to be used in evidence without further proof of the execution thereof.

See, *Sess. Laws of Ill.*, 1847, 47, sec. 8; *Secrist v. Green*, 3 Wall., 750 (70 U. S., XVIII., 155).

There has not been such valid judgment and precept (*Blackwell, Tax Titles*, 329) as was shown in *Spellman v. Curtenius*, 12 Ill., 411; *Marsh v. Chesnut*, 14 Ill., 324; and recognized as necessary in *Brown v. Hogle*, 30 Ill., 141; *Charles v. Waugh*, 35 Ill., 323; *Altes v. Hinckler*, 36 Ill., 267; *Conway v. Cable*, 37 Ill., 82.

Although a deed executed by the collector may, under the statute, be *prima facie* evidence of certain facts, yet the decisions establish clearly that, upon a tax sale, the title acquired by a collector's deed is nothing until it is first shown that there was a judgment as the foundation of said tax sale and deed.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiff, Herndon, brought an action of ejectment against Little, in the court below, to recover possession of a lot of land, situate in the County of Iroquois, described as the south half of the northwest quarter of section twenty-six, township twenty-seven north, range thirteen west. He gave in evidence two patents, including the premises from the government to Robert Hood, each dated November 1, 1839; and a deed from Hood to himself, dated Feb. 4, 1842, and rested.

The defendant, in his defense, offered in evidence a deed from the sheriff of Iroquois County to L. M. Peck, including the premises, dated July

1, 1864, purporting to be a deed given in pursuance of a sale for the non-payment of taxes for the year 1861; also a quitclaim deed from Peck and wife to B. L. T. Bourland, dated July 1, 1864, and from Bourland and wife to Isaac Underhill, dated April 29, 1865; and then offered in evidence five tax certificates for taxes paid on the premises for the several years therein mentioned, stating that the object of offering the same in evidence was to recover the amount of the taxes and costs paid upon the land, in case the deed from the sheriff should be questioned as to the title by the plaintiff, under the terms of the Act of February 21, 1861, and to defeat his using said patent as a title, if he refused to pay the taxes according to the statute. But the court was of opinion that the defendant had not brought himself within the statute, for the reason, among others, that he must first show that there was a judgment, as the foundation of the tax sale and deed. To this ruling the defendant excepted, and judgment was rendered for the plaintiff.

The question in the case is whether, upon a true construction of the Act of February 21, 1861, the plaintiff was bound to pay the taxes which had been paid by the defendant, and by those under whom he claimed, as a condition of being permitted to attack the deed under the tax sale.

The defense is placed upon the construction of the Act that the Sheriff's deed of the sale properly executed, with its recitals, was sufficient evidence, in the first instance, to impose this condition upon the plaintiff. The Act in question is as follows:

"All deeds hereafter made by the proper officer, in pursuance of sales of real estate for the non-payment of taxes, shall be held to be null and void if it be shown that said taxes had been paid before the sale, or that said real estate was not subject to taxation; or that it had been redeemed from sale; or if notice required by the Constitution was not given; or that the description of said land was not sufficiently definite; and the validity of all such deeds hereafter made by the proper officers for real estate sold for the non-payment of taxes, shall not be questioned in any suit or controversy in this State for any other cause, unless the party wishing to contest the same shall tender to the claimant under said tax deed, or deposit in the court in which such suit is pending, for his use, the amount of the redemption money now provided for by law, with ten per cent. per annum interest thereon from the date of said deed to the time of said tender or deposit; and after said tender or deposit is made, the validity of said deed may be questioned in the same manner and to the same extent as now provided by law."

At the time of the passage of the Act, it is admitted that a tax deed executed by the proper officer had no validity unless founded upon a judgment against the parcel of land in default for non-payment of the tax, an order for the same, and precept thereon, and that these preliminary steps must have been first shown in order to give any effect to a title under the deed. The cases in the courts of Illinois are very full and explicit under this head of law.

12 Ill., 409; 16 Ill., 224; 18 Ill., 412; 30 Ill., 119; 35 Ill., 815.

Is there anything in the Act in question indicating an intention, on the part of the Legislature, to change this course of decision, and to give validity and effect to the naked deed of the officer?

The argument in favor of this construction is placed upon the introductory words of the Act: "All deeds hereafter made by the proper officer in pursuance of sales of real estate for the non-payment of taxes shall be held," etc. It is contended that the words should be construed as meaning simply the deed of the "proper officer," and nothing more, and that they impliedly, at least, exclude the necessity of giving any evidence of the judgment, order of sale, or precept. But we are inclined to think that this idea fails to give full effect to the language used. The deed must not only be made by the proper officer, but must be made "in pursuance of sales of real estate for the non-payment of taxes." How are those sales made according to the law of Illinois? As we have seen, after a judgment rendered by the court against the parcel of land for default in payment of the taxes, on order of sale, and precept to the officer. Unless these steps have first been taken, the sale cannot be said to be in pursuance of sales of real estate for the non-payment of taxes, as provided in the Act. It is, perhaps, not inappropriate to look at the consequences that might attend any different interpretation. If the naked deed of the officer is sufficient to impose the conditions upon the owner to pay all taxes and costs, and ten per cent. interest, before he can be permitted to attack the deed for any irregularity, except as specified in the Act itself, then a deed without a judgment, or order of sale (as these are not within the exception), would be just as available for the purpose as if founded on a judgment and order of sale. It is not necessary to stop to point out the abuses to which such an interpretation would naturally lead.

In the case of *Spellman v. Curtenius*, 13 Ill., 411, the court observed "that a regular tax deed, founded upon a valid judgment and precept, is made by the statute *prima facie* evidence of every fact necessary to authorize a recovery upon it; but, as it is only *prima facie* evidence, it follows that there must be some way of contesting the case made by the deed, else it would be conclusive of those facts of which the statute expressly declares it shall be *prima facie* evidence merely." The opinion then points out many grounds and objections that would overthrow this *prima facie* evidence and defeat the title. And we think it is this *prima facie* title, thus explained, which is fairly embraced in the introductory language of the Act of 1861.

In the ordinary case of a title to land, set up by virtue of a sale under a judgment and execution, the party is bound to give evidence of the judgment and execution to support this title. Without these, the sheriff's or marshal's deed would be a nullity. And it would be singular, in these tax sales, so stringently scrutinized by the courts, and every prerequisite prescribed by the Legislature before a sale rigidly enforced, if the Act in question was intended to dispense with the necessity of producing the judgment and precept as the foundation of the sale and of the validity of the

deed. For these reasons we are inclined to think that the construction of the statute by the court below was right, and should be affirmed.

We regret that this statute has not come under the review of the courts of the State, as we should have been relieved from this examination of it. But, after a diligent search into the reports of their decisions, we have not been able to find any case involving its construction except one, which holds that the Act is not retrospective. *Conway v. Cable*, 37 Ill., 90.

A minor objection below was to the admission of one of the patents, on the ground of an erasure. The court left the question to the jury, which was quite as favorable a ruling as the defendant could ask. In the absence of any proof on the subject, the presumption is that the correction was made before the execution of the deed. In a recent case in the Queen's Bench, Lord Campbell, *Chief Justice*, in delivering the opinion of the court, after referring to the note in Harg. & Butler to Coke Litt., 285b, where this rule was asserted, observed: "This doctrine seems to us to rest on principle. A deed cannot be altered, after it is executed, without a fraud or wrong; and the presumption is against fraud or wrong." *Doe v. Calmore*, 16 Ad. & E., (N. S.), 745. The cases are not uniform in this country, but the most stringent leave the question to the jury. *Lewis v. Payn*, 8 Cow., 76; *Jackson v. Jacoby*, 9 Cow., 126; *Hatch v. Hatch*, 9 Mass., 812.

Another objection was to the admission of the deed in evidence from Hood to Herndon, which was executed and acknowledged in the State of Virginia. But it appears that the acknowledgment was taken in conformity with the laws of Virginia at the time the deed was executed, which, according to the laws of Illinois, was sufficient to admit it to be there recorded, and to be given in evidence. See *Scot v. Green*, 3 Wall., 744 [70 U. S., XVIII., 158]; *Carpenter v. Dexter* [ante, 426].

The judgment of the court below is affirmed.

Mr. Justice Miller, dissenting:

I dissent from the opinion of the court in this case on the construction of the Statute of Illinois of February 21, 1861.

That Act mentions certain facts which may be shown without any condition precedent, in order to establish the invalidity of a tax deed. These are: 1. That the tax had been paid before sale. 2. That the land was not subject to taxation. 3. That it had been redeemed from the tax sale. 4. That the notice required by the Constitution had not been given. 5. That the description of the land was not sufficiently definite.

It then provides that a tax deed, made after the passage of that Act, shall not be questioned in any suit for any other cause, unless the party wishing to contest the same shall tender to the claimant under the tax deed, or deposit in the court in which the suit is pending, for his use, the amount of redemption money required by law to redeem, and ten per cent. per annum interest.

The defendant in this case offered his tax deed, and required of the court to have the amount which he showed by the deed and tax

receipts paid or deposited, before the plaintiff should be permitted to question it. The court refused to receive the tax deed in evidence, and permitted the plaintiff to contest it and exclude it from the jury, on the ground that no judgment was produced by defendant under which the tax sale was made. The absence of such a judgment is not one of the grounds mentioned for which a deed may be contested without paying the redemption money as a condition precedent. The decision of the court makes that part of the statute requiring the payment as a condition precedent to contesting the deed a nullity. The policy of the Act is clear, and it is wise. It has been a desideratum for years to provide a law which would secure payment of taxes on real estate, and at the same time give the owner of the property, who may not have been prompt, some reasonable opportunity to save it. This law is happily conceived. It says, in effect, if no valid tax was levied, or if it has been paid, or no notice was given of proceedings for sale, the deed is void, and this may be shown at any time without condition. But if there has been a valid levy of a tax and a sale, and the tax has never been paid, either before or after sale, the party who should have paid this tax, and has neglected to do so, must pay it now before he can contest the deed made by the proper officer on such sale. This is fair; it is just, and would tend to procure bidders at tax sales, and to admit of redemption on just terms. As there is no decision of the State Court of Illinois directly on this point, under this statute, I regret the construction that this court has placed upon it.

Cited—37 Am. Rep., 264 (25 Kan., 510).

JONATHAN C. STURTEVANT, *Plff. in Err.*,

v.

JOHN M. HERNDON.

The opinion in *Little v. Herndon*, *ante*, 878, disposes of all the questions in this case.

[No. 198.]

Argued Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court. See, also, the case of *Little v. Herndon*.

Mr. B. C. Cook, for plaintiff in error.

Mr. Conway Robinson, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

This suit in ejectment was brought by Herndon against Sturtevant, in the court below, to recover possession of the southwest quarter of the northeast quarter, and the south half of the northwest quarter of section 26, township 27, north, range 18 west. The opinion in *Little v. Herndon* [*ante*, 878], disposes of all the questions in this case.

Judgment affirmed.

See 10 WALL.

ISAAC UNDERHILL, *Plff. in Err.*,

v.

JOHN M. HERNDON.

The opinion in *Little v. Herndon*, *ante*, 878, disposes of all the questions in this case.

[No. 197.]

Argued Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

See, also, the case of *Little v. Herndon*, *ante*, 878.

Mr. B. C. Cook, for plaintiff in error.

Mr. Conway Robinson, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

This is a suit in ejectment against Underhill, in the court below, to recover possession of the southwest quarter of the northeast quarter, and the south half of the northwest quarter, section 26, township 27 north, range 18 west.

The opinion in the case of *Little v. Herndon* [*ante*, 878] disposes of all the questions raised and decided in this case in the court below.

Judgment affirmed.

ENOCH LONG, ABEL STURTEVANT AND JOHN ROBINSON, *Plffs. in Err.*,

v.

PEGGY F. PATTON.

Where a will was proved in Virginia, agreeably to the laws of that State, it is as available in proof in Illinois according to the laws of that State, as if probated there.

The opinion in *Little v. Herndon*, *ante*, p. 878, disposes of all the other questions in this case.

[No. 196.]

Argued Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court. See, also, the preceding case of *Little v. Herndon*.

Mr. B. C. Cook, for plaintiffs in error.

Mr. Conway Robinson, for defendant in error.

(See abstract of the argument of the above counsel in the preceding case of *Little v. Herndon*).

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The suit in ejectment in this case was brought by Mrs. Patton against Long and others, to recover possession of the south half of section 22, township 27 north, range 18 west. The plaintiff-

iff gave in evidence a patent to Robert Hood, including the premises, dated November 1, 1859, and deed from Hood to John M. Patton, and the will of Patton, by which the lot in question was devised to the plaintiff, and rested.

The defendant offered in evidence a deed from the Sheriff of the County of Iroquois to L. M. Peck, including the premises in question, dated July 1, 1864, which purported to be a deed upon a sale for taxes; a deed from Peck and wife to B. L. T. Bourland, dated July 1, 1864; and from Bourland and wife to Isaac Underhill, dated April 29, 1865, and then offered in evidence five tax certificates of payment of taxes on the lot for the year therein mentioned, stating that his object in offering said evidence was to show title to the premises, and to require the payment of said taxes by the plaintiff, in case he questioned the title of Underhill under the statute. But the court held that the defendants had not brought themselves within the Act of February 21, 1861, to which ruling there was an exception.

All the questions presented in this case have been disposed of in the case of *Little v. Herndon* (ante, 878), except as to the admission of the will of J. M. Patton. The only material point to notice is, that it was not properly proved or probated. But the proofs are conclusive that it was proved in the Circuit Court of the City of Richmond, Virginia, agreeably to the laws of that State, and according to the laws of Illinois, the will was as available in proof there as if probated in that State.

Judgment affirmed.

ISAAC UNDERHILL, *Plff. in Err.*,

v.

PEGGY F. PATTON.

All the questions in this case are disposed of in the cases of *Little v. Herndon*, ante, 878, and *Long v. Patton*, ante, 881.

[No. 199.]

Argued Apr. 25, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

See, also, the above cases *Little v. Herndon* and *Long v. Patton*.

Mr. B. C. Cook, for plaintiff in error.

Mr. Conway Robinson, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The suit in ejectment was brought by Mrs. Patton against Underhill, in the court below, to recover possession of the south half of section 22, township 27 north, range 13 west.

All the questions in this case are disposed of in the cases of *Little v. Herndon* and *Long v. Patton*.

Judgment affirmed.

EDWARD C. BATES, *Plff. in Err.*,

v.

THE EQUITABLE FIRE AND MARINE INSURANCE COMPANY OF RHODE ISLAND.

(See S. C., 10 Wall., 33-38.)

Condition in policy—consent of company—effect of indorsements on policy—sale by insured.

Where one of the conditions of a policy was, that if the property insured should be sold or conveyed the risk assumed should cease, it ceased to be binding when the assured parted with his interest in the property insured, unless the Company was notified of the sale.

If, however, the Company consent to it, the policy may continue for the benefit of the purchaser.

Indorsements on a policy, "Payable in case of loss to A." "Consent is given to the above indorsement," do not of themselves imply a knowledge of a sale, or a consent to insure the purchaser.

When the insured had sold the property and had no interest in the goods when the fire occurred, he sustained no loss and the policy covered none.

[No. 183.]

Argued Apr. 21, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

This suit was brought by the plaintiff in error, in the court below, to recover on a certain policy of insurance.

The verdict and judgment in the court below having been in favor of the defendant, the plaintiff sued out this writ of error.

The facts of the case sufficiently appear in the opinion of the court.

Mr. C. B. Goodrich, for plaintiff in error.

The indorsement upon the policy "Boston, November 28, 1861, payable in case of loss to Edward C. Bates," made and signed by W. D. Philbrick, is an assignment of his entire interest in the policy and in the property thereby insured. The indorsement is absolute and unconditional, without limitation or the reservation of any right in Philbrick, accompanied by a delivery of a policy to the plaintiff by whom it was produced in court. The defendant, upon the application of the plaintiff made through Reed and Hastings, by an indorsement made upon the policy, consented to the indorsement made by Philbrick, and thereby became bound absolutely to pay the sum insured to Bates in case of a destruction (loss) of the property insured by fire, at the place and within the year covered by the policy.

The words are capable of this construction: there is no proof tending to show that Philbrick did not sell nor intend to sell the policy and the property therein described. There is no ground, legal nor equitable, upon which the defendant can rely to limit or restrain the indorsement of Philbrick within narrower limits, and thereby render it unavailable and as an exoneration of the defendant from liability for which it has received and retained the premium.

The defendant stipulates in express terms in the policy that it may continue, notwithstanding a sale of the property insured for the benefit of a purchaser, if the Company gives its consent thereto, to be evidenced by a certificate of the fact or by indorsement upon the policy. There is nothing, therefore, in the policy to control or limit the construction or effect of the

indorsement of Philbrick, which it has adopted and made its own.

It is in proof, not controverted nor denied, that Bates purchased and paid for the policy and the property therein described; took possession of the policy, of the property, and sent the policy to the defendant for its approval of the indorsement of Philbrick, which approval was given without qualification or inquiry, and the policy returned to the plaintiff as a subsisting and continuing obligation for his benefit upon which he reposed and confided.

In *Hooper v. Ins. Co.*, 17 N. Y., 426, the court says: "It is insisted that the Company had no notice of the sale to Hooper. The fact that he requested an assignment of the policy was sufficient notice that he had acquired or was about to acquire some interest in the goods. The assignment of the policy, to be of any benefit to the assignee, must be accompanied with a transfer of some kind of interest in the subject of insurance to the assignee."

It is submitted that the consent indorsed upon the policy by the defendant created an express undertaking and promise to pay Bates the entire sum insured. It conferred upon him a right of action in his own name, to his use.

Messrs. William H. Potter and George H. Brown, for defendant in error:

Under the policy, no recovery can be had if the property has been sold without consent.

Carpenter v. Ins. Co., 16 Pet., 503; *Grosvenor v. Ins. Co.*, 17 N. Y., 398.

The contract created by such a clause is enforced with great strictness.

Finley v. Ins. Co., 80 Pa., 311; *Dis v. Ins. Co.*, 23 Ill., 272; *Foster v. Ins. Co.*, 2 Gray, 216; *Mt. Vernon Mfg. Co. v. Ins. Co.*, 10 Ohio St., 347; *McLaren v. Ins. Co.*, 5 N. Y., 151; *Howard v. Ins. Co.*, 3 Den., 301; *Murdock v. Ins. Co.*, 2 N. Y., 210; *Adams v. Ins. Co.*, 29 Me., 298.

The words of the indorsement, viz.: "Payable in case of loss to Edward C. Bates," do not import or convey any notice of sale of the property covered by the policy; neither do those words and the additional indorsement, taken together or separately, import nor convey a consent to a sale of the property. They do not even amount to an assignment of the policy, but simply make Bates an appointee to whom they agree the money shall be paid if a loss happens to Philbrick, according to the provision of the policy.

Fogg v. Ins. Co., 10 Cush., 346; *Hale v. Ins. Co.*, 6 Gray, 169; *Loring v. Ins. Co.*, 8 Gray, 28, 29, 30; *Young v. Ins. Co.*, 14 Gray, 153; *Ins. Co. v. Roberts*, 31 Pa., 438; *Grosvenor v. Ins. Co.*, 17 N. Y., 394; *Ketchum v. Ins. Co.*, 1 Allen (N. B.), 136.

No notice, actual or constructive, was ever given to the insurer, and there can be no consent without knowledge of the matter to be consented to.

Mr. Justice Miller delivered the opinion of the court:

The policy of insurance on which this suit was brought contained this provision: "And this Company agree, that if the assured should sell the aforesaid property, or any part thereof, before the expiration of this policy, a proportion of the premium received shall be re-

paid on receiving notice of such sale before a loss happened: * * * or this policy may be continued for the benefit of such purchase, if this Company give their consent thereto, to be evidenced by certificate of the fact, or by indorsement on this policy." Philbrick, the party insured, sold the goods during the life of the policy to plaintiffs, and indorsed on the policy, "Payable, in case of loss, to Edward C. Bates. W. D. Philbrick."

The policy, with this indorsement, was sent by a policy broker to the defendant, and the Secretary of the Company placed under the above indorsement these words: "Consent is hereby given to the above indorsement. Equitable Insurance Company. Fred. W. Arnold, Secretary."

The Secretary of the Company swears that he had no knowledge of the sale, nor is there any evidence that any officer of the Company had notice of it, unless it is to be implied from the request to give their consent to the indorsement made by Philbrick, and the consent so given.

One of the conditions of the policy was that if the property insured should be sold or conveyed, the risk assumed ceased, and the policy became void; and there can be no doubt that, looking to both the provisions of a policy, such as this one contained, and which are cited in the statement of the case, it ceases to be binding when the assured parts with his interest in the property insured, unless the Company be notified of the sale. When this is done before a loss happens, the Company is bound to refund a part of the prepaid premium, to be apportioned in reference to the unexpired time for which the policy was given.

If, however, the purchaser and the assured ask it, and the Company consent to it, the policy may continue for the benefit of the purchaser. This latter proposition is founded upon the knowledge of the sale, and upon the consent of the Company to accept the purchaser as the party whose interest is insured, instead of the vendor who was originally insured.

As there is no evidence outside of the two indorsements already quoted from the policy, that there was any consent to accept Bates, the purchaser, as the party whose interest was insured, and as the presumption, if there is one arising from those indorsements of a notice of sale, is not supported by anything else, it becomes important to determine what those indorsements imply on those two points.

If Philbrick could not, in law or in fact, have directed the payment of the loss, if one should occur to him, as owner of the property, to another party, with the consent of the Company, then it would be a reasonable inference that the indorsement made by him implied a sale of his interest. But if he could make, with the consent of the Company, a valid appointment that any loss covered by the policy should be paid to a third person, though he remained the owner of the goods, and the loss was his loss, then the indorsement of Philbrick does not necessarily convey the idea of a sale, nor the consent of the Company imply a consent to a sale.

Now, it is a well known and frequent thing in insurance business, for a person to insure his life, or his property, and either in the policy itself, or by indorsement at the time it

is made, or by subsequent indorsement, to which the consent of the Company is generally required, to direct the loss to be paid to some third party. And this is done in language similar, if not identical, with that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the Company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor, gives him this indemnity.

In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser.

If it could be shown that it had been the course of dealing, between these particular parties to recognize the indorsement of the party first assured as evidence of a sale, and the indorsement of the Company as a consent to the sale; or if it could be shown that by custom and usage, in any particular place, these indorsements were so treated, the case might be different; but, in the absence of such usage or custom, we can see in these indorsements nothing more than the direction of Philbrick, and the consent of the Company, that any loss sustained by Philbrick, covered by that policy, should be paid to Bates. As Philbrick did not have any interest in the goods when the fire occurred, he sustained no loss, and the policy covered none.

The analogy of the effect of such indorsements on promissory notes, in assigning the notes to the indorser, is very imperfect. In such case the sum mentioned in the note is payable absolutely, and without regard to the interest of the original payee in any other matter. It is all contained in the note whose contents, to use the language of the Judiciary Act, are thus made payable to the indorsee, and the indorser necessarily parts with his interest in the subject-matter of the contract.

These views are well supported by recently adjudged cases in this country. *Fogg v. Middlesex Ins. Co.*, 10 Cush., 846; *Hale v. Mech. Ins. Co.*, 6 Gray, 169; *Young v. Ins. Co.*, 14 Gray, 158; *Grosvenor v. Ins. Co.*, 17 N. Y., 891; *Ins. Co. v. Roberts*, 81 Pa. St., 438.

The judgment of the Circuit Court is, therefore, affirmed.

Cited—9 Blas., 169; 31 Mich., 356; 9 Am. Rep., 43 (107 Mass., 378); 28 Am. Rep., 58 (68 Me., 313).

ANDREW WIGGINS ET AL., *Piffs. in Err.*,
v.

WILLIAM D. BURKHAM.

(See S. C., 10 Wall., 129-133.)

Admission of an account, by not objecting—silence, when not an admission—reasonable time, when question for court or jury—favorable error, not ground of complaint.

An account rendered and not objected to within a reasonable time, is to be regarded as admitted to be *prima facie* correct.

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If certain items, in an account under such circumstances, are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission.

The silence of the party to whom the account is sent is an admission of its correctness, but may be repelled by showing that the party was absent from home, suffering from illness, or expected shortly to see the other party.

The court cannot take judicial notice of the cartime, and the number of mails.

Where the facts are clear, the question of what is reasonable time is exclusively for the court.

Where the proofs are conflicting, the question is a mixed one of law and fact.

An error of the court favorable to the party objecting, furnishes no ground of complaint.

[No. 191.]

Submitted Apr. 22, 1870. Decided Apr. 30, 1870.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This suit was brought by the defendant in error, in the court below, to recover on a certain account.

The trial resulted in a verdict and judgment for \$4,600 and costs, in favor of the plaintiff. Whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. Thomas A. Hendricks, for plaintiffs in error.

The only question presented in this case arises upon the instructions and refusal.

The rule stated in the instruction is that which applies to a settlement of disputed accounts by the parties; where, upon conference, they agree to the result. In that case the settled account is *prima facie* correct, and may be impeached by evidence of fraud, omission or mistake.

Perkins v. Hart, 11 Wheat., 287; *Hagar v. Thompson*, 1 Black, 80 (68 U. S., XVII., 41); see, also, *Lockwood v. Thorne*, 13 Barb., 487; *Dows v. Durfee*, 10 Barb., 218.

In *Lockwood v. Thorne*, 11 N. Y., 173, the court says:

"The second point made by the defendants is, that the referees erred in not giving legal effect to an account stated and settled between the parties, and in permitting the same to be opened without proof of fraud or mistake, and this presents properly a question of law for our decision; for whether, on a given state of facts,

NOTE—Account stated. When impeachable for fraud, mistake, error, omission, accident, usurious charges. See note to *Perkins v. Hart*, 24 U. S. (11 Wheat.), 287.

What constitutes an account stated.

An account stated is an agreement between the parties to an account, that all the items are true. In equity, an account rendered by one merchant to another and received and held without objection, will generally be deemed an account stated. *Stebbins v. Niles*, 25 Miss., 287; *Terry v. Sicks*, 13 Cal., 437; *Kufner v. Hewitt*, 7 V. Va., 535; *Mansell v. Payne*, 18 La. Ann., 124; *Darlington v. Taylor*, 2 Grant, 195; *Avery v. Leach*, 9 Hun, 106; *Coopwood v. Bolton*, 23 Miss., 512.

It exists only where the accounts have been examined and the balance admitted as the true balance between the parties. Their minds must meet as in making other agreements, and they must both assent to the account and balance as correct. *Stenton v. Jerome*, 54 N. Y., 430; *Kook v. Bonitz*, 4 Daly, 117; *Lockwood v. Thorne*, 12 N. Y., 170; *Reinhardt v. Hines*, 51 Miss., 344.

Where defendant acknowledges his indebtedness for a sum certain, being balance of an account, the court may treat it as an account stated. *May v. Kloss*, 44 Mo., 800.

An action cannot be maintained on account

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the transaction amounts to an account stated, is a question of law and not of fact."

Toland v. Sprague, 12 Pet., 800.

In *Gatling v. Newell*, 9 Ind., 577, the court says:

"Where there are no facts involved but the simple one of the length of time elapsed, it is a question of law."

Athwood v. Clark, 2 Me., 249; *Kingsley v. Wallis*, 14 Me., 57; *Murry v. Smith*, 1 Hawks, 41; *Roth v. R. R. Co.*, 84 N. Y., 548.

In the case last cited upon the question of "reasonable time," the court says: "Ordinarily it is a mixed question of law and fact; when the testimony is conflicting, and the facts are unsettled, the jury are to decide, under the instructions of the court, as to the law. Where there is no dispute as to the facts, the question is purely one of law, and the court should decide it."

11 Johns., 187; 8 N. Y., 272; 8 N. Y., 266; 27 Barb., 221; 2 Duer, 269; 1 Wend., 457; 2 Pars. Cont., 535, and *N. P.*, 661.

Messrs. McDonald, Roache & McDonald, for defendant in error:

It is difficult to see on what grounds the instruction of the court is objected to. The evidence, as shown in the bill of exceptions, tends to support it, and the legal propositions contained in it are in strict accordance with the law, as laid down in 1 Story, Eq., sec. 526. The text in *Story* is sustained by numerous authorities, among which we cite *Lockwood v. Thorne*, 11 N. Y., 170; *Willis v. Jernegan*, 2 Atk., 251; *Tudor v. Samyngs*, 2 Vern., 270.

Was it error for the court to refuse the instructions asked for by the plaintiffs in error?

It is a question of fact, or, what amounts to the same thing in the trial of a cause, a mixed question of "law and fact" and, therefore, for the jury, where there is a conflict in the testimony, or where the facts are not all clear, or where other elements enter into it other than the mere lapse of time, as opportunity, distance, the frequency and character of the intercourse between the parties. In support of this position, we rely on the authorities above cited, and also, *Lockwood v. Thorne*, 18 N. Y., 285.

Mr. Justice Swayne delivered the opinion of the court:

stated where one of the parties never assented to the balance claimed by the other to be found due. *C. G. & C. R. R. Co. v. Kimmel*, 58 Mo., 83; *Porter v. Cooper*, 1 Crompt. & R., 387; *S. C.*, 4 Tyr., 264.

There must be proof of an express or implied assent to the account, and party must be competent to assent, but it is not necessary that the parties should sign the account. The simple rendering of the items of the account between the parties and striking a balance, or agreeing upon the amount due, is sufficient. *Lockwood v. Thorne*, 11 N. Y., 170; *S. C.*, 18 N. Y., 288; *Kook v. Bonitz*, 4 Daly, 117; *Holmes v. D'Camp*, 1 Johns., 34; *Trueman v. Hurst*, 1 Term, 40; *Knowles v. Michel*, 13 East, 249; *Bruen v. Hone*, 2 Barb., 586; *Hutchinson v. Market Bk.*, 48 Barb., 302; *Stenton v. Jerome*, 54 N. Y., 490; *Cobb v. Arundell*, 28 Wis., 553; *Brown v. Vandyke*, 8 N. J., Eq., 765; *White v. Campbell*, 26 Mich., 463.

The mere admission that something is due does not entitle to even nominal damages on an account stated. The amount must be fixed. *Lane v. Hill*, 18 Ad. & El. (N. S.), 252; *Kirton v. Wood*, 1 Mood. & Rob., 259; *Tucker v. Barrow*, 7 Barn. & C., 623; *Green v. Davies*, 4 Barn. & C., 236; *Bernasconi v. Anderson*, 1 Mood. & Malk., 183.

The acknowledgment of a definite sum due im-

This is a writ of error to the Circuit Court of the United States for the District of Indiana. The action was *assumpsit*. The declaration contained only the common counts. The case, as shown by the bill of exceptions, is as follows: *Burkham*, the plaintiff, lived in Chicago, and the defendants at Hagerstown, in Indiana, distant from Chicago about two hundred and twenty miles by railroad. Upon the trial, evidence was given tending to prove that the plaintiff, on or about the 16th of May, 1866, sent to the defendants by mail a written statement of the account sued upon, in the nature of an account current, and that the defendants made no objection to it till on or about the 28th of that month, when they addressed a letter to the plaintiff by mail objecting to some items of the account, but making no objection to others, to which latter items it did not appear they ever objected until after the commencement of the suit. The plaintiff asked the court to instruct the jury:

"That when an account is rendered by a creditor to his debtor, if the debtor does not, within a reasonable time after he has examined the same, make any objection thereto, his silence, unexplained, is an implied admission of the correctness of such account, though not conclusive evidence thereof; and if the debtor, within such time, objects to some of the items, and, during such reasonable time, makes no objection to the residue of such items, he ought, *prima facie*, to be presumed thereby to admit the correctness of the items not objected to; and in both the foregoing instances the account so in whole or in part admitted, is to be deemed, in legal effect, an account stated."

This instruction was given. The defendants thereupon asked the court to instruct as follows:

"That, if the plaintiff made out his account on the 16th day of May, 1866, and then sent it to the defendants, it was within a reasonable time, if the defendants, on the 28th day of month, by letter, notified the plaintiff of their dissatisfaction with that account."

But the court refused to give the said instruction and, on the contrary, then and there instructed the jury:

"That what was reasonable time for a debtor to object to his creditor's account, after its presentation to him, is a matter of fact for the

plies a promise to pay, and in an action upon an account stated it is not necessary to set forth the subject-matter of the original debt. *Hoyt v. Wilkinson*, 10 Pick., 31; *Montgomery v. Ives*, 17 Johns., 38; *Fitch v. Leitch*, 11 Leigh, 471; *Tasey v. Church*, 4 Watts & S., 141; *Foster v. Allanson*, 2 Term, 480.

Balance of a stated account is principal; it cannot be re-examined to ascertain the items or their character. *McClelland v. West*, 70 Pa. St., 183.

Assent of the party is presumed from his receiving and keeping an account, without any objection to it, beyond a reasonable time for examining and returning it under the circumstances of the case. *Terry v. Sickles*, 13 Cal., 427; *Thorp v. Thorp*, 15 Vt., 105; *Case v. Hotchkiss*, 1 Abb. Ct. of App. Dec., 324; *Townley v. Denison*, 45 Barb., 490; *White v. Hampton*, 10 Iowa, 238; *Langdon v. Roane*, 6 Ala., 518.

The liability from retaining a stated account without objection is only applicable between merchants; between other persons such retention is a circumstance for the jury. *Anding v. Levy*, 57 Miss., 51; *S. C.*, 34 Am. Rep., 435; *contra*, cases last above cited which were not between merchants, and *Shepard v. Bk. of Mo.*, 15 Mo., 141; *Brown v. Kimmel*, 67 Mo., 430; *Powell v. F. R. R. Co.*, 65 Mo., 658.

consideration of the jury, and not a matter of law to be decided by the court."

The defendants excepted to the instructions given, and to the refusal to instruct, as asked by them. This action of the court presents the only subject for our consideration. The bill of exceptions does not purport to set out all of the evidence. What other evidence was given, if any, does not appear.

The first instruction given by the court below, embraces two propositions:

(1) That an account rendered, and not objected to within a reasonable time, is to be regarded as admitted by the party charged to be *prima facie* correct.

(2) That if certain items in an account under such circumstances are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission.

We see nothing objectionable in these propositions. They are in accordance with all the leading authorities on the subject. *Lockwood v. Thorne*, 11 N. Y., 170; 1 Story, Eq., sec. 526. The other exception also involves two propositions:

1. That the court refused to instruct the jury that, upon the hypothesis stated, the account was objected to by the defendants within a reasonable time.

2. That the court did instruct that what was a reasonable time was not a question of law to be decided by the court, but a question of fact for the jury.

Judge Story says: "Between merchants at home, an account which has been presented, and no objection made thereto, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account." See, also, *Lockwood v. Thorne*, 11 N. Y., 174.

The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and intended and preferred, to make his objections in person. Other circumstances of a like character may be readily imagined. *Lockwood v. Thorne*, 18 N. Y., 289. As regards merchants residing in different countries, Judge Story says: "Several opportunities of writing must have occurred." Sec. 526.

We see no objection to the rule as he lays it down, in respect to parties in the same country.

When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission or mistake, and in these respects he is in nowise concluded by the admission implied from his silence after it was rendered. *Perkins v. Hart*, 11 Wheat., 256.

If the car-time between Hagerstown and Chicago were ten hours, as is alleged by the counsel for the defendant in error, and there were "several posts" between the time when the account sent to the defendants, on the 16th of May, reached them, and the 28th of that month, when they replied, the court properly 886

refused the instruction which they asked. Whether these facts were in evidence does not appear. We are asked to take judicial notice of them. This we cannot do, however well satisfied we may be upon the subject. They should have been proved by proper testimony.

But error is not to be presumed. It must be affirmatively shown. The facts in question may have been proved, and this may have been the reason of the refusal by the court to instruct as asked by the defendants. The propriety of the refusal depended upon the state of the evidence. The terms of the instruction do not necessarily imply that there were not facts in proof bearing upon the subject, besides those of which the instruction was expressly predicated. The car-time and the number of mails may have been proved or admitted. If these facts were not in proof the bill of exceptions, under the circumstances, should have so stated. It does not appear, from anything in the record, that the court erred in refusing to give the instruction. The presumption is the other way.

The proposition that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the court. The point was so ruled by this court in *Toland v. Sprague*, 13 Pet., 836. See, also, *Lockwood v. Thorne*, 11 N. Y., 175, and 3 Pars. Cont., note c, 661. Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties.

If the evidence in the case was such as warranted the court in refusing the instructions asked by the defendants—if there were several posts between the time of the receipt of the account by the defendants and the date of the letter objecting to it—the court should have instructed the jury that the letter was not within a reasonable time, which is the opposite of the instruction asked. This would have been conclusive against the defendants. The error of the court in submitting the question to the jury was, therefore, favorable to them, and they have no right to complain.

The judgment of the court below is affirmed.

Cited—91 U. S., 402; 107 U. S., 334; 6 Sawy., 211; 40 Ind., 27; 343 Am. Rep., 329 (51 Md., 562).

THE STATE OF TEXAS, *Compl.*,

v.

GEORGE PEABODY'S EXECUTORS ET AL.

Rule to show cause why counsel should not be changed.

Party desiring to change his counsel, court grants a rule nisi, to such counsel, to show cause, at an early day, why his name should not be stricken from the docket as such counsel.

[No. 10. Orig.]

Motion made Nov. 11, 1870. Decided Nov. 14, 1870.

ON MOTION to strike name of counsel from docket, etc.

Mr. T. J. Durant, in support of the motion.

Mr. George W. Paschal, opposing.

Mr. Justice Clifford delivered the opinion of the court:

The complainant in this case, by T. J. Durant, moves the court that the name of George W. Paschal "Be stricken from the docket as counsel in this case, and that he be prohibited to interfere in any manner therewith as counsel of the complainant."

Satisfactory evidence was exhibited to the court on the 4th of the present month, that the said T. J. Durant was duly employed by the complainant as counsel in this cause; and on the 7th of the same month, such counsel on the docket of the present term, and by the motion under consideration, filed by him in behalf of the complainant, he informs the court that George W. Paschal has long since been relieved by the complainant of all duty in said cause, and that he has ceased to be counsel of the complainant therein; but that he, nevertheless, refuses to give up his connection with the same, and insists in controlling it against the will of the complainant; and for these reasons, and also because such interference on the part of the said Paschal, as the complainant alleges is illegal and unwarrantable, it, the complainant, files the motion to which reference is made.

Due notice was given to the respondent by the complainant before the hearing, and he appeared by counsel on Friday last and expressed his readiness to answer the motion upon its merits; and in view of these circumstances, the court has come to the conclusion to grant the rule nisi, as in the preceding case, giving leave to the parties respectively to file, at the hearing on the return of the rule, such affidavits pertinent to the issue as they are advised are material to the matter in controversy.

Ordered, accordingly, that a rule nisi issue to George W. Paschal, returnable on Friday next, to show cause, if any, why his name shall not be stricken from the docket in this cause as counsel of the complainant, as prayed in the pending motion.

ELIZA C. DEERY'S LESSEE, *Plff. in Err.*,

v.

MARTHA CRAY ET AL.

(See S. C., 10 Wall., 263-272.)

Deed, when evidence—lines, how established—immaterial error.

A deed, which on its face presented no apparent uncertainty, is evidence, subject to the effect of it as to title, when all the evidence should be in.

Lines in a deed may be established by parol evidence, and by a long standing division fence, recognized by the adjoining owners.

An error in the instructions of the court which could work no injury, is not ground of reversal.

[No. 210.]

Argued Nov. 3, 1870. Decided Nov. 14, 1870.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The case is fully stated by the court.

Messrs. Robert J. Brent and T. T. Crittenden, for plaintiff in error:

Whatever they may be in other States, the
See 10 WALL.

land laws of Maryland are stringent and technical.

These principles are fully discussed and settled by the Court of Appeals of Maryland in the leading case of *Hammond v. Norris*, 2 H. & J., 132, which involved the admissibility of a deed from John Howard to Philip Hammond, dated Sep. 27, 1853, for two parcels of a tract called Wood's Inclosure, one parcel containing 86 acres, the other 94 acres, sold to John Howard by Joseph Wood, as by deed duly made and recorded in the records of Frederick County, appears the said two parcels of land, being also what the said J. Howard's dwelling plantation is made upon.

In pages 146 and 147 the court rejected the deed as a title paper, because "It did not sufficiently specify the land, but referred for its description or bounds to another deed, which could not be found."

Now this is our very case; the only difference being that the deed in *Hammond v. Norris* was unlocatable and inoperative without producing the lost deed, which was referred to for boundaries of the past. This difference does not affect the principle which rejects a deed which is unlocatable on its face, except by reference to another document which is not produced. Here, looking at this deed of Samuel L. Chew to Elizabeth Chew, no one can say how the easterly line was or should run, without producing the plat of Brown and showing its location thereon, or producing proof where John Thomas ran his line, if he ever did run it. Tradition is evidence of boundaries, but here there is no primary nor secondary nor traditional evidence of that boundary line. As it stands on this record the court has admitted an unlocatable deed.

The principle of the case of *Hammond v. Norris* and the case itself, has been more recently recognized and confirmed in Maryland.

Blessing v. House, 8 Gill & J., 291.

This court fully approved the same principle in 18 How., 158 (59 U. S., XV., 323).

These cases in Maryland are but emanations of the common law principle laid down in 2 Thomas's Coke, 241 (marg.), that the office of the premises *inter alia* is "to comprehend the certainty of the lands or tenements to be conveyed either by express words, or which may be by reference reduced to a certainty."

A still later case in the Court of Appeals decides that a reference to another deed for boundaries makes the deed referred to a part of the deed.

17 Md., 134; 10 G. & J., 10.

On its face, the deed is defective and incomplete without proof of the identical line called for, and it is the same as if no boundaries were given for the part proposed to be granted.

Miller v. Smith, 35 Pa., 386; *Doe v. Curtis*, 3 How. (Miss.), 230; 13 Sm. & M., 328; *Fenwick v. Floyd*, 1 H. & G., 174; *Budd v. Brooks*, 8 Gill., 198.

No possession under this imperfect deed can supply this necessary paper muniment called for in the deed as part of it, or found a presumption while the defective deed is in evidence.

2 H. & J., 96; 6 H. & J., 386; 20 Md., 895.

Messrs. S. T. Wallis and Thomas, for defendants in error:

The proposition of the plaintiff is, that the

deed from Samuel L. to Elizabeth Chew is void for uncertainty, for the reason that the beginning of the northern line is not fixed, and the plat referred to is not produced. No parol proof, it is contended, can help this deed, which is to be treated as an absolute nullity.

This proposition, it is submitted, rests on a misapprehension of the term and purport of the deed. That describes the quantity of land intended to be conveyed, in language perfectly clear, *i. e.*, "one half of the number of acres of the whole tract." It does not leave to Mr. Thomas to designate the point from which the northern line is to start or the course it is to run. Both of these are to be in conformity with, "agreeable to" a plat already made and referred to. The deed is, therefore, not uncertain because it is with the plat made absolutely certain.

There is, undoubtedly, a class of cases in Maryland (and the Maryland law in this regard is not peculiar), in which it is held that a deed is void for uncertainty when it does not give a description of the property conveyed sufficiently certain to enable it to be laid out and located upon a plat, or does not furnish the means or references by which such uncertainty may be made certain.

But none of these rulings touch this case. A thing *in pais* was to be done after the grant by direction of the deed, and there can be no rule of evidence which precludes showing by direct proof or circumstances satisfactory to the jury, that it was done, or that something was done in its stead, by arrangement of the parties interested.

Blake v. Doherty, 5 Wheat., 859, *Read v. Proprs.*, etc., 8 How., 289; *Noonan v. Lee*, 2 Black, 504 (67 U. S., XVII., 280).

There is no rule more fully settled than that it is competent to show by parol that a boundary line has been fixed by the parties, and to identify in the same manner the lands referred to in the written instrument. Such proof does not go to contradict, alter, add to or detract from the writing; but only to explain the same by giving locality and identity to the subject-matter, and applying the contract. As often as writings fail to describe by metes and bounds the lands conveyed, or to give a precise location to them, the omission is supplied and the application of the writing made to the lands by parol.

Bertsch v. Lehigh Co., 4 Rawle, 130; *McCaleb v. Pradat*, 25 Miss., 267; *Criss v. Withers*, 26 Md., 569; *Dorsey v. Eagle*, 7 Gill & J., 331; *Crafts v. Hibbard*, 4 Met., 452.

And any parol arrangement sustained by twenty years' possession, is conclusive in ejectment as to boundary.

Boyd v. Graves, 4 Wheat., 513; *Jackson v. Long*, 7 Wend., 170; *Munroe v. Gates*, 43 Me., 463; *Russell v. Marks*, 3 Met. (Ky.), 87; *Allen v. Bates*, 6 Pick., 460.

Boundaries may not only be established by hearsay (*Boardman v. Reed*, 6 Pet., 341), but in opposition to the calls of an ancient patent.

Conn. v. Pa., Pet. (C. C.), 496.

The evidence in the present case is conclusive as to the existence in fact of a northern boundary to the southern moiety, as far back as the memory of the oldest witness (Godman) goes, a period of sixty years before the trial in 1868.

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It was likewise argued below that a title by possession could not be set up where a paper title found bad had been relied on.

Colvin v. Warford, 20 Md., 395.

A good deed would not, of course, be presumed from possession, where the possession had been under a bad one. But this cannot apply to a case where the defect is not in title, but consists in an uncertain boundary to be made certain afterwards. There the possession itself establishes the certainty required, and instead of being referred to, another and presumed deed goes back to and stands upon the very deed propounded, whose deficiency it supplies and with which it is consistent.

Mr. Justice Miller delivered the opinion of the court:

This case has been under consideration in this court before, and is reported in 5 Wall., 795 [72 U. S., XVIII., 653].

The suit is brought to recover an undivided interest in a tract of about two thousand acres of land on Kent Island, known as Kent Fort Manor. The Manor was originally patented to Giles Brent, and plaintiff was arrested in the deraignment of her title in the former trial, by the refusal of the court to permit her to introduce a copy of an ancient deed by the Brents to Samuel Chew, a remote ancestor of plaintiff. The refusal was held by this court to be erroneous, and the judgment rendered by the circuit court against her was for that reason reversed, and a new trial ordered.

It is to the rulings of the court against plaintiff on this second trial, that the present writ of error is directed.

The plaintiff, on this trial, having established by evidence to which there is no objection, a title to the whole of the Kent Fort Manor in Samuel Lloyd Chew, one of her ancestors, further traced the title by descent to Lowman Chew, a lunatic, who died in 1862, childless and intestate, leaving five heirs, of whom she is one.

The defendants introduced, on the trial, conveyances from Samuel A. Chew, the father of Lowman Chew, for a large part of the northern half of the Manor; and, by agreement, it was conceded that plaintiff had no controversy with the tenant in possession, in remainder of the northern half not conveyed by Samuel A. Chew.

The controversy was thus limited to the southern half of the Manor; of which plaintiff claimed an undivided fifth part, and to which she had shown a *prima facie* title.

To defeat this, the defendants introduced a deed, dated October 22, 1787, from Samuel Lloyd Chew, from whom plaintiff derived title, to his mother, Elizabeth Chew, which was claimed to be a conveyance of the fee of this south half of the Manor. The introduction of this deed was the subject of the plaintiff's first exception, and the instructions of the court on the effect of this deed and the title under it, constitute the grounds of other exceptions; and is the principal point in the case.

The objection to this deed is, that the description of the land conveyed is so uncertain as to render the deed void.

In order that we may have a clear idea of this objection, it is necessary to understand that Kent Fort Manor is an irregular shaped piece of land, whose longest direction is mainly north

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and south, surrounded entirely by water, except the northern line, which crosses a rather narrow neck of land.

So, also, if the Manor is divided into nearly equal parts by a line running from the western water boundary to the eastern, all of the southern half will be surrounded by water, except the short line separating it on the north from the other half.

The description of the land, then, in this deed, which in all other respects is unquestioned, is in these words:

"All that moiety or half part of a tract of a tract of land called Kent Fort Manor, lying and being in Kent Island, in Queen Anne's County, being all that part of said tract of land which lies to the southwestward of a line beginning on Northwest Creek and running an easterly course, agreeable to the plat of said land made by William Brown, of Anne Arundel County, in such manner as to comprehend one half of the number of acres of the whole tract, the said line to be run and ascertained under the direction of John Thomas, Esquire, of Anne Arundel County."

The plaintiff excepted to the introduction of this deed, unless the plat therein referred to as made by Brown was produced and its lines shown; but the court permitted the deed to be read, subject to the right of the plaintiff to exclude the same hereafter, if upon the closing of the testimony it should not have been legally and sufficiently applied by defendants to the maintenance of the issue on their part.

Now, unless the deed is so fatally defective as that no subsequent competent evidence could make it good in point of description, the court did not exceed its just discretion in permitting it to be read. In other words, if the uncertainty was a patent ambiguity, an uncertainty which inhered in the essence of the description, rendering it incapable of being applied to the subject matter, then the deed was void absolutely, and should not have been admitted. Otherwise it was well admitted.

But this does not seem to us to be the character of the instrument. All the boundaries given are well known and easily identified, except one. This one is to separate the southwestern half of the Manor from the other half. The division is to be into moieties exactly equal in quantity. Now, it is entirely clear, that if you give a surveyor the number of acres of the whole tract, and the point on the Northwest Creek where the division line is to commence, he can then determine mathematically the course, the distance, and the *terminus* of a straight line running an easterly direction which will divide the Manor equally.

It may be conceded that if there was nothing referred to in the deed by which the commencement of this line, or any other part of it, could, at the date of the deed, have been fixed, that it would have presented a patent ambiguity. But if there was anything by which either the beginning or the end of the line could have been located, then the whole of it could have been located. On this point the deed seems sufficiently clear in two particulars. First, the line was to be run agreeable to the plat of land made by William Brown, of Anne Arundel County. Second, it was, with this aid, to be run under the direction of John Thomas, of

said county. Now, what is the meaning of this, fairly construed? It is that the grantor conveys one half in quantity of the land. It is to be divided by a line running from the creek eastwardly, and there is a plat of this land made by William Brown, which shows this line, which is to be run out on the ground according to the plat, under the direction of John Thomas. The deed, therefore, refers perspicuously to the means which renders certain the description. "*Ambiguitas patens*," says Lord Bacon, "is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."

So here, the deed on its face presented no apparent uncertainty. It is only when we come to apply it, and are unable to find or identify the plat made by Brown or the line run by Thomas, that there is any difficulty.

The cases relied on by counsel for the plaintiff to show that the courts of Maryland have established a different doctrine, are not inconsistent with what we have said.

In *Fenwick v. Floyd*, 1 Har. & G., 172, the land was described as "part of Resurrection Manor, containing 251 acres, more or less." Resurrection Manor was a large tract of 4,000 acres, and the sheriff levied on and sold 251 acres of it, with no other description than that just stated. Nothing else was shown by which this quantity could be located or identified, and the description was clearly a patent ambiguity on which the levy and sale was rejected as evidence.

In *Thomas v. Turvey*, 1 Har. & G., 437, three levies and execution sales were rejected, the schedules of which described the land as "part of Borough Hall, containing the supposed quantity of 180 acres of land, more or less." Borough Hall was a tract of 500 acres, and there was nothing by which the location of the 180 acres could be shown, nor any evidence that it had ever been located.

In *Hammond v. Norris*, 2 Har. & G., 180, the description in the deed was, "all these two parcels of land, being parts of a tract of land called Wood's Inclosure, and sold to said John Howard by Joseph Wood, one parcel containing 86 acres, the other 94 acres, as by deed duly made and recorded in Frederick County appears." The court overruled plaintiff's objection, and permitted the deed to be read in evidence, but, as it subsequently appeared that there was no such deed as that referred to on record in Frederick County, and as no other satisfactory proof was made of the location of these tracts within the larger tract of Wood's Inclosure, the court finally held that it conveyed no title.

That is just in accordance with the action of the court on this case in admitting the deed to be read in evidence, subject to the effect of it as to title, when all the evidence should be in.

This leads us next to inquire whether defendants have shown, by satisfactory and competent evidence, that this northern line had an existence, so as to enable us to determine what is the south half of the Manor.

Upon this point it does not seem to us there can be any doubt, for though the plat of William Brown is not produced, nor is it proved

expressly that the line was ever run under the direction of Mr. Thomas, yet there is as much evidence as can possibly be expected to be produced after the lapse of eighty years, that such a line was run, and that with such slight changes as the holders of the title on each side of it made by consent and for their mutual convenience, a fence has been standing along that line ever since.

And this does not depend solely upon parol evidence. A map is introduced by agreement, of the Kent Fort Manor, which is admitted to be part of a record of a chancery suit in Maryland, filed in 1802, and the location on said map of Susanna Tate's moiety is admitted to be a correct location of the share of said Manor, assigned in said suit to Susanna Tate, as sister, and one of the heirs of Arthur Byran, in partition of his real estate. This map has figures and lines of it, showing a division of the Manor into two equal parts, of 1,002½ acres each, and that division is made by a straight line from a point on Northwest Creek, projecting far into the body of the tract, in a course a little south of east, to the eastern shore of the island.

Deeds are produced showing conveyances from Elizabeth Chew, grantee in the deed we have considered, to Thomas M. Forman, from Forman to Philip Barton Key, and from Key to Arthur Byran, of the same land, describing it either as the land on said Manor, purchased by Elizabeth Chew of her son Samuel, or as Elizabeth Chew's half part of the Manor.

It is also proven by a witness over seventy years of age, that he knew Robert Tate, the husband of Susanna, and knew Fort Manor, since he was eleven years old; that a fence then divided the north and south parts of the Manor, and said Tate held up to that fence; that after Sam. A. Chew, father of Lowman Chew, came to live on the north half of the Manor, he and Robert Tate changed the location of the fence, and that both recognized it as the boundary between them. And there is other testimony, showing the holding under the parties by this line from that day to this; we think quite sufficient to show that the line mentioned in the deed of Samuel L. Chew to his mother was run and established; that with the change made by Tate and Samuel A. Chew for convenience, it has remained the line to the present time, and that the parties claiming the north and south parts of the Manor have recognized that fence for over thirty-five years as the line dividing their estates.

We add further, that, as this testimony is uncontradicted, it is conclusive against the claim set up by plaintiff of any title derived from Samuel A. Chew, and of her case. *Sargent v. Adams*, 8 Gray, 72; *Bertsch v. Coal Co.*, 4 Rawle, 139; *Munroe v. Gates*, 48 Me., 463; *Reed v. Proprietors, etc.*, 8 How., 289; *Noonan v. Lee*, 2 Black, 499 [67 U. S., XVII., 278].

It is unnecessary to inquire into the effect of the mortgage given by plaintiff on her title, as we have already stated that she had none on which the jury could have found a verdict in her favor, and the error, if there was one in the instructions of the court on that subject, could work her no injury. *Ryder v. Wombwell*, L. R., 4 Exch., 32; *Giblin v. McMullen*, L. R., 2 Pri. Coun., 817.

The judgment of the Circuit Court is affirmed.

THE STEAMSHIP COLUMBIA, HER
TACKLE, ETC., PAUL SPOFFORD ET AL.,
Claimants, *Appts.*,

JAMES H. BUNTING.

(See S. C., "*The Columbia*," 10 Wall., 246-251.)

Rule of navigation—negligent steamer.

When two steam vessels are crossing, so as to involve risk of collision, the one which has the other on her own starboard should keep clear.

Where a steamer made no attempt to slacken her speed when the danger became imminent, and by starboarding her helm, precipitated herself directly upon the libellant's vessel, this court holds her liable for the collision.

[No. 212.]

Argued Nov. 4, 1870. Decided Nov. 14, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the District Court of the United States for the Southern District of New York by the appellee, to recover for damages resulting from a collision. That court having entered a decree dismissing the libel, the libellant took an appeal to the circuit court, in which the said decree was reversed and judgment ordered for the libellant; whereupon the claimants took an appeal to this court.

The case is fully stated by the court.

Messrs. Benedict & Benedict, for appellants.

Messrs. Beebe & C. Donohue, for appellee.

Mr. Justice Strong delivered the opinion of the court:

The collision which gave rise to this libel, occurred in the Harbor of New York, on the 7th day of January, 1860. On the afternoon of that day, the propeller "*Jersey Blue*" started on her voyage from a coal dock in Jersey City across the Hudson to the East River. The tide was strong ebb, and there was very little wind. From her start, the course of the propeller was nearly towards the Battery, New York, and somewhat south of east; and she kept on that course until almost immediately before the collision. Her rate of speed was variously estimated, but it was probably not far from six miles an hour through the water. Soon after she left the docks the steamship, *Columbia*, pushed out from pier No. 4, on the New York side of the Hudson, to commence her voyage to Charleston. There was at that time a body of floating ice, extending outward from the pier six or eight hundred feet; but beyond the ice the river was clear. As the ship hauled out into the stream, her bow was swung by the tide downward, and her helm was put to the starboard. Whether she had cleared the ice fields before she headed down the bay, is perhaps not a matter of much importance. Her owners libeled the *Jersey Blue*, and their libel was taken as an answer to the

NOTE.—Collision, rules for avoiding—steamer meeting steamer. See, note to *Williamson v. Barrett*, 54 U. S. (13 How.), 101. Rights of steam and sailing vessels with reference to each other, and in passing and meeting. See note to *St. John v. Paine*, 51 U. S. (10 How.) 557.

present action. In that it is averred, that having cleared the ice, the steamer began to move down. If she had not entirely cleared it, she had so far, at least, that only her port wheel was in the ice field when she met the propeller. All was open on her starboard side. She proceeded down the river in a course nearly parallel with the outer ends of the piers, probably just on the outer edge of the ice fields, and at a rate of not less than four miles an hour. When she came to a point nearly opposite Castle Garden and a little below the Battery, she collided with the propeller, her starboard wheel mounting the deck of the propeller about midships on the larboard side, and walking over it about forty or fifty feet, doing considerable damage. There were other important circumstances preceding the collision. The Columbia was seen from the propeller soon after she hauled out from the pier and commenced swinging down the river. The propeller then blew one whistle, which was not answered. When the vessels approached each other and danger of collision appeared, the propeller again blew one whistle, thus signaling that she intended to pass on the right. This second signal was also not answered; but when they came within six or seven hundred feet of each other, the pilot of The Columbia hailed that he could not stop, and the engine of the propeller was immediately reversed, and she immediately commenced backing. The backing was continued until the collision, entirely stopping the headway of the propeller, and swinging her head somewhat outwards from New York. On the other hand, the propeller was seen from The Columbia when the latter was only about one hundred yards from pier No. 4, and manifestly before she had taken her course down the river. She was seen to be headed from Jersey City about towards the Battery, and to be at most about half a mile distant. She was off the starboard bow of The Columbia, and only her port side could be seen. It was apparent her course must cross any course The Columbia could take. After the latter had headed down the river and had come within six or seven hundred feet of the propeller, her helm was put to the starboard so that she headed inside of Governor's Island, instead of west of the island, her proper course out to sea. She then hailed, but did not stop her engine; certainly not until the collision took place, if at all.

Thus far there is very little controversy in regard to the facts. Most of them appear in answer to the libel, and from the testimony of the pilot of The Columbia.

From those facts which appear in answer to the libel, and from the testimony of the pilot of The Columbia, and about which there is very little controversy, it is not difficult to determine where the fault of the collision in this case lies. The propeller was all the time, from the moment she was first seen, off the starboard side of The Columbia. It was, therefore, the duty of the latter to keep out of the way. The regulations then existing required that when two steam vessels were crossing, so as to involve risk of collision, the one which had the other on her own starboard should keep clear. Plainly she had no right to expect the propeller to change her course. It was, therefore, a fault in

The Columbia that she did not port her helm and go astern of the other vessel. And the fault was the more inexcusable because she knew, even before she had settled on her course, that the course of the propeller must take her across any line The Columbia could take in going directly out to sea. There was nothing, then, to prevent her adopting such a course as would have avoided all danger of a collision. Instead of that she went straight down the river, in a line nearly parallel with the ends of the piers and very near to them and, as the vessels approached each other on converging lines, she swung to port, so as to come more directly into the line of the propeller's course. This was the exact opposite of what she should have done.

We think, also, the evidence establishes that The Columbia was the following vessel, and if she was, another regulation required her to keep out of the way of the propeller. Chadsey, the Captain of The Jersey Blue, testifies that he first saw The Columbia when his own vessel was below (south of) pier No. 1, and two or three hundred yards distant. He saw her over his left shoulder, as he was standing at the wheel. She was then just coming out of pier No. 4, and swinging down the river. This was evidently before she had straightened on her course. If this is so, The Columbia must have been above, namely: further up the river, and the following vessel. Captain Chadsey's testimony is corroborated by that of Green, the engineer; Taylor, a deck hand; and by the testimony of Klickner and Pritchard, shipwrights, who repaired the propeller after the collision. Both shipwrights testify that the force of the collision must have come from aft forward. The chain bolts of the propeller were bent forward, which could not have been unless The Columbia overtook the propeller and struck her from aft. There is no satisfactory evidence to rebut this. Hutchinson, the engineer of The Columbia, states that when he saw The Jersey Blue, she was some two hundred yards distant, headed obliquely for The Columbia and, as he thought, above. He adds immediately, "However, my not being on the deck to notice the compass, everything appeared abeam to me." Kelsoe, the pilot, states that when he first saw the propeller (his own ship being one hundred yards out from pier No. 4), she was half a mile distant, and his impression is that she was above at the time, though he adds, "I cannot swear she was above; the boats were angling towards one another." This is all the testimony given to prove that The Columbia was not the following vessel. But it is manifest that it tends to prove the contrary. Maps have been exhibited to us describing the situation of the piers and the course of the propeller from the coal docks to the place of collision. If they are to be relied upon, and if the propeller was not more than a half mile from The Columbia when Kelsoe saw her, she must have been below pier No. 1, as the evidence for the libellant shows that she was, when The Columbia was only one hundred yards from pier No. 4. It seems to be satisfactorily established, therefore, that The Columbia was the following vessel. Of course the fault of the collision was hers. She had two courses before her, either of which would have avoided

the disaster. Had she put farther out from her pier, where she had clear water, before heading down the river, or if, after heading down, she had ported her helm, as the regulations required, instead of starboarding, or even if she had stopped when she saw danger of collision, she would have passed astern of the propeller and no injury would have been done. By so doing she would have pursued her most direct course out to sea. But she did neither. She made no attempt to slacken her speed when the danger became imminent, and by starboarding she precipitated herself directly upon the libellant's vessel.

Decrees of the Circuit Court affirmed, with interest and costs.

THE NEW ORLEANS, OPELOUSAS AND
GREAT WESTERN RAILROAD COM-
PANY, *Plff. in Err.*,

CHARLES MORGAN.

(See S. C., 10 Wall., 256-268.)

Writ of error, when not dismissed for defect in record—affirmance—error in proceedings—what questions not considered on motion to dismiss—final judgment.

A writ of error to a Circuit Court of the United States will not be dismissed because the record contains no bill of exceptions, nor any agreed statement of facts or any special verdict, demurrer to a material pleading, or demurrer to evidence.

If there is no error in any part of the record the prevailing party in the circuit court is entitled to an affirmance of the judgment.

There may be error in the proceedings apparent in the record for which the judgment will be reversed, although they are not shown by a bill of exceptions, an agreed statement of facts, or by demurrer, or in any special verdict.

Questions of reversal or affirmance appertain to the merits of the controversy, and will not be determined upon a motion to dismiss.

A judgment of dismissal, with costs, held to be a final judgment.

[No. 321.]

Argued Nov. 11, 1870. Decided Nov. 14, 1870.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The defendant in error filed a petition in the court below, to obtain payment on certain railroad bonds issued by the plaintiff in error. An order was made without notice, on his petition, granting him executory process for the collection of his demand out of the property mortgaged to secure said bonds, unless the said demand should be paid after three days' notice. Default having been made in the payment, and seizure of the mortgaged property having been made upon said process, the respondent filed a petition in said court, to stay said proceedings and make inquiry into the regularity and legality of the proceedings. He alleged, among other things, that said executory process could not be legally ordered upon an *ex parte* application, as had been done in this case. The petition of the respondent having been dismissed and judgment given for the original petitioner, Morgan, the respondent sued out this writ of error.

The case is further stated by the court.

Mr. T. A. Jenckes, for defendant in error.
Messrs. F. Phillips and J. A. Campbell, for plaintiff in error.

Mr. Justice Clifford delivered the opinion of the court:

Two principal causes are assigned in support of the motion to dismiss the writ of error:

1. That the record contains no bill of exceptions nor any agreed statement of facts or any special verdict, demurrer to a material pleading, or demurrer to evidence.

2. That the supposed judgment exhibited in the record is not a final judgment.

Express jurisdiction is conferred upon this court by the 22d section of the Judiciary Act to re-examine, upon writ of error, and reverse or affirm final judgments in civil actions rendered in a circuit court, where the matter in dispute, exclusive of costs, exceeds the sum or value of \$2,000, whether the same was brought there by original process or was removed there from courts of the several States, or from a district court. 1 Stat. at L., 84.

Such a writ of error, when issued to a circuit court, removes the whole record into this court, and if all the proceedings in the suit were correct, it follows, if not from the very words of the section, certainly from the necessary construction of the same, that the judgment must be affirmed. *Taylor v. Morton*, 2 Black, 484 [67 U. S., XVII., 278].

Error may be shown in such a case by a bill of exceptions or by a demurrer to the declaration, or a material pleading, or it may appear by an agreed statement of facts, if made a part of the record, or in a special verdict, if put in due form; but even when all these are wanting it is no cause for dismissing the suit, because the writ of error issued to a circuit court under that section brings up the whole record, and their absence only shows that there is no error in the proceedings; and if there is no error in any part of the record the prevailing party in the circuit court is entitled to an affirmance of the judgment. *Minor v. Tillotson*, 1 How., 287; *Stevens v. Gladding*, 19 How., 64 [60 U. S., XV., 569].

Cases brought here by writ of error to a state court, issued under the 25th section of the Judiciary Act, stand upon a very different footing, as in such a case it must appear on the face of the record in express terms or by necessary implication, that some one, at least, of the questions described in that section did arise in the state court, and that the question so appearing in the record was decided in the state court, as required in that section; and if it does not so appear in the record, then this court has no jurisdiction of the case, and in that event the writ of error must be dismissed; as this court, under those circumstances, has no power either to reverse or affirm the judgment rendered in the state court. *Suydam v. Williamson*, 20 How., 440 [61 U. S., XV., 963]; *Taylor v. Morton*, 2 Black, 483 [67 U. S., XVII., 278]; 1 Stat. at L., 85.

Certain errors in judicial proceeding can only be examined in an appellate court when they are shown by a bill of exceptions—as where proper testimony is rejected or where improper testimony is admitted—but there may be error in the proceedings of a subordinate court ap-

parent in the record for which the judgment will be reversed in an appellate tribunal, although they are not shown by a bill of exceptions and do not appear in an agreed statement of facts or by demurrer or in a special verdict—as where the original process was unauthorized by law, or where the defendant was not served with process, or where the proceedings under the process were irregular and void. Such were the rules of the common law, and they have been adopted and applied in this court in repeated cases. *Slacum v. Pomery*, 6 Cranch, 221; *Garland v. Davis*, 4 How., 131; *Bennett v. Butterworth*, 11 How., 669; *Cohens v. Va.*, 6 Wheat., 433; *Suydam v. Williamson* [*supra*].

Whatever the error may be and in whatever stage of the cause it may have occurred, it must appear in the record or proceedings, as before explained, or be shown by a bill of exceptions, agreed statement of facts, demurrer, or special verdict. 1 Chit. Pl., 481; 1 Tidd, Pr., 586; *U. S. v. Eliason*, 16 Pet., 291.

Two thousand bonds for the sum of \$1,000 each were, on the 1st of April, 1859, issued by the plaintiffs in error, falling due in thirty years, with interest at eight per cent. payable semi-annually in coupons for the proper amount. Their road was completed at that time from Algiers, opposite the City of New Orleans, to Berwick Bay, a distance of eighty miles, and they mortgaged the same, together with the road-bed of the main track and branches and the depots and the lands appertaining thereto, to secure the payment of the bonds. On the 23d of February, 1869, Charles Morgan filed his petition in the circuit court, averring that he was the holder of a certain number of these bonds and of a large number of coupons which were past due, and an order was made on that petition, on the 30th of March following, that the Corporation plaintiffs, on three days' notice, pay to the petitioner, the defendant in error, \$316,840, and the cost of the proceedings, and that in default of such payment the mortgaged property might be seized and sold according to law for the whole of the debt secured by the mortgage. Payment, as thus summarily ordered, was not made, and thereupon a writ of seizure was issued by the court, and the whole of the mortgaged property was seized by the Marshal and sold; and the petitioner became the purchaser of the same at the sale.

It is contended by the plaintiffs that the process and all the proceedings in the circuit court, were irregular and void, and that the same should be set aside; but the court will not determine that question at this stage of the controversy, because it is clear that if the views of the plaintiffs are correct, and the judgment is a final one, it must be reversed. Questions of reversal or affirmance appertain to the merits of the controversy, and will not be determined upon a motion to dismiss.

But the defendant insists that the judgment is not a final one, and that the writ of error should be dismissed on that ground.

On the 1st of June, 1869, the plaintiffs for the first time appeared on the law side of the circuit court, and filed their petition in the nature of an *avisita querela*, averring that the executory process could not be legally ordered without notice; that the order was made with-

out notice and without proper evidence and parties; that the subject of the suit was only cognizable in equity, and prayed that the validity of said proceedings may be examined, and that they be restrained and suspended by a writ until a final order herein.

Hearing was had on the petition, and the court having duly considered the petition and exhibits submitted by the petitioner in this cause, and "being satisfied that the prayer thereof cannot be granted, it is ordered and decreed that the said petition be dismissed with costs."

Judgment rendered June 14, 1869. Judgment signed June 18, 1869.

The forms of verdicts and judgments, it is true, are not controlled, even in Louisiana, by the state law, but there must be some variation from the form of a judgment as at common law to render it appropriate to the form of the process adopted in that circuit. Common law suits as well as suits in equity are commenced in that court by petition, and the judgment in this case is in a form not unusual in that court. It is called a judgment in the record and treated as such by the court and the parties, and in our opinion the writ of error ought not to be dismissed for either of the reasons assigned in the motion.

Motion denied.

ISRAEL DEMING, *Appt.*,

v.

UNITED STATES.

(See S. C., "*Deming's Appeal*," 10 Wall., 251-256.)

Re-instatement of appeal, lost by laches.

Where an appeal was dismissed on motion of appellant's counsel, long acquiescence by silence of the appellant will prevent its being re-instated, although he swears that his counsel in consenting to the dismissal, acted without his knowledge and consent.

[No. 7.]

Motion filed Nov. 11, 1870. Decided Nov. 14, 1870.

APPEAL from the Court of Claims.

On motion to re-instate.

The petition in this case was filed in the court below, by the appellant, to recover a balance alleged to be due him on a certain contract with the United States.

The claimant had received the sum due in legal tender notes at their nominal value, but claimed to be entitled still to the difference between their actual value and the value of the same sum in coin, inasmuch as, at the time of making the said contract, coin was the only legal tender. The court below having entered a decree dismissing the petition, the claimant took an appeal to this court. The appeal after having been, by order of the court, set down successively for various days to be argued, was subsequently dismissed on motion of the claimant's counsel. Now the claimant, by other counsel, moves to have the order of this court dismissing the appeal vacated, and to re-instate the case upon the calendar.

A further statement of the case appears in the opinion of the court.

Mr. Lander, for appellant.

Mr. Amos T. Akerman, *Atty. Gen.*, for appellees, filed his written consent to the motion.

Mr. Justice Swayne delivered the opinion of the court:

A motion has been made on behalf of Deming to re-instate this case upon the calendar. The suit was originally instituted in the Court of Claims. A judgment was rendered in favor of the United States, and the plaintiff brought the case into this court by appeal. That case and the case of *Latham v. U. S.*, 1 Ct. Claims, 149, also brought into this court by appeal from the judgment of the Court of Claims, were supposed to involve the question of the constitutional validity of the paper circulation issued by the United States, known as legal tender notes. On the 1st of April, during this term, both these cases were set for argument on the 11th of that month. On that day the argument was postponed until the 18th of April. The hearing was further postponed to the 20th of April. On that day the counsel for the Lathams and the counsel of Deming united in a written motion that both appeals should be dismissed.

The court recognizing the right of the counsel to have this done, thereupon dismissed the appeals. No reason was given for this step, and no explanation was made by either counsel, except the statement that they did not wish further to trouble the court in relation to the cases. The court continued to sit until the 30th of April. The long vacation then commenced. No motion was made prior to that time by Deming, to set aside the dismissal of his appeal. On the 5th of May the mandate of this court was sent to the Court of Claims to carry the judgment into execution. This motion was filed on the 7th of November, instant. It appears by the affidavit of Deming that he was aware of the dismissal very shortly after the order was made. This must necessarily have been so. It was announced in the proceedings of the court published the next day. Nothing is produced from his counsel who made the motion. Deming states in his affidavit, that the counsel acted without his knowledge or consent. Granting this to be so, his silence after the facts came to his knowledge, must be held to amount to acquiescence and ratification. The dismissal of the appeal left the judgment of the Court of Claims in favor of the United States in full force. They can sustain no prejudice by the overruling of this motion. We therefore lay out of view, as an element to be considered, the consent of the Attorney-General that the order of dismissal shall be rescinded.

The motion is addressed to the discretion of the court. Under the circumstances, we are all of the opinion that it ought to be denied.

And it is denied, accordingly.

THE WASHINGTON, ALEXANDRIA &
GEORGETOWN RAILROAD COMPANY
AND ALEXANDER HAY, *Appts.*,

v.

THE MAYOR, BOARD OF ALDERMEN,
AND BOARD OF COMMON COUNCIL
OF THE CITY OF WASHINGTON AND
JOSEPH H. BRADLEY ET AL.

(See S. C., "*Washington Railroad v. Bradleys*," 10
Wall., 299-303.)

*Amended bill, when irregular—omission to file
replication, when irregular—cross-bill—relief
upon.*

An amended bill cannot be filed after the cause is regularly at issue, without leave of the court. It is irregular to hear the cause on amended bill put in without leave.

Omission to file replications to answers is an irregularity.

Parties defendant are as necessary to cross-bills as to original bills; and their appearance in both cases is enforced by process in the same manner.

A cross-bill which was a nullity should have been stricken from the files.

The court, upon such a cross-bill, cannot decree against the complainants the opposite of the relief which they sought by their bills.

[No. 213.]

Argued Nov. 8, 1870. Decided Nov. 21, 1870.

THIS case arose in the court below, upon the petition of the appellants for an injunction against the sale of certain railroad property.

The history and facts of the case are fully stated in the opinion of the court.

Messrs. R. J. Brent, J. L. Brent, A. G. Riddle, J. B. Stewart and T. J. Durant, for appellants:

Messrs. J. H. Bradley, W. D. Davidge and T. W. Bartley, for appellees:

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the decree of the Supreme Court of the District of Columbia.

The appellants are the complainants in the case. The original bill made the Corporation of Washington and Joseph H. Bradley and A. Thomas Bradley only, defendants. The prayer of the bill was that the defendants, Joseph H. and A. T. Bradley, should be enjoined from selling, under a deed made to them as trustees for the security and benefit of the Corporation of Washington, the railroad described in the deed of trust, and that the deed should be ordered to be delivered up and canceled. The defendants answered. The complainants filed a replication. A preliminary injunction was granted forbidding the sale of the road. Subsequently the complainants filed an amended bill, whereby they made George W. Riggs and A. T. Kieckover, partners, under the name of Riggs & Co., James C. McGuire, D. P. Lengham and James P. Kibbreth, defendants, in addition to those made by the original bill. All the defendants were duly served with process except Lengham and Kibbreth. McGuire answered. Kibbreth also answered, and thus became a party to the record. Lengham did not appear. The Corporation of Washington and J. H. and A. T. Bradley failed to answer the amended bill. Riggs & Co. also failed to answer, and it was ordered, as to them, to be taken as confessed. No such order was made as to the Corporation of Washington and the trustees in the deed of trust. No further replication was filed by the complainants. Testimony was taken on behalf of the Corporation of Washington. The case was referred to an auditor. In this condition of things the defendant Kibbreth filed a cross-bill, wherein he alleged that he was the holder of certain securities indorsed by the Corporation of Washington and secured by the deed of trust, and prayed that the preliminary injunction should be dissolved, and that the trustees should be required to proceed to sell the

trust property for the benefit of the *cestui que trust*. This bill makes no defendants, and asks for no process. None was issued. It appears by the record that the cause came on to be heard upon this cross-bill, and was reserved to the court in bank. In that court it appears that the case came on to be heard on the answer and cross-bill of Kibbreth, the original and amended bills of the complainants, the answers, exhibits, and testimony, and that the court decreed that the preliminary injunction should be dissolved; that the trustees should proceed to sell the trust property in the manner prescribed by the deed of trust, and bring the proceeds of the sale into court, and that all further questions arising in the case should be reserved for future consideration and adjudication. This appeal is prosecuted to reverse that decree.

The record is voluminous; we have adverted to its contents only so far as is necessary to develop the points which we think must control the determination of the case. Several important questions involving the merits of the controversy, have been argued by the counsel, both in the briefs submitted and at the bar. In our view of the case it is needless to examine them. We have, therefore, given them no consideration.

The reference to the auditor was not revoked and he made no report. For aught that appears to the contrary, the case is still before him for the purpose specified in the order.

The amended bill was filed without the leave of the court, after the cause was regularly at issue. This was in violation of the 29th rule of equity practice prescribed by this court. That rule provides as follows:

"After the replication filed the plaintiff shall not be permitted to withdraw it, and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff submitting to such other terms as may be imposed by the judge for speeding the cause."

If the defendants, without laches on their part, had moved the court to strike this bill from the files, it must have been done. After the testimony was taken, without the objection having been made, the case presented a different aspect. But even then such action should have been taken and such terms imposed as would have vindicated the rules of practice by which the court was governed and the regular order of proceeding. To hear the case without any order on the subject was a gross irregularity.

If the amended bill is to be considered as in the case, the omission to file replications to the answers of McGuire and Kibbreth was also an irregularity. The 66th Rule is explicit on the subject. The replication is necessary to put the case at issue. If the complainant omit to file it within the time limited the defendant is entitled as of course to an order for the dismissal of the suit, unless the court or a judge thereof, upon cause shown, shall allow it to be filed *nunc pro tunc* upon such terms as it may be deemed proper to impose.

See 10 WALL.

Parties defendants are as necessary to cross-bills as to original bills, and their appearance in both cases is enforced by process in the same manner. 3 Dan. Ch. Fr., 1747. Without the aid of a cross-bill the court could not have decreed the sale of the property covered by the trust deed. It could only have dismissed the bills of the complainants and have denied the relief sought. *Wickliffe v. Clay*, 1 Dana, 589; *Carnochan v. Christie*, 11 Wheat., 446; *Eyre v. Potter*, 15 How., 56; *Price v. Berrington*, 7 Eng. L. & E., 254. But the cross-bill was a nullity. It was not before the court, and should have been stricken from the files. The complainants prayed for an injunction forbidding the trustees to sell. The court, upon the cross-bill, and according to its prayer, decreed a sale. This error is inevitably fatal to the judgment given.

It is hardly necessary to repeat the axioms in the equity law of procedure, that the allegations and proofs must agree, that the court can consider only what is put in issue by the pleadings, that averments without proofs and proofs without averments are alike unavailing, and that the decrees must conform to the scope and object of the prayer, and cannot go beyond them. Certainly without the aid of a cross-bill the court was not authorized to decree against the complainants the opposite of the relief which they sought by their bills. That is what was done by the decree under consideration.

There is a large class of cases in which it has been held that objections not taken in the court below will not be allowed to be taken in this court. We do not intend to impugn this doctrine or to narrow the limits of its just operation. But where there is such a combination of errors, and errors of so grave a character as those which mark the record in the case before us, this principle can have no application.

The decrees below is reversed, and the cause will be remanded for further proceedings, in conformity to this opinion.

JOHN B. BRAUN, *Plff. in Err.*

PETER G. SAUERWEIN.

(See S. C., 10 Wall., 218-224.)

Statute of Limitations—when running of, suspended—Act of July 13, 1866.

It is the general rule that when a Statute of Limitation has begun to run, a disability to sue, subsequently intervening, does not stop its running, even though the disability be one of those expressly recognized in the Statute itself.

But the running of a Statute of Limitation may be suspended by causes not mentioned in the statute itself.

Under the Act of July 13, 1866, the interval between the appeal and its decision was the entire period during which a party was disabled to sue.

The said Act of Congress denied to him a right to sue during that period, and no longer.

[No. 214.]

Argued Nov. 8, 1870. Decided Nov. 21, 1870.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The history and facts of this case are fully stated in the opinion of the court.

Messrs. R. J. Brent, J. L. Brent and James Hughes, for plaintiff in error:

The rejoinder states the appeal to have been made Aug. 20, 1867, but the law of Congress having intervened and suspended the right of action July 18, 1866, when the state Statute of Limitations had run against the cause of action for only two years, four months and eleven days, we maintain that the bar of limitations under the state law was then incomplete.

As we could not sue after July 18, 1866, until an appeal taken and a decision thereon, and as our replication avers that the appeal was duly made, which is not denied in the second rejoinder, the appeal must be taken to have been in time. If so, the rejoinder shows a decision of that appeal some thirty-nine days after the appeal. It results that if we deduct the whole period between July 18, 1866, and the decision, Jan. 11, 1868, we have only two years, five months and twenty days left between the receipt of the money, Feb. 2, 1864, and the bringing of this suit, Feb. 19, 1868, and the state statute of three years could not bar the action. Again; if the appeal was too late, and the plaintiff in error should have appealed July 14, 1866, the very day after the enactment of the law by Congress, it is plain under that Act, that twelve months were allowed from the date of appeal in which to bring suit.

The computation of time, therefore, cannot be resumed under the state Statute until July 14, 1867; from which last date to the bringing of this suit is but seven months and five days, not enough to complete the bar of three years, even if you add the two years, four months and eleven days which elapsed prior to the Act of July 18, 1866.

Messrs. A. T. Akerman, Atty. Gen., and C. H. Hill, Asst. Atty. Gen., for defendant in error:

Under the regulation of Feb. 1, 1864, in force when the cause of action accrued, the limitation of time for appeals was three months. The plaintiff had lost his right to appeal before the Statute of 1866 was enacted. If that Statute gave him six months in which to appeal, he did not take advantage of it; for he did not appeal for more than a year after it took effect, namely: until Aug. 20, 1867. The fact that the Commissioner of Internal Revenue entertained the appeal cannot affect the legal rights of the parties.

No suit was brought until more than a year and a half after the Act took effect. Even if the Statute of Limitations was suspended for a year from Aug. 1, 1866, it began to run again Aug. 1, 1867, and the suit was barred Feb. 1, 1868. This suit was not commenced until Feb. 18, 1868.

See *Hanger v. Abbott*, 6 Wall., 532 (78 U. S., XVIII., 939), and cases cited.

Mr. Justice Strong delivered the opinion of the court:

This was an action brought to recover from the defendant a sum of money alleged to have been illegally exacted by him from the plaintiff, in virtue of his office as Collector of Internal Revenue and, therefore, had and received by him for the use of the plaintiff. It was commenced in the Circuit Court of the State of Maryland, on the 18th day of February, 1868. Among other defenses set up, the defendant pleaded the Maryland Statute of Limitations,

which bars an action of this nature unless it is brought within three years from the time when the right of action had accrued. To these pleas (the 2d and 5th) the plaintiff replied, in effect, that, after defendant had received the money for which the suit was brought, the plaintiff duly appealed from the assessment and collection thereof, made by the defendant to the Commissioner of Internal Revenue of the United States, according to the provisions of law, and in conformity to the regulations of the Secretary of the Treasury; that a decision of his appeal was not made until on or about the 9th day of February, 1868, and that a suit was brought within six months from that date. The plea, it will be observed, does not aver when appeal was taken, nor the day when it was decided. While the record was in this condition, the case was moved into the Circuit Court of the United States, and subsequently the defendant rejoined to the plaintiff's replication by averring that the money alleged in the declaration to have been had and received for the plaintiff's use, was received on the 2d day of February, 1864, and not afterward; that the appeal of the plaintiff to the Commissioner of Internal Revenue was taken on the 20th day of August, 1867, and not before; and that the decision of the appeal by the Commissioner was made on the 11th of January, 1868. To this rejoinder the plaintiff then demurred. From the facts admitted by the demurrer, it appears that more than three years elapsed after the cause of action accrued, before the suit was brought, and more than three years before the appeal was taken to the Commissioner of Internal Revenue. The statute began to run on the 2d day of February, 1864, and had nothing intervened to suspend its operation, the bar would have been complete on the 2d of February, 1867. But on the 18th of July, 1866, an Act of Congress was passed, which, the plaintiff contends, worked a suspension. 14 Stat. at L., 152, sec. 19. By that it was enacted that no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall have been brought within six months from the time of said decision or within six months from the time this Act takes effect, provided that, if such decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal. The Act took effect on the 1st of August, 1866.

It is, undoubtedly, a general principle, that when a Statute of Limitation has begun to run, a disability to sue subsequently intervening does not stop its running, even though the disability be one of those expressly recognized in the Statute itself. Notwithstanding this, however, the courts in this country have engrafted upon such statutes at least one implied exception. Thus, in *Hopkirk v. Bell*, 3 Cranch, 454, this court held that the Treaty of Peace of 1783, by which the independence of the United

States was acknowledged by Great Britain, prevented the operation of a Virginia Statute of Limitations upon debts due to British subjects, and contracted before the Treaty was made. In that case, though the Statute had begun to run before the commencement of the war in 1676, the time during which it had thus run was not allowed to be added to any time subsequent to the Treaty. This, perhaps, in not to be regarded as a clearly judicial exception, in incorporated into the Virginia Statute. It was rested upon the force of the Treaty which declared the creditors on either side (British or American), should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted. The Treaty, however, was not the Act of Virginia, and the suspension of the Statute's operation was by something outside of the statute itself. But in *Hanger v. Abbott*, 6 Wall., 532 [78 U. S., XVIII., 939], it was ruled, after grave consideration, that the time during which the courts of the recently rebellious States were closed to the citizens of other States, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by Statutes of Limitation, within which only suits may be brought, and this, though the statutes contain no such exemption. In other words, it was held that the Statutes of Limitations of the insurrectionary States were suspended, while the courts in those States were closed by the war. Similar decisions have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue.

It seems, therefore, to be established, that the running of a Statute of Limitation may be suspended by causes not mentioned in the statute itself. Assuming, then, that the Act of Congress did, for a time, stop the running of the Maryland Statute against the plaintiff, the inquiry remains: how long did the suspension continue? To this there can be but one answer. Manifestly, only so long as he was prevented from suing by the Act of Congress. The Act, speaking from August 1st, 1866, prohibited a suit until he should appeal to the Commissioner of Internal Revenue, and until his appeal should be decided, unless the decision should be postponed longer than six months, in which case he was at liberty to sue within a year from the time when his appeal was taken. The interval between the appeal and its decision, then, was the entire period during which he was disabled by the Act. If, in fact, he was disabled a longer time, the prolonged disability was caused by his own neglect to appeal. The replication to the defendant's pleas fail to state when the appeal was made. True, the averment is, it was "duly" made, but that is pleading a conclusion of law rather than a fact. The time when the appeal was taken was material to show how long the Statute of Limitations was suspended. The effect of the replication was only to aver that the Statute was sus-

pended for a time. Nothing more was well pleaded by it. Instead of meeting it by a demurrer, however, the defendant rejoined, setting forth the date of the appeal, and the date of its decision, and the plaintiff demurred to the rejoinder. It is thus admitted that the plaintiff's appeal was pending only from August 20th, 1867, to January 11th, 1868, four months and twenty-two days. The Act of Congress denied to him a right to sue during that period, and no longer. The time which he permitted to elapse between August 1st, 1866 (when the Act of Congress took effect), and August 20th, 1868, when he appealed, was not taken from him by any controlling power. He lost it by his own delay. It would be giving a most unreasonable construction to the Act were we to hold, that by merely delaying to appeal, when it was all the time in his power, he could have suspended the running of the Statute indefinitely. Deducting, then, the four months and twenty-two days, during which his appeal was pending, and during which he was disabled, from the four years and sixteen days that elapsed between the inception of his right to sue and the commencement of his suit there remains much more than three years in which he was under no disability, except such as was imposed by himself. The judgment of the circuit court on the demurrer was, therefore, correct.

It remains only to add that the case was well removed into the Circuit Court of the United States. *Hodgson v. Millward*, 8 Grant's Cas., 412; *Bigelow v. Forrest* [ante, 696].

The judgment of the Circuit Court is affirmed, with costs.

Cited—12 Wall., 11, 14; 92 U. S., 90; 4 Cliff., 189.

THE NATIONAL BANK OF THE REPUBLIC, *Plff. in Err.*,

v.

REES J. MILLARD.

(See S. C., 10 Wall., 152-158.)

Bank check, rights under—drawn by government officer.

The holder of a bank check cannot sue the bank for refusing payment unless it was accepted by the bank or charged against the drawer.

That the check in question was drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties.

[No. 211.]

Argued Nov. 7, 1870. Decided Nov. 21, 1870.

IN ERROR to the Supreme Court of the District of Columbia.

NOTE.—*Liability of a bank upon a check drawn upon it.*

As to the liability of the bank upon which a check is drawn to pay the holder of it there is some difference among the authorities. Very many of the authorities hold that there is no privity between the holder of the check and the bank until the check is presented and accepted, and that the check does not operate as an equitable assignment of the deposit, nor impose any liability upon the bank to pay to such holder. *Natl. Bk. v. Whitman*, 94 U. S., 343; *Hopkinson v. Forster*, L. R., 19 Eq., 74; *Caldwell v. Merch's Bk.*, 26 U. C. P. C., 294; *Lamb v. Sutherland*, 37 U. C. Q. B., 143; *Bellevue Falls Bk. v. Rutland Co. Bk.*, 40 Vt., 377; *Carr v. Natl. Security Bk.*, 107 Mass., 45; S. C., 9 Am. Rep., 6; *Dana v. Third Natl. Bk.*, 13 Allen, 445; *Case v. Henderson*,

This action was brought in the court below by the defendant in error, to recover the amount of a bank check drawn in his favor upon plaintiff in error. Judgment having been given for the plaintiff in that court, the defendant sued out this writ of error.

The case is further stated by the court.

Messrs. J. H. Bradley and W. S. Cox, for plaintiff in error:

A bank check closely resembles an inland bill of exchange. It is payable at sight, on demand, without grace, and must be presented for payment as soon as may be conveniently practicable.

It gives no right of action in *assumpsit* to the holder against the drawee, until he has accepted it or come under some distinct obligation to the holder to pay that check.

All the elementary writers agree on these points.

Chit., 7th Am. ed., 512; Byles, 1, 14, and *n.* 1; Story, sec. 489; Grant, Bank., 34, 45, 96; 2 Pars. Bills and N., 59, 60, 61, and *n.*, ed. 1868; Levi, Mer. Law, 259.

All the decided cases, except two, are the same.

Chapman v. White, 6 N. Y., 412; *Butterworth v. Peck*, 5 Bosw., 341; *Bullard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wend., 373; *Dykens v. Bk.*, 11 Paige, 616; *Nat. Bk. v. Eliot Bk.*, 5 Am. Law Reg., 711; *Parke, B., arguendo in Bellamy v. Marjoribanks*, 7 Exch., 404; and see the *note* in *Parsons* above referred to and in *n.* 1, in Byles, p. 21; *In re Brown*, 2 Story, 502.

They proceed on the ground that there was no promise by the drawee and, therefore, no privity of contract between the holder and the drawee.

The cases on the other side are *Fogarties v. Bk.*, 12 Rich., 518, and *Vanbiber v. Bk.*, 14 La. Ann., 486.

In each case the court respectively proceeds on the assumption that by the law the merchant establishing a usage having the force of law, the bank or banker on whom a check is drawn is the agent of the depositor, under a contract to pay the funds deposited to the order of the depositor; and the order of the depositor creates an obligation in favor of the payee or holder of the check, which transfers this agency *quoad* the amount of the check, and creates an equitable or legal right in favor of such payee or

holder, which may be enforced by actions at law or in equity. The cases already referred to show that this is purely an assumption by those two courts; that no such commercial law or law merchant exists; and indeed it is conceded by *Judge Johnson* in his opinion in the first named of the two cases, that in the books and reports "We do not hear of such an action on the part of the holder."

Upon elementary principles, the holder of a check without acceptance cannot have a right of action against the bank or drawee.

This case has settled in *Thompson v. Riggs*, 5 Wall., 678 (72 U. S., XVIII., 707), that the relation of depositor and banker is that of debtor and creditor. The moment the deposit is made it becomes part of the property of the bank, under a contract to repay the amount to the depositor or to his order, at such time and in such amount as he may direct. The funds are no longer the funds of the depositor, but of the bank; and the depositor is the creditor for the principal sum. He has a right to draw for them in such sums as he may see fit.

The obligation of the banker to the depositor is perfect. The latter may maintain an action for the whole deposit; he may countermand any and all the checks he has given; if he has funds when the check is presented, he may maintain an action on the case for a refusal by the banker to pay his check. The effect would be, that a right of action for the same money in the hands of a third party, existed in two persons upon one promise at the same time.

Besides a check is not payment unless it is received as such; the payee taking the risk of its being paid, and a receipt for a check or even a surrender of a bill of exchange on receiving a check is not payment, unless the check is paid. See cases already cited.

Mr. Edwin L. Stanton, for defendant in error:

The court properly refused to rule that the plaintiff below could not recover unless the defendant had accepted, or had promised the plaintiff to pay to him or his assignees the particular check in controversy.

While a check resembles a bill of exchange in some respects, it does not in all; and an argument from analogy must have regard for the differences.

A bill of exchange is, *prima facie*, a single transaction between the drawer and the drawee,

23 La. Ann., 49; S. C., 8 Am. Rep., 590; *Etna Natl. Bk. v. Fourth Natl. Bk.*, 46 N. Y., 32; S. C., 7 Am. Rep., 314; *Bk. of Republic v. Millard*, *supra*, and cases therein cited; *Planters' Bk. v. Merritt*, 7 Heisk., 117; *Planters' Bk. v. Keesee*, 7 Heisk., 200; *Moses v. Franklin Bk.*, 34 Md., 574.

Some cases, however, hold that a check is an equitable assignment of so much of the deposit, and transfers it to the holder upon presentment, if the funds are there to meet it, and that he may sue without waiting for a promise to pay the check. *Fogarties v. State Bk.*, 12 Rich., 518; S. C., 8 Am. L. Reg., 393; *Munn v. Burch*, 25 Ill., 35; *Roberts v. Corbin*, 28 Iowa, 321; *Fourth Natl. Bk. v. City Natl. Bk.*, 68 Ill., 398; *Lester v. Given*, 8 Bush., 357; *Zelle v. Ger. Savings Instn.*, 4 Mo. Ap., 401; *McGrade v. Ger. Savings Instn.*, 4 Mo. Ap., 330.

It has also been held that the check holder has a right of action in *assumpsit* against the bank, when it has funds of the drawer available, upon the implied promise which the law raises in his behalf. *Chicago, &c., Marine Ins. Co. v. Stanford*, 28 Ill., 165; *Brown v. Leckie*, 43 Ill., 500; *Vanbiden v. Bk. of La.*, 14 La. Ann., 481; *Seventh Natl. Bk. v. Cook*, 73 Pa. St., 485.

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When payment of a check on a bank is refused, the recourse of the holder is against the drawer and not against the bank, even though bank held funds of the drawer sufficient to pay the check. *Moses v. Franklin Bk.*, 34 Md., 574.

When a bank receives a check drawn on it and charges it against the drawer, and settles with him upon that basis, the payee of the check has a right of action against the bank for the amount of the check. *Seventh Natl. Bk. v. Cook*, 73 Pa. St., 483; S. C., 13 Am. Rep., 751.

A check operates to transfer the sum named to payee, who may sue for and recover the amount from the bank, and a transfer of the check carries with it the title to the amount named in the check. *Union Natl. Bk. v. Oceana County Bk.*, 80 Ill., 212; S. C., 23 Am. Rep., 185.

A check in the ordinary form does not operate as an assignment of so much of the funds in the drawer's hands, nor when a receiver of drawer has, subsequent to the giving of the check, drawn all the funds out, entitle the holder to a preference to other creditors. *Atty-Gen. v. Continental Life Ins. Co.*, 71 N. Y., 325; S. C., 37 Am. Rep., 55; *Duncan v. Berlin*, 60 N. Y., 151; *Tyler v. Gould*, 48 N. Y., 622.

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the latter does not hold himself out as the custodian and disbursor of the former's money. He may not be even a debtor to the former, nor hold any funds for him. Hence, in the case of a bill of exchange, arises the necessity for the drawee's acceptance, which is recognition by him of the drawer's competence to give the direction expressed by the bill.

Obligation to accept, with the resulting rights of holders who have relied on the faith of the promise, may be fairly implied from the custom of trade or the course of business between the parties.

Mandeville v. Welch, 5 Wheat., 286; *Russell v. Wiggin*, 2 Story, 237; *Carnegie v. Morrison*, 2 Met., 381.

Now, bank checks are drawn on common repositories where many persons agree to keep their cash, to be always and immediately ready at their call or subject to their direction, in any amount, to any and every payee. A check, therefore, requires no acceptance in respect to commercial paper. No custom is more prevalent, none more practically affects the dealings of men, than the usage and regular course of business out of which arises an understanding and expectation that a check upon presentment for payment will be paid; and if the drawer or depositor has the money to meet it, he transfers to the holder the title to the money it calls for, and will at once be paid as matter of right and not of favor. Upon the strength and convenience of this usage and understanding, checks pass from hand to hand like cash, and are used in most payments and settlements between individuals and banks. The promise implied from this usage and held out to the commercial world by banks, is a valid *assumpsit* to an individual holder, and gives him a consequent right of action independent of acceptance of the particular check.

The weight of judicial authority is on the side of the holder's right of action against the drawee.

Munn v. Burch, 25 Ill., 35; *Ins. Co. v. Stanford*, 28 Ill., 168; *Fogarties v. Bk.*, and *Ambler v. Bk.*, 12 Rich., 518. In Louisiana the same doctrine was held in 14 La. Ann., 486.

In *Morse, Banks and Banking* (1870), 459, the question is examined elaborately and the authorities reviewed, and the same conclusion reached. The reasoning in support of the rights rests upon that of this court in *Mandeville v. Welch*, 5 Wheat., 286; especially upon the doctrine there stated, that "An obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as part of their contract."

Reliance is also had on *Carnegie v. Morrison*, 2 Met., 381; *Weston v. Barker*, 12 Johns., 276; *Russell v. Wiggin*, 2 Story, 237; *Story, Bills*, secs. 20, 213; *Brewer v. Dyer*, 7 Cush., 337; 8 Kent, Com., 105, n. a; *Beawes, Lex Mercatoria*, 371.

Mr. Justice Davis delivered the opinion of the court:

This is an action of *assumpsit*, brought by the defendant in error against the National Bank of the Republic, for failing to pay a check drawn on it in his favor by one Lawler, a paymaster in the United States Army. The declaration, in addition to the special count on

the transaction, contained a general count for money had and received by the defendant, to the use of the plaintiff.

The only question presented by the record which it is material to notice is this: can the holder of a bank check sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer?

It is no longer an open question in this court, since the decision in the cases of *Marine Bk. v. Fulton Bk.*, 2 Wall., 252 [69 U. S., XVII., 785], and of *Thompson v. Riggs*, 5 Wall., 663 [72 U. S., XVIII., 704], that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the Bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst and Campbell, in the House of Lords, in the case of *Poley v. Hill*, 2 Cl. & F., H. of L. Cas., and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect.

As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the *status*, which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring *assumpsit* for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes him no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy

to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the Bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge (*Chapman v. White*, 6 N. Y., 417), is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions. *Chapman v. White*, 6 N. Y., 412; *Butterworth v. Peck*, 5 Bos., 341; *Bullard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wend., 373; *Dykens v. Bk.*, 11 Paige, 616; *National Bk. v. Eliot Bk.*, 5 Am. Law Reg., 711; Pars. B. & N., ed. 1863, pp. 59, 60, 61, and n.; Parke, Baron, in argument in *Bellamy v. Majoribanks*, 8 Eng. L. & E., 522; *Wharton v. Walker*, 4 B. & C., 168; *Warwick v. Rogers*, 5 Man. & G., 374; Byles, Bills, ch. Check on a Banker; Grant, Banking, Lond. ed. 1856, p. 96.

The few cases which assert a contrary doctrine, it would serve no useful purpose to review.

Testing the case at the bar by these legal rules, it is apparent that the court below, after the plaintiff closed his case, should have instructed the jury, as requested by the defendant, that the plaintiff, on the evidence submitted by him, was not entitled to recover. The defendant did not accept the check for the plaintiff, nor promise him to pay it but, on the contrary, refused to do so. If it were true, as the evidence tended to show, that the Bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature, to a person not authorized to receive the money, it does not follow that the Bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment.

It may be, if it could be shown that the Bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex equo et bono* would be applicable, as the Bank, having assented to the order and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use and, therefore, under an implied promise to him to pay it on demand.

It is hardly necessary to say that the check in question, having been drawn on a public depository, by an officer of the government, in favor of a public creditor, cannot change the rights of the parties of this suit. The check was commercial paper, and subject to the laws which govern such paper, and it can make no difference whether the parties to it are private persons or public agents. *U. S. v. Bk.*, 15 Pet., 377.

As soon as the deposit was made to the credit of Lawler as paymaster, the Bank was authorized to deal with it as its own, and became answerable to Lawler for the debt in the same manner that it would have been had the deposit been placed to his personal credit.

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As this case will be remanded for a new trial, it is not necessary to notice the exceptions taken to the charge of the court on the evidence introduced by the defendant.

Judgment reversed and a venire de novo awarded.

Cited—44 U. S., 344; 104 U. S., 308; 107 U. S., 612; 110 U. S., 152; 7 Blac., 185, 199; 2 Wood., 383; 1 McCrary, 503; 15 Bank. Reg., 219, 461; 16 Bank. Reg., 401; 17 Blatchf., 321, 411, 412; 90 N. Y., 536; 73 Pa. St., 485; 7 Am. Rep., 316, 317 (48 N. Y., 52); 9 Am. Rep., 9 (107 Mass., 49); 13 Am. Rep., 752 (73 Pa. St., 485); 23 Am. Rep., 72 (123 Mass., 196); 34 Am. Rep., 370 (127 Mass., 298); 84 Am. Rep., 323 (51 Md., 562); 43 Am. Rep., 413 (15 Vroom, 638).

J. L. HORNSBY AND JOHN ROLAND,
Appts.,
v.

UNITED STATES.

(See S. C., 10 Wall., 224-245.)

Mexican grants, of three kinds—vested interest—approval—map—recital as evidence—neglect of governor—termination of Mexican authority—juridical possession—confirmation.

Grants of the public domain of Mexico were of three kinds: 1, grants by specific boundaries; 2, grants by quantity; and, 3, grants of places by name.

Under grants of the first kind, as between the Government and the grantee, the latter had a vested interest in the quantity of land mentioned. The general gift became a particular gift when the survey was made.

Such grant was subject to the approval of the Departmental Assembly, and had certain conditions annexed.

That no map accompanied the petition is not a controlling objection.

Where the grant recites that the necessary steps had been taken and inquiries made, something more than mere surmises are necessary to show that the recital is false.

The clause subjecting the grant to the approval of the Departmental Assembly did not prevent the title from passing to the grantees upon the execution of the instrument; but until such approval the estate granted was subject to be defeated.

It was the duty of the Governor, and not of the grantees, to submit to the Assembly grants issued by him for its approbation. His neglect in this respect did not defeat the grantees of the estate already vested in them.

The court cannot inquire into any acts or omissions of the Mexican authorities since those authorities were displaced. It is not authorized to pronounce a forfeiture for anything done or omitted by them since that period.

The authority and jurisdiction of Mexican officials are considered as having terminated July 7, 1848.

Mere neglect to comply with the condition to obtain juridical possession did not, of itself, work a forfeiture of the grantees' right under the Mexican law.

There having been no forfeiture of the grantees' interest in the present case, nor any such disregard of the conditions annexed to their grant as to have justified a forfeiture, the claimants under the grant are entitled to a confirmation.

[No. 204.]

Argued Nov. 1, 1870. Decided Nov. 21, 1870.

APPEAL from the District Court of the United States for the District of California.

This case are upon a petition filed before the Board of Land Commissioners of California, by the appellants, to secure the confirmation to them of title to a certain tract of land.

This was a claim for nine square leagues of land, purporting to be the vacant or surplus land of the plains called Las Animas and the

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rancho de Pala, and embracing the lands of the Cerro Colorado (Red Mountain).

The petitioners claimed to derive their title from a grant made by Governor Pio Pico to Don Luis Arenas and Don Juan Roland, on the 6th day of May, 1846. A traced copy of an *espediente* from the archives of the Mexican Government in California, now in the custody of the United States Surveyor-General, duly certified, was filed in the case.

It appears from this document that the grantees presented their petition to the Governor, for the grant, May 5, 1846. On the next day, that officer, without, so far as appears from the record, making any inquiries or investigation in relation to the matter, entered a decree of concession and directed the title to be issued and delivered to the interested parties.

There was no evidence that the grant was ever approved by the Departmental Assembly, or that judicial possession was ever given; nor is it shown that the grantees were ever in possession of the land or occupied it in any manner. The lands, all described in the grant, are situated in the vacant or surplus lands of the place called Las Animas and of the *rancho de Pala*, in the jurisdiction of the *pueblo* of San José Guadalupe—belong to Don Carlos Weber and José de Jesus Bernal, embracing the lands of the Cerro Colorado (Red Mountain), towards the slope of the valley, until the full number of nine leagues is made up.

A careful examination of these files affords no aid to the description contained in the grant. There was nothing to show that there is any *sobranste* or surplus contained within the limits of their claim; or if there was, in what part of them it is situated.

Nor was there any proof of the existence of the position of the mountain called Cerro Colorado.

A decree having been entered against the said petitioners, they took an appeal to the United States District Court, in which the decree was affirmed. The petitioners thereupon took a further appeal to this court.

The case is further stated in the opinion of the court.

Messrs. M. Blair and F. A. Dick, for appellants:

The objections to the confirmation, by the Board, were:

1. That the grant was not approved by the Departmental Assembly.

2. That the grantees were never in possession.

3. That there is nothing to show that a surplus or *sobranste* existed in the place called Las Animas and in the *rancho de Pala*, after satisfying the grant to Weber and Bernal.

4. That the usual inquiry in the *informe* was not made.

With respect to the first three objections of the Board, little need be said. These objections were all overruled by this court in *Prémont's case*, 17 How., 542 (58 U. S., XV., 241); and the decision on these points has been repeatedly affirmed since in other cases.

In *Larkin's case*, 18 How., 557 (59 U. S., XV., 485), there was no description and no possession. In *Rodriguez v. U. S.*, 1 Wall., 588 (68 U. S., XVII., 691), the court says that in some of the cases the decree of confirmation de-

signed the land; while in others the grant only was confirmed, leaving it to the surveying department to ascertain the boundaries.

In reference to the *informe*, the provision of the 8d Article of the Ordinance of 1828 is, that "The Governor shall proceed immediately to obtain the necessary information, whether the petition embraces the requisite conditions required by the law of the 18th of August, 1824."

* * * Or if it be preferred, the respective municipal authority may be consulted whether there be any objection to making the grant or not."

Rock. Mex. & Span. L., 453.

As the Governor certifies in the grant that he had fully informed himself as to the facts required by law, preliminary to the making of the grant, the reference to the municipal authorities, which he was at liberty to make in case he did not otherwise obtain the information, became unnecessary. This construction of the Article was adopted by this court in the case of *The U. S. v. Johnson*, 1 Wall., 326 (68 U. S., XVII., 597).

Moreover, it is a well settled principle, that when a patent is produced, all previous steps required by law before its emanation are presumed.

Polk v. Wendal, 9 Cranch, 87; *Patterson v. Winn*, 11 Wheat., 383.

Messrs. E. R. Hoar and John A. Wills, special counsel for appellee:

The grant was not approved by the Departmental Assembly, as required by Regulation 5, although in the decree of concession, a special order is made that "the *espediente* shall be retained to be submitted for the approval of the Departmental Assembly."

The grant is vague and indefinite in its description of boundaries. It is for a *sobranste*, or surplus of land, in two other grants. There is no evidence that any such surplus exists, or if so, to show where the grant should be located. A map is a necessary part of such a grant; for want of which the grant is void for uncertainty.

U. S. v. Pucheco, 23 How., 226 (68 U. S., XVI., 386).

But waiving all defects of form, the claim must be rejected for a total failure to comply with all the terms and conditions of the grant.

It was a colonization grant, made with a view to the occupation and cultivation of the land. The grantees never have been in possession for an hour; nor have they shown anything to excuse them for this neglect.

They have, therefore, no equity entitling them to a confirmation of this claim.

Yontz v. U. S., 23 How., 497 (64 U. S., XVI., 478); *Pico's case*, 2 Wall., 279 (69 U. S., XVII., 856); *U. S. v. Pico*, 23 How., 406 (63 U. S., XVI., 357). In *Roland's case* (*ante*, 184), there was some evidence of occupation, but in this case there is none.

This case, therefore, falls within the rule stated in *White v. U. S.*, 1 Wall., 660 (68 U. S., XVII., 693).

"It has been held by this court, in a long and uninterrupted line of adjudications, that when there is no archive evidence, and its absence is unaccounted for, and there has been no such possession as raises an equity in behalf of the party, and especially when in addition, the *espe-*

diente produced is tainted with suspicion of fraud, the claim must be rejected."

Mr. Justice Field delivered the opinion of the court:

As we have had occasion to observe in several instances—*Higuera v. The U. S.*, 5 Wall., 828 [73 U. S., XVIII., 469]; *Aloisio v. U. S.*, [ante, 805]—grants of the public domain of Mexico, made by Governors of the Department of California, were of three kinds: 1, grants by specific boundaries, where the donee was entitled to the entire tract described; 2, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by out-boundaries, where the donee was entitled out of the general tract only to the quantity specified; and 3, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence.

The greater number of the grants which have come before this court for examination have belonged to the second class. They have usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession was limited to the specific quantity mentioned, and that the magistrate of the vicinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation.

When the first grant of this kind was presented for the consideration of this court, in the *Prémont* case, 17 How., 542, 558 [58 U. S., XV., 241, 246], which was for ten leagues within a tract of much greater extent, it was objected that the grant was void for uncertainty of description, and that no interest passed to the grantee until the quantity was surveyed and severed by known boundaries from the public domain; but the court held the objection untenable, and that, as between the Government and the grantee, the latter had a vested interest in the quantity of land mentioned. "The right to so much land," said the Chief Justice, in delivering the opinion of the court, "to be afterwards laid off by official authority in the territory described, passed from the Government to him by the execution of the instrument granting it." And in support of the principle asserted, the court cited the case of *Rutherford v. Greene*, reported in 2 Wheat., 196, which arose upon an Act of the State of North Carolina, passed in 1782; providing that twenty-five thousand acres of land should be allotted and given to General Greene and his heirs, within the bounds of a tract reserved for the use of the army, to be laid off by commissioners appointed for that purpose. The commissioners, in pursuance of the Act, allotted the twenty five thousand acres, and caused the quantity to be surveyed off, and the survey to be returned to the proper office, and the question upon which the case turned related to the validity of the title of General Greene, and the date at which it commenced. The court held that the general gift of twenty-five thousand acres lying in the territory reserved, became by the survey a particular gift of the quantity within the survey, and concluded an elaborate examination of the title by stating that it was the clear and unanimous opinion of

the court that the Act of 1782 vested a title in General Greene to the twenty-five thousand acres to be laid off within the boundaries designated, and that the survey, made in pursuance of the Act, gave precision to that title, and attached it to the land surveyed.

And this court, in deciding the *Prémont* case, observed in reference to this case of *Rutherford v. Greene* [supra], that "It recognizes as a general principal of justice and municipal law, that such a grant for a certain quantity of land by the Government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest. In the language of the court, the general gift becomes a particular gift when the survey is made; and when this doctrine has been asserted in this court, upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican Government, where a controversy arises between the United States and the Mexican grantees."

Under Mexico the measurement and segregation from the public domain of the quantity, specified in this class of grants, could only be made by the officers of the Government. A measurement by the grantee was inoperative for any purpose. Although a general possession of the land ceded was permitted in California before the official measurement, the grantee acquired by such possession no absolute right to the tract occupied, or any interest which could control the action of the officers of the Government in the segregation of the land. A private survey was as ineffectual under the former Government as under the present Government. The right, which the former Government reserved to itself over the survey, passed, with all other public rights, to the United States upon the cession of the country, and is now to be exercised in pursuance of their laws. *Rutherford v. Greene* [supra].

Now, if we consider the present case in the light of these views, we shall find little difficulty in its disposition. The grant here, like the one in the *Prémont* case, is a grant by quantity. It was made under the same law and regulations, and like that, was subject to the approval of the Departmental Assembly, and has certain conditions annexed. It was issued to Luis Arenas and John Roland, on the 6th of May, 1846, by the then Governor of California. A petition for the land had been presented by them to him on the 5th of May, and the same day he made an order on its margin directing a decree of concession, and the issue of a grant to the parties. On the subsequent day, the 6th, a formal decree was signed by him declaring the petitioners owners of the land, and directing a grant to be issued, which would secure to them the property. The grant followed. The petition, the marginal order, the decree of concession, and the draft of the grant, are in the Mexican archives now in the custody of the Surveyor-General of the United States for California. Traced copies of these instruments, and the original grant issued, were produced by the claimants before the land commissioners and in the district court. Their genuineness and authenticity were not disputed in either tribunal. The issue of the grant by the Governor was admitted in the writ-

ten stipulation of the counsel of the Government.

Several years previous to the issue of this grant to Roland and Arenas, a grant of two square leagues in the place called Las Animas had been made to one Thomas Brown, from whom the property by various *mesne* conveyances had passed to one Charles Weber; and a grant of about the same quantity in the place called Cañada de Pala had been made to José Bernal and others. For the surplus land remaining in these places, after satisfying the previous grants, including lands of the Cerro Colorado, within the jurisdiction of the same *pueblo*, to make up the amount of nine leagues, the petition of Roland and Arenas was presented, and the grant to them was issued. No map of the land solicited accompanied the petition, but the petitioners offered to furnish a map to the governor at a convenient time, that is, whenever there might be occasion for its use.

The grant, after reciting the petition, and that the necessary steps had been taken and inquiries made, proceeds to state, that the Governor, by a decree of that day, in the exercise of the powers with which he was invested by the Supreme Government, and in the name of the Mexican Nation, had declared and did declare the parties owners in full property of the land solicited; describing it as in the petition, in conformity with the Law of 1824 and the Regulations of 1828, subject to the approval of the Departmental Assembly and certain conditions annexed.

The instrument purports on its face to transfer a full title to the property solicited. If valid when issued, it passed, according to the decision in the *Frémont* case, to the grantees a present and immediate interest in the quantity of land specified, to be subsequently laid off by official authority. And this brings us to the questions, whether there was anything in the action of the Governor or of the grantees previous to its issue, which impaired its validity; and if the instrument was valid when issued, whether there was any such subsequent disregard of its conditions as to work its forfeiture.

That the Governor, under Mexico, was authorized to make grants of land in the Department of California is not questioned; and that the instrument produced in this case is genuine and was issued by him is admitted. But it is said that the grantees did not accompany their petition with a map of the land solicited, and that the Governor did not make any inquiries as to the qualifications of the petitioners, and the condition of the land, as required by the Regulations of 1828, which were adopted to carry into effect the Colonization Law of 1824.

It is true that the regulations provided that a map of the lands solicited should accompany the petition, but a compliance with the provision was not exacted in all cases. The Governors exercised a discretionary power of dispensing with it under special circumstances. No motive existed for insisting upon its presentation when the information, which it was designed to impart, was already in the public archives open to the inspection of the Governor; and such information existed there in the present case. At any rate, the Governor was satisfied with the offer of the petitioners to furnish a map at the proper time subsequently.

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As was said in the *Frémont* case, in answer to an objection of a similar character, "The court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were instructed with their execution." 17 How., 561 [58 U. S., XV., 247].

It is also true that the regulations provided that the Governor, upon receiving a petition for land, should proceed to obtain the necessary information as to the qualifications of the petitioner and the character of the land. But they did not prescribe any particular mode by which this information should be acquired. It might have been obtained by the Governor from his own investigations, or he might, as stated in the regulations, if that course were preferred, consult the appropriate municipal authority, which was that of the district, whether any objection existed to making the grant. In some instances, as in the case of *Sutter*, the character of the petitioner, and of the land solicited, were matters of general notoriety. *U. S. v. Sutter*, 21 How., 172 [52 U. S., XVI., 119]; *The Sutter* case, 2 Wall., 563 [59 U. S., XVII., 381]. The objection appears to proceed upon the idea that a formal reference to the local magistrate, and a report from him, were essential to give the information required. This course was usually adopted, but it was not essential. The grant in this case recites that the necessary steps had been taken, and inquiries made, and something more than mere surmises at this day are necessary to show that the recital is false. *U. S. v. Johnson*, 1 Wall., 829 [68 U. S., XVII., 599].

There is nothing in these objections which touches the validity of the instrument at the time it issued. And the clause subjecting the grant to the approval of the Departmental Assembly did not prevent the title from passing to the grantees upon the execution of the instrument. Such approval was not a condition precedent to the vesting of the title. According to the Regulations of 1828, the authority to make grants of land in California was lodged solely with the Governor. It was not shared by him with the Assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subjected to be defeated. With such approval the grant became, as it was termed in the regulations, "definitively valid;" that is, it ceased to be defeasible, and the estate was no longer liable to be divested, except by proceedings for breach of its other conditions.

Besides it was the duty of the Governor, and not of the grantee, to submit to the Assembly grants issued by him for their approbation. His neglect in this respect suspended the definitive validity, as it was termed, of the grants; that is, it prolonged the liability of the estate to be defeated by the action of the Assembly, and of the Supreme Government thereon, to which the matter was referred in case the approval of the Assembly was not obtained; and no other consequence followed. His neglect was not permitted to operate to divest the grantees of the estate already vested in them. *U. S. v. Reading*, 18 How., 4 [59 U. S., XV., 292]; *U. S. v. Vaca*, 18 How., 556 [59 U. S., XV., 485]; *U. S. v. Larkin*, 18 How., 558 [59 U. S., XV., 486]; *U. S. v. Cervantes*, 18 How.,

553 [59 U. S., XV., 484]; *U. S. v. Johnson*, 1 Wall., 329 [68 U. S., XVII., 598]. In many instances years elapsed before the approval was obtained, although the grantees were in the meantime in the possession and enjoyment of the property; and in many instances no approval was had previous to the conquest.

The grant being valid at the time of its issue, has there been any such disregard of the conditions annexed as to work its forfeiture? The objection taken is that the grantees never applied to the proper magistrate for official delivery of possession, as provided in the second condition; and that they never entered upon the land. The objection applies only to the period intervening between the date of the grant, and the time when the country passed under the jurisdiction of the United States. The question is, what right did the grantees acquire in the land from the Mexican authorities? The court cannot inquire into any acts or omissions by them since those authorities were displaced. It is not authorized to pronounce a forfeiture for anything done, or anything omitted by them since that period. Now, the military forces of the United States took possession of Monterey, an important town of California, on the 7th of July, 1846, and within a few weeks afterwards occupied the principal portions of the country; and this occupation continued until the Treaty of Peace. On that date, therefore, the authority and jurisdiction of Mexican officials are considered as having terminated. The Political Department of the Government, at least, has designated that day as the period when the conquest of California was completed, and the judiciary, in this respect, follows the action of the Political Department. *U. S. v. Yorba*, 1 Wall., 423 [68 U. S., XVII., 637].

Between the date of the grant under consideration and the period thus designated, only sixty-one days elapsed. There are very few instances of grants in California where a juridical possession was delivered to the grantees within a period as limited as this after their issue. In many instances years elapsed before this proceeding was had; and in many instances no juridical possession was ever delivered previous to the conquest.

In the case at bar it was impossible for the magistrate to deliver such possession until the previous grants to Weber and Bernal, in the same general locality, had been surveyed and severed from the public domain. It was for the surplus in that territory, remaining after the quantities granted to them had been satisfied, that the present grant called. What part of the general tract occupied by the previous grantees would be finally set apart to them, could not be known until the official measurement. The grantees in this case were, therefore, necessarily compelled to await the action of the elder grantees; and no action was ever taken by them to segregate the quantity granted to them previous to the conquest.

This want of segregation of the quantities claimed by the previous grantees furnishes also an excuse to the grantees here for not entering upon the land without the delivery of juridical possession. To have made such entry would have been to intrude upon the possessions of others. They could not of themselves have undertaken to determine what part of the general

tracts should be set apart to the earlier grantees, and appropriate the balance as the surplus to which they were entitled.

But independent of the considerations stated, it is a sufficient answer to the objection to say, that mere neglect to comply with the condition did not of itself work a forfeiture of the grantees' right under the Mexican law. The neglect of a grantee to apply for or to take possession, if unreasonably prolonged, only left the land open to denouncement by other parties. The interest of a grantee could not be divested under the Mexican law any more than at the common law, upon mere allegations or surmises. Some formal and regular proceedings were required to effect such divestiture, and under the Mexican law these had their inception in what is termed a denouncement by a party desirous of obtaining the land. An investigation then followed whether or not the condition had been complied with, or so disregarded as to justify a decree of forfeiture. Without such inquiry and decree the title did not revert to the government, nor was the land subject to be re-granted.

The object of the colonization laws and regulations of Mexico was the settlement of the vacant lands of the Republic, and grants were usually made to accomplish this purpose without other consideration. But the public, as observed in the *Frémont* case, "had no interest in forfeiting them even in these cases, unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements." *Frémont v. U. S.*, 17 How., 561 [58 U. S., XV., 247].

The several cases cited by counsel, where the absence of possession and the omission of proceedings usually taken in obtaining concessions of land, are noticed and made grounds of objection to a confirmation, have no application. They are cases where the grants produced were unaccompanied by any archive evidence, and the attempt was made to uphold them by evidence of the recollections of witnesses. Thus, in the *Cambuston* case, 20 How., 59 [61 U. S., XV., 828], the alleged grant produced was unknown to any person beside the grantee and an interested party until July, 1850, although bearing date in May, 1846, and no trace of its existence was found in the archives of the country.

So in the *Castro* case, 24 How., 346 [65 U. S., XVI., 659], the instrument produced as a grant first made its appearance in June, 1849, though dated in April, 1846, and was not sustained by a single document in the archives. The absence of all traces of the grants, where evidence would usually be found, if it had existed, naturally created a strong presumption against their validity, which could not be overcome by testimony resting on the uncertain recollections of Mexican officials.

There having been no forfeiture of the grantees' interest in the present case, nor any such disregard of the conditions annexed to their grant as to have justified a forfeiture, the claimants under the grant are entitled to a confirmation. The interest which passed by the grant, whether it be regarded as a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, or as a mere equitable or inchoate title, constituted property which the United States were bound to protect by the

stipulations of the Treaty of Cession. That Treaty provides for the protection of the rights of property of the inhabitants of the ceded territory. And, independent of the Treaty, they were entitled to such protection by the law of nations, according to which, as said by this court in *Strother v. Lucas*, 12 Pet., 436, "The rights of property are protected even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect."

By the term "property," as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of *Soulard v. U. S.*, 4 Pet., 511, when considering the import of the term in a stipulation contained in the Treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property. "It comprehends," said the court, "every species of title, inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away."

It follows from the views we have expressed that the appellants possessed under the grant in this case, at the date of the cession of California to the United States, a right of property in the land granted and, as a consequence, that their claim is valid and should be confirmed.

The decree of the District Court must, therefore, be reversed and the cause remanded, with directions to enter a decree confirming the claim of the petitioners; and it is so ordered.

Mr. Justice Davis, dissenting:

I am unable to concur in the decree of the court in this case, and as the claim embraces a large tract of country which is a part of the public domain, if this claim is not sustainable, I think it proper to state, as briefly as possible, the grounds of my dissent. Similar claims have been so frequently before the court, that any extended discussion of the general rules of law applicable to them is not necessary, as these rules have been so often explained in our reported decisions. It is clear that valid claims should be confirmed, and equally clear that those of a contrary character should be rejected. Tested by the rules of law established by this court in analogous cases, I am of opinion that the claim of the appellants is invalid. The Mexican authority was overthrown in California on the 7th of July, 1846, but the history of the times made it clear to every intelligent man for a considerable period before this date, that the country would pass to the jurisdiction of the United States. During this period grants of land were made very freely by Pio Pico, the acting Governor, and the records of this court show that many of these grants were invalid and fraudulent. Doubtless, grants were made by him within that time which were valid, but all must agree, I think, that every grant which bears his signature should be examined with the most careful scrutiny. By the record in this case, it appears that the petition for this grant is dated the 5th day of May, 1846, and the grant, if any were made, was on the follow-

See 10 WALL.

ing day, and did not comply with the requirements of the law conferring power on the Governor of California to grant lands. The Mexican law, to make a title valid, required it to be evidenced by certain written instruments which, taken together, constitute an *expediente*. The *expediente*, when complete (as decided by this court), consisted of a petition, with a *diseno* or map annexed; a marginal decree referring the petition to a local officer to report whether the land was vacant and grantable, and the petitioner a proper person to obtain the bounty of the Government; the report of that officer on these subjects, called an *informe*; the decree of concession and a copy or duplicate of the grant, as the original was delivered to the petitioner. It was in express terms required by the Mexican law, that the petitions for lands, and the grants, with maps annexed, should be recorded. *Knight's case*, 1 Black, 228 [66 U. S., XVII., 76]. It was insisted that the papers which were produced in this case before the commissioners, constituted such an *expediente*, but if it be conceded the papers are of Mexican authority, they do not contain any *diseno* or map, or reference to the local officer, or his report thereon. There could be no record of the petition and grant with the map of the land granted, because no map of any kind was annexed to the petition, and there is no evidence in the record that any part of the *expediente* was recorded as required by Mexican law. Grants of this kind were made subject to the approval of the Department Assembly, but there is nothing to show an attempt, even, to comply with this requirement. On the contrary, there is every reason to conclude that it never was presented to that Assembly, as it is well known that there were a large number of grants made about that time which were presented and approved, and as this one was not approved, the inference is fair and reasonable that it was never presented for approval. It also appears that no judicial measurement of the land was made, nor possession of it taken by the supposed grantees, as required by the Mexican law, and the conditions of the grant.

The documents offered in evidence are not shown by any competent proof to be Mexican documents. The court in its opinion describes them as having been produced from the public archives, and this statement might create the impression that the *expediente* under consideration came from the Mexican archives. This cannot be so, as the number of the *expediente* proves, beyond a doubt, that it is one of those papers found in the custom-house at Monterey the latter part of the year 1847, or the fore part of the year 1848, which were subsequently included in Hartnell's Index.

This index is not, and never has been, regarded as a Mexican document. *Knight's case* [supra]. Since the decision of *Castro's case*, 24 How., 349 [65 U. S., XVI., 660], this court, until now, as I suppose, has adhered to the principle, that whoever claims title to land in California under a grant from a Mexican Governor, must, as a general rule, produce the grant and show that it came from the public archives of land titles in the proper office of that department, or that it was found in Jimeno's Index, or that it was recorded in the *Toma de Razon*. It is true, in that case, Chief Justice Taney said

that secondary evidence could be received, when it appeared that the grant had been properly made, and that the papers, or some of them, in the office where there were kept, had been lost or mislaid, but the court held that a party setting up a grant by such proofs, must also show that there was a judicial survey of the land, and that the supposed grantees took actual possession of it, and exercised acts of ownership over it, before the change of jurisdiction. There are a number of cases in which the same rule is laid down (some of earlier and others of later date than *Castro's* case), and it seems to me they ought to control the decision of this case. *U. S. v. Cambuston*, 20 How., 59 [61 U. S., XV., 328]; *Puentes v. U. S.*, 22 How., 445 [63 U. S., XVI., 376]; *U. S. v. Bolton*, 23 How., 341 [64 U. S., XVI., 569]; *White v. U. S.*, 1 Wall., 660 [68 U. S., XVII., 698]; *Pico v. U. S.*, 2 Wall., 279 [69 U. S., XVII., 856].

No possession of any kind is proved in this case, and the authenticity of this grant, covering an area of over forty thousand acres of land, depends on the testimony of a single witness, unsupported by any proof, except the imperfect or mutilated *expediente* found among a mass of loose papers on the floor of one of the rooms of the custom-house at Monterey, after the Mexican officials had fled, on the approach of our forces.

Possession is essential in such a case to establish an equity, and as none is proved, the claimant has no equity, and in my judgment the decree ought to be affirmed.

Mr. Justice Clifford and *Mr. Justice Swayne* concur in this dissent.

Cited—18 Wall., 263; 97 U. S., 216; 111 U. S., 423; 2 Sawy., 440.

HENRY R. HAZLEHURST AND WILLIAM D. WEIGAND, *Appts.*,

THE STEAMER LULU, THE NEW YORK GUARANTY AND INDEMNITY COMPANY, Claimants.

(See S. C., "*The Lulu*" 10 Wall., 123-204.)

Master's right to procure repairs or supplies in a foreign port—lender must ascertain necessity—defense to such claim—necessity for credit, presumed.

Where repairs or supplies in a foreign port or a port of another State are necessary to render the ship or vessel seaworthy, or to enable her to prosecute her voyage, the master is authorized to procure them, either on the credit of the vessel or that of her owners.

Reasonable diligence must be exercised by the merchant or lender, to ascertain that the repairs and supplies were necessary.

Proof of failure to institute inquiries as to whether the master had funds is no defense to such claim for repairs or supplies even if the master had funds, unless that fact was known to the libellant or such facts and circumstances were known to him as were sufficient to put him on inquiry.

Necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship.

[No. 216.]

Argued Nov. 9, 1870. Decided Nov. 21, 1870.

APPEAL from the Circuit Court of the United States for the District of Maryland.

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The libels in this case was filed in the District Court of the United States for the District of Maryland by the appellants, to recover the value of certain repairs to the steamer, Lulu. A decree was entered in that court in favor of the libellants, which was reversed, upon appeal, by the circuit court; whereupon the libellants took an appeal to this court.

The case is fully stated in the opinion of the court.

Messrs. Orville Horwitz and Geo. H. Williams, for appellants:

The repairs done to the vessel by the appellants were all done by the direction and at the instance of the master, whose approval is attached to the bill. They were ordered on the credit of the ship. The repairs were then necessary by implication of law. *The Grapeshot* (*ante*, 651).

They were also necessary, in point of fact, to enable the vessel to proceed on her voyage. In regard to these facts there is no conflict of evidence. The steamer was owned and enrolled in New York. Baltimore was not, therefore, her home port.

The general principles announced in *The Grapeshot*, declare that liens for repairs can be enforced in admiralty on showing that the repairs were furnished in a foreign port and were necessary to enable the vessel to proceed on her voyage; that the repairs being ordered by the master on the credit of the ship, implies the necessity. These three facts combining, the lien follows as a matter of course, unless there is proof by the claimants that there were funds in the hands of the master to meet the cost of repairs, or that the credit of the vessel was unnecessary. No such proof is furnished or attempted to be furnished by the claimant. The record is wholly without any such evidence, nor could such evidence have been furnished.

But what further appears? It is proved that the steamer was largely in debt to Mr. Keeling, the agent, at the very time that this bill was contracted, and that he was unwilling to advance any more on her account. Not only, therefore, were there no funds in the hands of the agent, but the agent himself was unwilling to trust the owners another dollar. Does this not show the necessity for the credit of the vessel?

Mr. Wm. Meade Addison, for appellees:

The necessity for repairs we admit; but we deny that the credit was given to the ship, or that the material men acted in good faith and made proper and reasonable inquiry.

They knew the vessel was earning freight; they had seen her for many months plying between the harbors of Baltimore and Charleston. They knew that her expenses ought to be paid out of her earnings; and when they were not paid regularly, as they ought to have been, it was their duty to stop furnishing materials, or else call on the owners for explanations, or advices whether they should make further repairs.

In *O'Hara v. The Mary, Bee*, 102, the court uses this language: "To constitute a right to hypothecate the ship, there must be urgent necessity in a foreign port, and a total want of sufficient personal credit." 3 Mod., 244.

The power vested in a master to impawn his owner's ship or goods for necessities furnished in a foreign port, is a legal indulgence founded

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on the urgency of the case and intended for the general benefit of commerce.

"Where money" says Lord Raymond, "is borrowed on a ship before the voyage is begun, she is not answerable in the admiralty." 1 Ld. Raym., 578; 2 Ld. Raym., 982.

The law means to favor the completion, not the commencement, of a voyage.

The Lulu, while obtaining necessities in the Port of Baltimore, made eleven distinct voyages to Charleston and back.

These repairs and supplies were all made, in the language of Lord Raymond, not "to favor the completion of a voyage," but "the commencement," of eleven distinct voyages.

This is an attempted innovation upon the ancient and well established principles of the admiralty law. It has no precedent to support it; and arrayed against it are the principles of sound maritime policy and commercial fair dealing.

The court in its decision in *The Grapeshot* in nowise impairs the force of its language as employed in *Pratt v. Reid*, where it says: These maritime liens in the coasting business and in the business on the lakes and rivers, are greatly increasing, and as they are tacit and secret, not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of this law, in this respect, will tend to perplex and embarrass business rather than furnish facilities to carry it forward.

Pratt v. Reid, 19 How., 861 (60 U. S., XV., 661).

If the libelants ever had a lien, it is lost by their allowing the vessel to leave the port on so many voyages. 2 Wood. & M., 98.

Mr. Justice Clifford delivered the opinion of the court:

Experience shows that ships and vessels employed in commerce and navigation often need repairs and supplies in course of a voyage, when the owners of the same are absent, and at times and places when and where the master may be without funds, and may find it impracticable to communicate seasonably with the owners of the vessel upon the subject.

Contracts for repairs and supplies, under such circumstances, may be made by the master to enable the vessel to proceed on her voyage, and if the repairs and supplies were necessary for that purpose, and were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the State where the vessel belongs, the *prima facie* presumption is that the repairs and supplies were made and furnished on the credit of the vessel unless the contrary appears from the evidence in the case.

Where it appears that the repairs and supplies were necessary to enable the vessel to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the vessel, as well as the master and owners, is responsible to those who made the repairs and furnished the supplies, unless it appears that the master had funds on hand, or at his command, which he ought to have applied to the accomplishment of those objects, and that they knew that such was the fact, or that such facts and circumstances were known to them.

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as were sufficient to put them upon inquiry and to show that if they had used due diligence in that behalf they might have ascertained that the master, under the rules of the maritime law, had no authority to contract for the repairs and supplies on the credit of the vessel.

Repairs and supplies amounting to \$8,796.21, as adjudged by the district court, were made and furnished by the various parties mentioned in the record to the steamship, Lulu, at the request of her master, while she was lying in the Port of Baltimore, and the owners of the steamer refusing to pay for the same, those several parties, including the appellants in this case, filed separate libels against the steamer in the district court to recover the amount of their respective claims. Monitions were issued in the several suits, and the steamer was arrested to answer to the allegations of the respective libels.

Appearance was entered in each suit by the owners of the steamer as claimants, and on their petition, and pursuant to the order of the court, the steamer was sold by the Marshal and the proceeds of the sale were paid into the registry of the court to abide such further order of the court as might be made in the respective causes.

Answers were filed by the claimants to the several libels and the suits were subsequently consolidated, and the order of the court was to the effect that they should be heard together.

Testimony was taken on both sides, and the district court entered a decree that the several libels filed in the case, except one, "be allowed as liens against the steamer to the amount of the respective claims," and by the decree of distribution the court awarded to the appellants the sum of \$2,837.46, as appears of record.

Appeal was taken from that decree by the claimants to the circuit court for the same district, where the parties were again heard, and the circuit court reversed the decree of the district court and ordered, adjudged and decreed, that so much of the fund in the registry of the court as was applicable to the payment of the appellant's claim, under the decree of the district court, should be paid to the claimants as the owners of the steamer. Dissatisfied with that decree, the libelants appealed from the same to this court and now insist that it ought to be reversed.

Prior to the 24th of August, 1866, the title to the steamer was in the grantors of the claimants; but the claimants admit, in their answers, that their grantors, as well as themselves, were residents of New York, and that the Port of New York was the home port of the steamer. Whatever title they have was acquired by virtue of a bill of sale executed on that day, and the record shows that it is duly recorded in the custom-house of that port. Although the bill of sale is absolute in form the claimants allege that it was intended only as a mortgage, but the fact alleged is of no importance in the decision of the case, as it is admitted that the former owners, as well as the claimants, were residents of a State other than the one where the repairs were made and the supplies furnished, and that the steamer belonged to a port of the State where her owners resided.

When arrested the steamer had been engaged for a period of eleven months in carrying pas-

sengers and freight between the Ports of Baltimore, in the State of Maryland, and Charleston, in the State of South Carolina, and the evidence is full to the point that the repairs made and the supplies furnished were necessary to enable the steamer to continue to make her regular trips between those ports, and to fulfill the obligations to the traveling and commercial public which her owners had contracted. Argument upon that topic is quite unnecessary, as the point is conceded by the claimants; but they deny that the repairs and supplies were made and furnished on the credit of the steamer, or that the evidence shows that there was any necessity for any such credit to the steamer. Full proof is exhibited that the repairs were made and the supplies furnished in the several cases at the request of the master, and there is no proof whatever that he had any funds which he ought to have applied, or which he could have applied, to accomplish those objects or any other.

Attempt is made to show that the agent of the steamer had funds derived from freight which might have been so applied, but the evidence in the case fails to establish that theory and satisfies the court that he had no funds of the owners and that he was not under any obligations to grant them any further credit for that purpose.

Unless the repairs or supplies, as the case may be, are necessary to render the ship or vessel seaworthy, or to enable her to prosecute her voyage, it is quite clear that the master, as between himself and the owners, is not authorized to make any such contracts or purchases either on the credit of the vessel or her owners. Such necessity usually arises when the ship or vessel is in a port distant from the owners, and oftentimes when they have no knowledge or means of knowledge as to the actual condition of the vessel, and it is chiefly for that reason that the authority is reposed in the master to act in their behalf and for the best interest of all concerned; but it should be borne in mind that his authority in that respect is limited to the circle of duties which that necessity requires should be performed before the owners can be consulted.

Merchants are not obliged to make advances to the master, nor to make repairs nor furnish supplies at his request, and before they can safely do so they should be reasonably satisfied that the vessel needs what the master requests them to make and furnish, as the law supposes that the vessel is in the port where the request is made, and that they have the opportunity of making due inquiry and investigation upon that point. 3 Pars. Ship., 829; *Bold Buccleugh*, 7 Moore, P. C., 284; Roberts, Adm., 895.

Subject to that limitation the master is the agent of the owners for the voyage, and they are bound to the performance of all lawful contracts made by him relative to the usual employment of the ship and for repairs made and supplies furnished for her use in a foreign port. *The General Smith*, 4 Wheat., 448; *The Chusan*, 2 Story, 468; *The Aurora*, 1 Wheat., 102.

Ports of States other than those of the State where the vessel belongs, are for that purpose considered as foreign ports, and the authority of the master in contracting for repairs and supplies is not confined to such as are absolutely or indispensably necessary, but includes also all

such as are reasonably fit and proper for the ship and the voyage. Where such repairs and supplies are reasonably fit and proper, the master, if he has not funds and cannot obtain such on the personal credit of the owners, may obtain the same on the credit of the ship, either with or without giving a bottomry bond, as necessity shall dictate. Reasonable diligence, in either event, must be exercised by the merchant or lender to ascertain that the repairs and supplies were necessary and proper, as the master is not authorized to hypothecate the vessel, unless such was the fact within the meaning of the maritime law. *The Paragon*, 1 Ware, 823; *The Fortitude*, 8 Sumn., 228.

Such necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them or to provide funds for the cost of them on the security of the ship. *The Grapeshot* [ante, 651]; *The Alexander*, 1 W. Rob., 362; *The Medora*, 1 Sprague, 189.

Proof that the repairs and supplies were necessary will not, in any case, be sufficient to entitle the furnisher or lender to recover by a suit *in rem* against the vessel, if it appear that the master had funds sufficient to execute the repairs and furnish the supplies, and that the party who made and furnished the same knew that fact, or that facts and circumstances were known to him sufficient to put him upon inquiry, and to show that if he had used due diligence he would have ascertained that no funds except such as the master already possessed were necessary for any such purpose.

Good faith is, undoubtedly, required of a party seeking to enforce a lien against a vessel for such a claim, but the fact that the master had funds which he ought to have applied to that object, is no evidence to establish the charge of bad faith in such a case, unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. *The Sarah Starr*, 1 Sprague, 455.

Express knowledge of the fact that the master had sufficient funds for the purpose, is not necessary to maintain the charge of bad faith, as it is well settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made. *May v. Chapman*, 16 Mees. & W., 855; *Goodman v. Simonds*, 20 How., 348 [61 U. S., XV., 934].

None of these rules, however, have any application to a case where the master had no funds which could be applied to any such object, as the party making the repairs and furnishing the supplies could not know what was not true, in point of fact, nor could he be put upon any inquiry in respect to any supposed funds which had no real existence.

Inquiry certainly need not be made as to the necessity for credit, if the master has no funds nor any other means of repairing his vessel or furnishing her with supplies, and it is equally certain that proof of failure to institute inquiries is no defense to such a claim, even if the master had funds, unless that fact was known to the libellant, or such facts and circumstances were known to him as were sufficient to put him on inquiry, and fairly subject him to the charge of collusion with the master, or of bad faith in omitting to avail himself of the means of knowledge at hand to ascertain the true state of the case.

Whenever the necessity for the repairs and supplies is once made out, it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the libellant knew the same or was put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the libellant. *The Virgin*, 8 Pet., 550; *The Phoebe*, 1 Ware, 265; 2 Pars. Ship., 333; *The Nestor*, 1 Sumn., 73.

Extended discussion of that question, however, is no longer necessary, as the principle is conclusively settled by a recent decision of this court. Where proof is made of necessity for the repairs and supplies, or for funds raised by the master to pay for the same, and of credit given to the ship, a presumption will arise, said the *Chief Justice*, in the absence of evidence to the contrary, of necessity for credit. *The Grapeshot* [supra]; *The Chusan* [supra].

Remarks are found in two cases decided by this court quite at variance with that rule, but it is unnecessary to comment upon those cases, or to enter into any explanation of those remarks, as it is clear that if they assert any different rule of decision they are, in that respect, directly overruled. *The Grapeshot* [supra]; *Thomas v. Osborn*, 19 How., 22 [60 U. S., XV., 584]; *Pratt v. Reed*, 19 How., 359 [60 U. S., XV., 660]; *The Sea Lark*, 1 Sprague, 571; *The Prospect*, 3 Blatchf., 526.

Whether the master has funds or not is a matter always known to him, and seldom or never known to merchants in the port selected by the master as a port for relief, unless they obtain it from the master. Masters, if they are honest, will not ask for such assistance when they are supplied with funds, and if they are dishonest they are not likely to communicate any facts to the merchant which would induce him to refuse to make the requested advances.

Inquiry as to the credit of the owners of the vessel, except of the master, would seldom be of any avail unless it was extended to the great majority of the merchants resident at the port of distress, and any rule which should impose that obligation upon the merchant as a condition to his right of action to recover the amount of his advances, would in many cases operate as a denial of justice, as he could better afford to lose his claim than to incur the expense of making the required investigation.

Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port, or to fit her for

an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel. Applying that rule to the present case, the conclusion is inevitable that the decree of the circuit court was erroneous. Rob. Adm., 210; *The Fortitude*, 8 Sumn., 268; *The Nelson*, 1 Hagg., 176.

Decree in the Circuit Court is reversed, and the cause remanded, with instructions to enter a decree affirming the decree of the District Court.

Reversing—1 Abb. U. S., 191.
Cited—10 Wall., 216, 217, 671; 13 Wall., 333, 335; 17 Wall., 609; 20 Wall., 164, 318; 21 Wall., 568; 107 U. S., 428; 2 Flipp., 148; 2 Hughes, 55; 5 Hughes, 485; 3 Biss., 101; 6 Biss., 173; 10 Blatchf., 514; 11 Blatchf., 242; 14 Blatchf., 35, 42; 7 Ben., 181; 8 Ben., 23; 1 Bro., 539; 5 Bank. Reg., 205; 10 Bank. Reg., 177; 5 Sawy., 490; 4 Dill., 444; 3 Cliff., 490.

THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, *Plff. in Err.*,

v.

SAMUEL REEVES.

(See S. C., 10 Wall., 176-192.)

Act of God, what is—proof of negligence—carrier's delay—remote cause.

Loss by flood or storm is a loss by act of God; and a common carrier is excused when the damage resulted from this cause immediately.

If, in such case, it is charged that the carrier's negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The carrier is not liable for a loss by act of God, although he had contracted to start with the goods before he did, and if he had done so the goods would have escaped injury.

The failure of the carrier to comply with such contract would have been only the remote cause of the loss.

[No. 220.]

Argued Nov. 10, 1870. Decided Nov. 21, 1870.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

This action was brought in the court below, by the defendant in error, to recover from the plaintiff in error as a common carrier damages for the non-delivery of certain goods. The court below having entered judgment for the plaintiff, the defendant sued out this writ of error.

The case is further stated by the court.

Messrs. P. Phillips, W. Y. C. Humes and D. K. McRae, for plaintiff in error:

The plaintiff sought to recover on the ground that the Company was bound by special contract to send forward the freight on the evening of the 5th; and that if they had done so, the damage would not have happened.

There is nothing in the evidence, such as it is, to authorize the court to submit to the jury the finding of a contract to forward this freight on the night of the 5th.

But supposing we admit that there was a contract to forward on the evening of the 5th;

the damage occasioned by the flood on the 6th cannot be referred to as a violation of that contract.

The subject is fully considered by the Supreme Court of Pennsylvania. A canal-boat containing the goods was wrecked at Piper's dam by an extraordinary flood. Great delay at the arrival at this point had been occasioned by reason of the boat having been towed by a lame horse. But for this, the boat would have passed that point long before the occurrence of the flood. It was held that this cause was too remote. "*Causa proxima non remota spectatur.*"

"There is nothing," says the court, "in the law of common carriers, that calls for a different rule. They are only answerable for the ordinary and proximate consequences of neglect, and not for those that are remote and extraordinary." *Morrison v. Davis*, 20 Pa., 171.

This is also decided by the Supreme Court of Massachusetts. Owing to the defective machinery, the goods did not arrive for six days after they were due, and then were destroyed by a flood. The court said: "The negligence of the carrier was remote; it had ceased to operate, as an active, efficient and prevailing cause as soon as the wool had been carried beyond Syracuse and, therefore, cannot subject the carrier to a responsibility for an injury to the property resulting from a subsequent inevitable accident, which was the proximate cause by which it was produced."

Denny v. R. R. Co., 13 Gray, 487.

In a case decided by the Supreme Court of New York, where the liability of the carrier was maintained and the damage was occasioned by a flood, the decision was placed expressly upon the gross neglect of the company. *Michaels v. R. R. Co.*, 30 N. Y., 575.

Though the proximate cause may be occasioned by inevitable accident, the carrier is still bound to use care and diligence. Yet no greater foresight of extraordinary perils is expected of him than of other men, and no greater penalty visited for his failure.

When he discovers himself in peril, the law requires of him ordinary care, skill and foresight.

This is defined in the common prudence which men of prudence and heads of families usually exhibit in matters that are interesting to them. It means, as difficulties increase in great danger, great care is the ordinary care of a prudent man. *Morrison v. Davis*, 20 Pa., 171.

If one uses the precautions which a reasonable man would use under the circumstances, he is not responsible for omitting other precautions which are conceivable, even though if he had used them the injury would certainly have been avoided. *Shear. & Redf. Neg.*, 7.

Now, as to the question of proof of negligence; the rule is admitted to be, that the burden of proof is on the carrier, to show that the loss was occasioned by a cause for which he was not responsible.

When, however, the evidence brings the loss within the excepted danger, the *onus probandi* is changed. It is then upon the plaintiff, to show that the danger might have been avoided by the exercise of reasonable skill and attention of the carrier.

Clark v. Barnwell, 12 How., 280.

The evidence is full to the point that due

diligence and care were used to avoid the threatened danger. It will be observed that the plaintiff produced no witnesses on this point. All the evidence on this subject was given by witnesses called by defendant.

The brief of the appellee is chiefly devoted to considerations which avoid the merits of this controversy, and seeks, on technical ground, to withdraw this case from the revisory power of the court.

It is first objected that it does not appear, from the bill of exceptions, that the rulings of this court were excepted to during the progress of the trial.

The fact that the trial was had Mar. 26 and the bill of exceptions was sealed at a subsequent day of the term, to wit: Apr. 18, affords no valid objection.

All that is required is that the exception should, in fact, be taken at the trial. The mere record of the fact may be subsequently made. The decisions on this point are too familiar to need particular citations.

The bill of exceptions open thus: "On the trial of this cause, the following proceedings were had and the following evidence submitted to the jury."

These proceedings thus had on the trial of the cause are the introduction:

1. Of a certain deposition of the plaintiff.

2. Of a certain deposition on the part of the defendant.

3. Then the prayer of the defendant to the court, to give the five following instructions (which are set out).

4. "But the court refused to give the instructions and instructed the jury as follows."

5. At the close of these instructions these words follow: "The defendant excepted to the action of the court in refusing the instructions aforesaid, and also in giving the charge aforesaid."

Now, it is certain that the exception to the action of the judge was a "proceeding," and a very important one, and the opening of the bill declares that all the "following proceedings were had on the trial of the cause."

Dredge v. Forreth, 2 Black, 567, 67 U. S., XVII., 254; *Kellogg v. Forreth*, 2 Black, 572; (67 U. S., XVII., 256); *Simpson v. Dale*, 3 Wall., 460 (70 U. S., XVIII., 265).

It is again said that the exceptions are too general, and that they should have been specifically made to the several charges. It is to be observed that the charges were asked in the first place by the defendant. These were rejected and the defendant excepted. Then the court gave several charges, all involving the single question of negligence. The substance of these was a denial of the doctrine asserted in the prayers of the defendant; and to these instructions the defendant also excepted.

We are aware that these exceptions are subject to remark and perhaps to animadversion, as not being in strict conformity to rules. But the reason on which this rule is based does not include within its scope this case.

The court in a recent case has said that "Justice to the court below requires that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground

of exception." *Harvey v. Tyler*, 2 Wall., 839 (69 U. S., XVII., 872).

Now, it is evident that the charges given are in direct response to the charges asked and refused, and no revision is now asked which involves a question that was not distinctly presented in the court below.

It is again urged that the motion made for a new trial was a waiver of the bill of exceptions.

This was not so considered by either of the parties, or the judge below, for the bill was drawn up and sealed after motion had been made and decided.

When last argued in this court at the bar, this objection was very summarily disposed of, the court dismissing the argument by saying: "The practice is every day otherwise."

U. S. v. Dashiell, 4 Wall., 185 (71 U. S., XVIII., 321).

This court will not allow the right of review to be defeated, because of any mere informality or irregularity in the mode in which the exceptions have been presented.

U. S. v. Morgan, 11 How., 154; *Simpson v. Dall*, 3 Wall., 460 (70 U. S., XVIII., 265).

Messrs. Albert Pike and Robert W. Johnson, for defendant in error:

The law requires that a bill of exceptions should be tendered at the trial. If it be drawn up afterwards, it should be handed to the judge immediately, or in a reasonable time after the trial.

Bradstreet v. Thomas, 4 Pet., 102.

So, though a bill of exceptions may be signed and drawn up after the trial, the exceptions must be taken at the trial, and when signed must purport on their face to have been so taken, and to have then been allowed and signed.

Walton v. U. S., 9 Wheat., 651.

In *The U. S. v. Dashiell*, 4 Wall., 183 (71 U. S., XVIII., 319), the ruling of the court complained of was excepted to at the trial. It was taken, the court said, in express terms to the particular instruction in question.

A bill of exceptions must be upon points expressly reserved and excepted to at the trial; otherwise they are waived as a bill of exceptions originally was, if not presented at the trial.

Meese v. Lewis, 13 Pa., 386; *Holden v. Cole*, 1 Pa. St., 303.

That was the rule under the Statute of Westminster. If the exception was not stated in writing and tendered at the trial, it was considered as waived, and the party could not resort to it after a verdict against him. *Wright v. Sharp*, 1 Salk., 288, is conclusive on this point.

No exception lies on account of any error in stating the trial to the jury, unless the attention of the judge is called to it at the time.

Cutler v. Welsh, 43 N. H., 497.

There is no proper bill of exceptions here on which the court can act and the judgment below must, necessarily, be affirmed.

We submit to the court whether it ought not to declare that if it is "matter of doubt" whether the exceptions were taken at the trial, they will not be considered. Else what is the avail of declaring that they must purport on their face to have been taken at the trial; that it must appear by the record that the exceptions were taken while the jury were at the bar; that it must be stated when an objection

is taken to the ruling of the court that the party then and there excepted?

Phelps v. Mayer, 15 How., 160; *U. S. v. Breitling*, 20 How., 252 (61 U. S., XV., 900); *Barton v. Foreyth*, 20 How., 532 (61 U. S., XV., 1012); *U. S. v. Gibert*, 2 Sumn., 22; *Nicoll v. Ins. Co.*, 3 Wood. & M., 530; *Pomerooy v. Bk.*, 1 Wall., 592 (68 U. S., XVII., 638).

In *Lathrop v. Judson*, 19 How., 66 (60 U. S., XV., 553), it was held that where no exceptions were taken in the progress of the trial, there was nothing on which the Court of Errors could act. Must not that fact, which is the foundation of the jurisdiction, affirmatively and expressly appear?

In the first place, the exceptions here are singularly sweeping and indiscriminate, being to the refusal to give long instructions and to the giving of eight pages of legal principles and propositions in their stead. It is directly contrary to Rule No. 4, and it is equally contrary to the law and to the practice of all appellate courts of respectability.

In *Simpson v. R. R. Co.*, 4 How., 401, the practice of excepting generally to the charge of the court to the jury was censured, and the writ of error was not dismissed, solely on account of the peculiar circumstances of the case.

Reynolds v. R. R., 43 N. H., 588; *Ins. Co. v. Updegraff*, 43 Pa., 358.

It must appear what particular rulings were excepted to.

Woolf v. Chalker, 81 Conn., 121.

In *Bathbone v. Ins. Co.*, 81 Conn., 204, it was held that where the motion for a new trial merely showed that a party claimed that certain evidence was not admissible in any way to affect the terms of a written instrument, without showing that this claim was made when the evidence was offered, or that the evidence was let in subject to exception, and the claim subsequently made that it should be excluded, or that the court was requested to charge as to its effect, or the consideration to be given to it; no question was raised which the court was bound to consider.

There is no doubt that some portions, at least, of the charge and directions of the judge below, in this case, were correct in point of law. If he stated one correct proposition, the exception to his charge falls paralyzed.

Johnson v. Jones, 1 Black, 210 (66 U. S., XVII., 117). "Each proposition must be separately and distinctly excepted to. If the propositions are excepted to in mass, and one of them is correct, the exception will be overruled."

Rogers v. The Marshal, 1 Wall., 645 (68 U. S., XVII., 714); *Harvey v. Tyler*, 2 Wall., 328 (69 U. S., XVII., 871).

All the instructions are fully sustained by the authorities, as the following brief statement will show:

1. A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the King's enemies, even though the jury expressly find that they were destroyed without any actual negligence on the part of the defendant. A carrier is in the nature of an insurer.

Forward v. Pittard, 1 T. R., 27. The loss was occasioned by fire, and there was no negligence.

Siordet v. Hall, 4 Bing., 607. Damage done to a cargo was by water escaping through the pipe of a steam boiler cracked by the frost; and this was held not damage by act of God, Best, *Ch. J.*, saying, "No one can doubt that this loss was occasioned by negligence."

McArthur v. Sears, 21 Wend., 189; *Wibert v. R. R. Co.*, 12 N. Y., 245, sustain the first and second instructions.

2. A common carrier is bound safely to carry the goods to their destination, unless prevented by some cause arising from irresistible force, over which he has no control and which cannot be guarded against by the watchful exertions of human skill and prudence.

The Niagara v. Cordes, 21 How., 24 (62 U.S., XVI., 46); *Gordon v. Buchanan*, 5 Yerg., 71; *Oakley v. Steam Packet Co.*, 34 Eng. L. & E., 530.

3. No matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome is inevitable, yet, if it be the result of human means, the carrier is responsible.

McArthur v. Sears, 21 Wend., 196; *Nav. Co. v. Wood*, 3 Esp., 127; *Campbell v. Moras*, 1 Harp. Const., 488; *Boat Co. v. Bason*, 1 Harp. Const., 262; *The Niagara v. Cordes* (*supra*).

See *Read v. Spaulding*, 30 N. Y., 630. *Denny v. R. R. Co.*, 18 Gray, 481, is not against these cases, because the court there held that when the damages by flood occurred, the defendants no longer held the goods as common carriers.

It is for the carrier to show any modification of the responsibility.

See, also, *Chamberlain v. Trans. Co.*, 45 Barb., 218; *Propeller Niagara v. Cordes*, 21 How., 26 (62 U.S., XVI., 47); *Elliott v. Russell*, 10 Johns., 7; *Richards v. Railway Co.*, 7 C. B., 839.

6. The moment a faulty negligence begins, the carrier becomes an insurer against the consequences therefrom, both ordinary and extraordinary.

Davis v. Garrett, 6 Bing., 716; *Bell v. Reed*, 4 Binn., 127; *Hart v. Allen*, 2 Watts, 114; *Williams v. Grant*, 1 Conn., 492; *Crosby v. Fitch*, 12 Conn., 410.

7. On the bare fact of the loss appearing, the carrier is *prima facie* responsible. The owner of the goods injured might otherwise have no proof, and be robbed with impunity. *Bason v. Boat Co.*, 1 Harp. Const., 265.

8. If a carrier improperly detains goods, and they are injured by a sudden and extraordinary rise of water, the detention being negligent, he is responsible. To relieve him, there must be an entire exclusion of human agency from the cause of the injury or loss.

Michaels v. R. R. Co., 30 N. Y., 570; *Read v. Spaulding*, 30 N. Y., 630.

9. The fact known to the agents of the Company that the flood was coming, if by any known means they could have prevented the damage, they should have done so.

Gordon v. Buchanan, 5 Yerg., 82.

10. The exception of the act of God or inevitable accident has, by the decisions of the courts, been restricted, in reality, to accidents which come from a force superior to all human agency, either in their production or resistance.

Redf., sec. 151; *Sherman v. Wells*, 28 Barb., 408; *Ferguson v. Brent*, 12 Md., 9.

11. If goods are damaged by a flood rising higher than ever before, and which it was negligence not to have anticipated, and from which the goods could not be delivered after the extent of the rise was seen, the damage will be deemed to have occurred by the act of God, unless the carrier was in fault in not having sooner sent the goods to their destination. If so in fault, he is responsible.

Read v. Spaulding, 30 Bosw., 395; *S. O.*, 30 N. Y., 630; *Michaels v. R. R. Co.*, 30 N. Y., 564; *Merritt v. Earle*, 29 N. Y., 115.

Mr. Justice Miller delivered the opinion of the court:

This was a suit brought by defendant in error against plaintiff in error, on an alleged breach of contract as a common carrier. A bill of exceptions to the charge of the judge at the trial, and to his refusal to charge as requested by defendant below, presents the only ground on which error is alleged.

A preliminary point is raised by the defendant in error, that the exception was not taken at the trial, but was taken afterwards on the overruling of a motion for a new trial.

It seems probable that the formal bill of exceptions was not signed or settled until after the motion was overruled, but it is a common practice, convenient in dispatch of business, to permit the party to claim and note an exception when the occasion arises, but defer reducing it to a formal instrument until the trial is over. We think the language of the bill implies that this was done in the present case. It commences after the title of the case by saying that "on the trial of this cause the following proceedings were had:" Then follow the testimony introduced; the prayer of the plaintiff in error for five distinct instructions; the refusal of the court to grant them, and the instructions which the court did give; and the statement that the defendant excepted to the action of the court in refusing the instructions aforesaid, and also in giving the charge aforesaid, and also in overruling his motion for a new trial. We think it is a reasonable inference from the language used at the beginning and end of this bill, that the exceptions were taken during the trial, as the rulings excepted to were made.

Comment is also made, that the exception does not point out to which instruction it is taken, nor to any special part of the charge which was given. But the instructions prayed by defendant were not offered as a whole, but each one for itself, and the action of the court in refusing them, to which exception is taken, may be fairly held to mean each of them.

As to the charge given by the court, the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent, and might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers, as it regards the effect of loss from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning point of the case.

We are of opinion, then, that both the refusal to charge as requested and the charge actually given are properly before us for examination. As regards the first, we will only notice one of the rejected instructions, the fourth. It was prayed in these words:

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.

What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

The testimony in the case, wholly uncontradicted, shows one of the most sudden, violent and extraordinary floods ever known in that part of the country. The tobacco was being transported from Salisbury, North Carolina, to Memphis, on a contract through and by several railroad companies, of which defendant was one. At Chattanooga it was received by defendant, and fifteen miles out the train was arrested, blocked by a land slide and broken bridges, and returned to Chattanooga, when the water came over the track into the car and injured the tobacco.

The second instruction given by the court says that if, while the cars were so standing at Chattanooga, they were submerged by a freshet which no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars were brought within the influence of the freshet by the act of defendant, and if the defendant or his agent had not so acted the loss would not have occurred, then it was not the act of God, and defendant would be liable. The fifth instruction given also tells the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for plaintiff.

In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In *Morrison v. Davis*, 20 Pa. St., 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which
See 10 WALL.

would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur*, applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them.

In *Denny v. R. R. Co.*, 13 Gray, 481, the defendants were guilty of negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison v. Davis* [*supra*].

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the effect that if the defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract, the failure to comply would have been only the remote cause of the loss.

But all the testimony that was given is in the record, and we see nothing from which the jury could have inferred any such contract, or which tends to establish it, and for that reason no such instruction should have been given.

The judgment of the Circuit Court is reversed and a new trial ordered.

Cited—12 Wall., 259; 2 Dill., 23; 1 Flipp., 88; 54 N. Y., 506; 60 Mo., 208; 7 Am. Rep., 330 (46 N. Y., 279, 280); 10 Am. Rep., 215 (35 N. J. L., 30); 13 Am. Rep., 239 (23 Ohio St., 541); 14 Am. Rep., 198 (55 N. Y., 109); 15 Am. Rep., 109 (115 Mass., 804); 19 Am. Rep., 596 (6 Helsk., 261); 37 Am. Rep., 748 (53 Tex., 46); 41 Am. Rep., 700 (18 W. Va., 361).

WILLIAM H. GUNNELL, *Appt.*,

v.

JOHN H. BIRD, Administrator *de bonis non* of WILLIAM BIRD, Deceased, and DAVID HEPBURN, Administrator of PETER HEPBURN, Deceased,

And Cross Appeal.

JOHN H. BIRD, Administrator *de bonis non* of WILLIAM BIRD, Deceased, *Appt.*,

v.

WILLIAM H. GUNNELL.

(See 8 C., 10 Wall., 304-306.)

Partnership accounts—pleadings as evidence.

*1. In stating partnership accounts, where one partner has had entire charge of the business, he is to be debited with the whole capital placed in his hands, as well as with the proceeds of sales realized by him.

2. If part of the capital consisted of stock, which has been used in the business, or disposed of and the proceeds charged against him, he should be credited with such stock as a disbursement, to the amount at which it was originally charged against him.

3. An allegation in an answer, entirely impertinent to the bill, cannot be used as evidence for the defendant, even though the plaintiff neglect to file a replication.

[Nos. 222, 444.]

Argued Nov. 10, 1870. Decided Nov. 21, 1870.

APPEAL from the Supreme Court of the District of Columbia.

This case arose in the Circuit Court of the District of Columbia, upon a bill in chancery filed by the appellees, for an accounting in and the settlement of a certain partnership. The case was referred by that court to an auditor; and upon his report a decree entered in favor of the complainants for the sum of \$3,001.56. The auditor reported as follows:

In the course of four years the parties received from sales.....	\$93,471 11
But of this they paid out from time to time for lumber, etc.....	55,878 78
For expenses, rent, etc.....	12,537 47
And lost in bad debts, etc.....	5,461 46
	\$72,877 96
So that they had left in hand.....	19,593 35
Out of this each partner was entitled first to receive back his capital, thus:	
Bird & Hepburn.....	\$7,775 66
Gunnell.....	6,627 56
	\$14,403 21

Leaving a balance of clear profit of 5,190 14

The amount of net profit was the only question in controversy before the auditor. It seems to have been assumed that, if his statement of the clear profits was correct, the account between the partners upon the materials before him was correctly stated, showing a balance due to complainants of \$3,001.56.

Both parties having appealed from the decree of the court, it was affirmed successively by the Special Term and the General Term of the Supreme Court of the District. Whereupon both parties took a further appeal to this court.

The complainants both having died during the course of the proceedings, their administrators upon a bill of revivor were admitted to prosecute the case in their stead.

The facts are further stated by the court.

Mr. Joseph H. Bradley, for Gunnell:

The auditor has made up his accounts, in which he gives Gunnell credit for only the \$55,146.58 expended by him in purchases from third parties, and makes the \$93,471.11 the amount of the sales, as the product of these purchases, thereby rejecting the \$6,627.56, Gunnell's stock, which constituted part of the material out of which the \$93,471.11 resulted.

Messrs. J. M. Carlisle and J. D. McPherson, for Bird.

Mr. Justice Bradley delivered the opinion of the court:

*[Head notes by *Mr. Justice BRADLEY*.]

On the 1st of May, 1845, Gunnell on one side, and Bird and Hepburn on the other, entered into a copartnership in the lumber business as equal partners, entitled to an equal share of the profits. Gunnell was the active partner and put in as his part of the capital, a stock of lumber valued at \$6,627.56, and Bird and Hepburn put in \$7,775.65 in cash, making a joint capital of \$14,403.21. The business was carried on for four years, during which period the gross amount of sales was \$93,471.11, and the disbursements were: for lumber purchased of others, \$55,146.55; for general expenses, \$12,242.95; for lime, \$732.18, and for rent not contained in the other accounts, \$111, making a total of \$68,232.68. At the termination of the partnership the stock on hand, books and unsettled accounts were turned over by Gunnell to Bird and Hepburn, who collected \$7,775.68 (including what they had previously received), and retained in hand in 1853, when the case came before the auditor, bad and uncollected debts to the amount of \$5,461.56.

These are the elements from which to state the accounts between the parties, and by means of which they might have been at any time easily stated and settled by a competent professional accountant.

The parties having failed to agree upon a settlement, Bird and Hepburn filed their bill in August, 1850, and after answer an auditor was appointed, who reported in August, 1852, that Gunnell was indebted to Bird and Hepburn in the sum of \$3,001.56, with interest from the 1st of May, 1849, the time of the dissolution of the partnership. Exceptions were taken to the report by both parties; but it was confirmed by the special term of the court, whose decision was affirmed by the general term. From that decision an appeal was taken to this court, and the question now before us is, whether the auditor's report was correct.

The opinion of the court is that the auditor committed an error, and we should refer the cause back for a further report if we deemed it necessary to do so; but the facts are confined within such narrow limits, and are so clearly ascertained by the proofs and admissions of the parties before the auditor, that we deem it a useless formality.

The error of the auditor consists in not charging Gunnell with the capital contributed by the partners and placed in his hands, and not crediting him with the cost of the lumber originally contributed by himself.

Being the active managing partner, it is plain that he should be charged with—

First, the whole capital..... \$14,403 21
Secondly, the proceeds of sales.... 93,471 11

Amounting in all to..... \$107,874 33

He received these amounts, and he should be charged with them.

On the other hand, it is equally plain that he should be credited with—

First, the lumber on hand when the business was commenced, he having disposed of it, and being charged with the proceeds instead.

This, as charged to him, was..... \$ 6,627 56
Secondly, the amount paid out by him to others for lumber, which was..... 55,146 55

Thirdly, the general expenses of the business,..... 12,242 95
 Fourthly, the item paid for lime... 732 18
 And the item paid for rent..... 111 00

Amounting in all to.....\$74,860 24
 And leaving a balance in hand, at the conclusion of the business, of \$33,014 08

The original capital had been increased to this sum, and had the assets all been good, there would have been a clear profit of \$18,610.87. But the bad and uncollected debts being deducted, the profit is reduced to \$18,149.31; one half of which, besides his or their original capital, belonged to each party.

Gunnell's capital was..... \$6,627 56
 His half of the profits was..... 6,574 65

Total amount due to Gunnell.....\$18,202 21

Bird and Hepburn's capital was.... \$7,775 65
 Their half of the profits was..... 6,574 66

Total amount due to Bird and Hepburn.....\$14,850 81

There remains to be adjusted a question of interest due to Bird and Hepburn for having contributed more capital than Gunnell whilst the business was being carried on. The auditor makes this interest \$183.52, one half of which should be deducted from the share of Gunnell, and added to that of Bird and Hepburn. This would reduce the former to \$13,110.45, and raise the latter to \$14,442.07.

Now the books show that Bird and Hepburn drew and collected only \$7,552.68. This left a balance still due them of \$6,889.39 to be accounted for by Gunnell.

In this account neither party is charged with the bad and uncollected debts. They are simply deducted from the profits and the loss is thus equally divided. It is claimed by the defendant that Bird and Hepburn should be charged with the whole of this loss because they had the securities and failed to collect them, when, by the use of due diligence, they might have done it. This fact does not appear in the case except by the unsupported allegation of the defendant, made in his answer to the bill of review. This portion of the answer was entirely impertinent to the bill, which was strictly and purely a bill of review. No formal replication was required to avoid its effect as evidence in the cause.

The result is that the complainants are entitled to a decree against the defendant for the sum of \$6,889.39, with interest from the 1st of May, 1849, and costs.

The decree of the District Court must be reversed, and a decree rendered for the complainants accordingly.

Cited—22 Wall., 204.

SLAUGHTER HOUSE CASES.

THE BUTCHERS' BENEVOLENT ASSOCIATION OF NEW ORLEANS, *Plff. in Err.*,

v.

THE CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE CO.

See 10 WALL.

SAME v. SAME.

HOTAIR IMBAU, JORDON F. AYCOCK AND JOSEPH GITZINGER, Composing the firm of IMBAU, AYCOCK & Co., *Plffs. in Err.*,

v.

THE CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE CO.

THE LIVE STOCK DEALERS' AND BUTCHERS' ASSOCIATION OF NEW ORLEANS, *Plff. in Err.*,

v.

THE CRESCENT CITY LIVE STOCK LANDING AND SLAUGHTER HOUSE CO.

PAUL ESTEBEN ET AL.,

v.

THE STATE OF LOUISIANA, *ex rel.*

(See S. C., 10 Wall., 273-299.)

Supersedeas, when issued—effect of—writ of error to state court—injunction, how affected by.

This court has power to issue a *supersedeas* before the return day of the writ of error, where the return has been made.

A writ of error to a State Court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court.

Neither an injunction nor a decree dissolving an injunction passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

The only effect of the *supersedeas* is to prevent all further proceedings in the subordinate court, except such as are necessary to preserve the rights of the parties.

[Nos. 475, 476, 477, 479, 480.]

Argued Nov. 18, 1870. Decided Dec. 2, 1870.

WRIT of error to the Supreme Court of the State of Alabama.

On motion for writs of *supersedeas*.

These cases arose in the State Courts of Louisiana, and all involve the question of the validity of a certain Statute of that State, giving to the Corporation named, the Crescent City Live Stock Landing and Slaughter House Co., certain exclusive privileges.

The several cases, which had been variously decided in the courts where brought, were, upon appeal to the Supreme Court of the State, all decided in favor of the Corporation named, and various injunctions were sustained in favor of that Corporation. Writs of error having sued out in each of the cases, the plaintiffs in error now move for writs of *supersedeas* to the judgments of the courts below.

The case is further stated by the court.

Messrs. J. A. Campbell, P. Phillips and J. Q. A. Fellows, for plaintiffs in error:

The 25th section of the Judiciary Act of 1789 authorizes the issue of the writ of error in this cause, and the 28d section prescribes that the writ shall be a *supersedeas* if allowed within ten days of the judgment, and be served on the defendant and a bond be given and be filed in the same time.

The effect of the writ thus accompanied is described in the decisions of this court.

Rubber Co. v. Goodyear, 6 Wall., 168 (78 U. S., XVIII., 762); *R. R. Co. v. Harris* (*ante*, 100).

A writ of error which is a *supersedeas*, removes the cause from the court to which it is

addressed, and prevents the inferior court from doing any act to carry that judgment into effect. It suspends its power and jurisdiction over the cause, and whatever is done in the cause subsequently, until its disposition in the Supreme Court, is done under the order or allowance of that court. The writ commands the record and proceedings to be sent to the Supreme Court, and the Act of Congress declares that this writ shall be a *superseas*.

Cases above cited; Bac. Abr., *Superseas*, a; *Stockton v. Bishop*, 2 How., 74; *Hogan v. Ross*, 11 How., 294; *Hardeman v. Anderson*, 4 How., 640.

The writ at common law was a *superseas* by implication (Cro. Jac., 584), but was regulated afterwards by statute, the principle of which (8 James, ch. 8) suggested the Act of Congress of 1789.

In the present cause the final order was made in the Supreme Court of Louisiana, May 9, 1870. The writ of error was allowed, served, and the bond approved and filed before and on May 16, 1870. No execution had been issued. These Acts made the writ operative and entitle us to claim the *superseas*. The cause was transferred from the Supreme Court of Louisiana to the Supreme Court of United States.

1 Har. & J., 475; cases above cited; *Bryan v. Bates*, 12 Allen, 202; 5 Taunt., 204; 1 Chit., 241; 2 Tidd, Pr., 1145; 4 Conn., 385; 4 Sm. & M., 670.

A *certiorari* would have operated in the same manner.

48 Pa., 377; *Patchin v. The Mayor*, 18 Wend., 664.

The cause in the Fifth District Court before the Eighth Court had been created, was determined and was removed from that court by a suspensive appeal to the Supreme Court of the State. The effect of the suspensive appeal to the Supreme Court of the State, is to divest the inferior court of jurisdiction of the cause.

The fact that the appeal is suspensive being ascertained, all other questions are to be settled in the Supreme Court.

Code Pr., 564; *La. v. Judge, etc.*, 19 La., 168, and the cases cited; S. C., 20 La. Ann., 529; S. C., 21 La. Ann., 43; 1 Bioche Dic. d. pro, tit. Appel, No. 470; *Talaidera l'appel*, 347.

The injunction granted in the Fifth District Court upon the petition *ex parte*, was operative until the judgment rendered in the cause in that court. The judgment in that court converted it from a temporary into a perpetual injunction, and the allowance of that perpetual injunction was the judgment appealed from.

By the suspensive appeal, its operation was suspended until the judgment in the Supreme Court of the State, which affirmed that of the Fifth Court. But before the execution of that judgment, the confirmatory judgment was itself suspended by the writ of error of the Supreme Court.

If there had been no writ of error to the Supreme Court of the United States, the judgment of the Supreme Court of the State might have been carried to the Fifth Court and spread on its record, and by motion in open court, would have been made executory. But until all this had been done, the Fifth Court could not have issued the final writ of execution (a perpetual injunction) for the writ of injunction is at one

stage of proceeding an administrative writ, and at another, a judicial writ—final process. This will appear from *R. R. Co. v. Bradleys* (ante, 274). Louisiana cases above cited.

And for the practice in regard to making judgments executory.

Ingraham v. Dawson, 20 How., 486 (61 U. S., XV., 984).

The courts of the United States under the Acts of Congress have adequate power to protect its jurisdiction from interfering between courts and parties, and to protect suitors before it from oppression. The final order of the Eighth Court on the motion to attach for a contempt is a final execution, and the sheriff has seized and holds property under it. Any court of record at common law will protect its jurisdiction by the issue of writs of *superseas* in a matter properly cognizable there. In the case of *Taylor v. Carryl*, 20 How., 583 (61 U. S., XV., 1028), the cases are collected in which such power is exerted.

The 25th section of the Judiciary Act places the State Courts in subordination to the Supreme Court, within the range of the cases described in it. The court may compel obedience to the writ of error.

U. S. v. Booth, 18 How., 476 (59 U. S., XV., 464).

It may render and enforce the final judgment in the cause arising under that section. The case before the court is one of an aggravated character. All that was required of the plaintiffs they have done to bring their cause hither.

Bac. Abr., tit. Sup., B; 1 Str., 419; 3 D. & E., 648; Tidd, Pr., 1145; *Morris' Cotton* (ante, 481); *Ex parte Milwaukee Co.*, 5 Wall., 188 (73 U. S., XVIII., 676); *R. R. Co. v. Bradleys*, (ante, 274); *Stockton v. Bishop*, 2 How., 74; *Hardeman v. Anderson*, 4 How., 640; 5 B. & Ald., 903; *Bryan v. Bates*, 12 Allen, 202; *Taswell v. Stone*, 4 Bur., 2454; 8 East, 416; *Slocum v. Mayberry*, 2 Wheat., 1; *Kershaw v. Thompson*, 4 Johns. Ch. 609; 6 H. & J., 302.

The Act of Congress of 1789, in relation to the revisory powers of the Supreme Court over State Courts, referred alone to the process and mode of proceedings at common law, and adopted them—writs of error and their effect. The *superseas*, whether by implication or writ of error, was adopted *in toto*. In reference to state adjudications, it has not been changed. The Act of 1803 adopts the appeal in equity and admiralty cases, but under the same regulations and restrictions. Upon this discussion some light may be thrown by considering the question before us with reference to the chancery law. The effect of an appeal will be found in the Louisiana decisions, and the French work on practice we have cited.

The appeal transfers the record; divests jurisdiction of the subordinate court; invests the superior court with full jurisdiction, and the appellate court generally decides *de novo*. The admiralty appeal is the purest form in which this writ is used. So it was in chancery. In Great Britain, this was found inconvenient from the slowness of the proceedings.

Notwithstanding an appeal, the subordinate court may go on with the cause. This was settled by rule of the House of Lords in 1807. The rule is to be found in *Huguenin v. Basile*, 15 Ves., 182.

The appellant might then apply to the House of Lords for stay of proceedings after appeal. *Macnachten v. Boshm*, 1 J. & W., 48; *Gwynne v. Lethbridge*, 14 Ves., 585.

The history is told (*Hart v. The Mayor of Albany*, 3 Paige, Ch., 381), and the New York alteration of the English rule stated (*Green v. Winter*, 1 Johns. Ch., 80), and the present English practice is stated.

Barra v. Feukes, L. R., 1 Eq., 395; *Gibbs v. Daniel*, 4 Giff., 1.

The change in the English rule was adopted after 1789, and the Judiciary Act of 1789 was the rule of the English courts at that date, both at law and in chancery. The writ of error with bond, and the appeal with or without bond, removed the suit to the appellate court entirely and absolutely.

The American Statute provided against vexatious delays by prescribing that no appeal or writ of error should issue, except on a final judgment. 4 Bibb, 221.

Mears. T. J. Durant, J. S. Black, Matt. H. Carpenter and Charles Allen, for defendants in error:

The general doctrine applicable to writs of error at common law is stated in Tidd, Pr., late ed., quite fully.

But writs of error, to reverse judgments at law, rest on a different basis from writs of error brought for the purpose of obtaining a revision of a case by the Supreme Court of the United States. *Supersedas* is a law term, and has no application to a chancery proceeding.

Second. In the English chancery practice, the question whether an appeal shall stay proceedings, rests very much in the discretion of the tribunal from which the appeal is taken; and it is common to make special application to that tribunal, either to stay further proceedings, or to pass an order that proceedings shall not be stayed.

2 Sm. Ch. Pr., 68.

Such was the course in the recent English case, *Barra v. Feukes*, L. R. 1 Eq., 392.

The application was made to the court appealed from. See, also, *Harrington v. Harrington*, L. R., 3 Ch. App., 564.

The general rule is, that an appeal will not stay proceedings.

See, General Order in House of Lords in 1807, copied in 15 Ves., 184; *Gwynn v. Lethbridge*, 14 Ves., 585; *Willan v. Willan*, 16 Ves., 216; 9 Ves., 318; *Waldo v. Caley*, 16 Ves., 209; 4 Ves., 316; 2 Ves., 568; *Hart v. Mayor, etc.*, 3 Paige, Ch., 381, where there is some account of the English practice; also in 2 Dan. Ch. Pr. under the head of "Re-hearings and Appeals," there is a general statement of the doctrine; see, also, *Walburn v. Ingilby*, 1 Myl. & K., 161; 6 Eng. Ch. Cas., 493.

Third. Under the practice by which causes are removed from State Courts to the United States Supreme Court on writs of error, the removal is in the nature of an appeal. It is a continuation of the same litigation, and not a mere suit as a writ of error at common law. The mode of removal is only a matter of form. The substance of the matter is, that the cause is brought before a supervising tribunal for revision; and the jurisdiction of the United States Courts is in its nature appellate. This doctrine has been constantly stated.

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Martin v. Hunter, 1 Wheat., 349; *Cohens v. Va.*, 6 Wheat., 410; *Nations v. Johnson*, 24 How., 204 (65 U. S., XVI., 631); *Bryan v. Bates*, 12 Allen, 213.

The writ of error, therefore, only inaugurates a new stage in the same cause; and accordingly an injunction should, of course, continue in force until the determination upon the writ of error, which is the ultimate determination of the original suit.

Fourth. The doctrine we contend for will be found in the following cases: *Hart v. Mayor, etc.*, 3 Paige, 381; *Graves v. Maguire*, 6 Paige, 381; *Stone v. Carlan*, 2 Sandf., 738; *Mining Co. v. Fremont*, 7 Cal., 181; *Spring v. Ins. Co.*, 6 Wheat., 519; *Thompson v. McKim*, 6 Har. & J., 302; *Williamson v. Carnan*, 1 Gill. & J., 184; *Boren v. Chisholm*, 3 Ala., 513; *Garrow v. Carpenter*, 4 Stew. & P., 336; *Colman v. Bridge Co.*, 5 Blatchf., 58.

Fifth. It is impossible to suppose that there should not be authority in a court of equity, by a decree, to hold matters in a certain fixed position until the ultimate determination of the cause. This is apparent by considering the nature of the relief which may be granted by means of an injunction, in many cases where, if the injunction is suspended while the appeal or writ of error is pending, all the mischief will be done which is sought to be prevented.

For instance:

If an injunction to stay waste by cutting down trees is suspended, the trees will be cut.

Disease and death will prevail if an injunction to restrain a nuisance affecting health, to abate and suppress a source of diseases, is suspended.

If an injunction to restrain the marriage of a ward in chancery is suspended, an irretrievable mischief may occur at once.

2 Seton, Forms of Decrees, 3d Lond. ed., 727, for a form of such a decree.

Sixth. So in cases at law. Suppose articles have been seized on a search-warrant—stolen goods, obscene books or pictures, lottery tickets or gambling materials, counterfeit coins, forged bank notes, implements for counterfeiting or any other article deemed dangerous or obnoxious—which state laws may authorize to be seized, and held for condemnation and forfeiture; and a restoration to the owner (in case of stolen goods), or a condemnation and forfeiture and destruction of them have been decreed. If a writ of error is sued out, that supersedes the final order of restoration to the owner, or condemnation; but shall the articles, therefore, be given up to the person who had the guilty possession of them, or shall they still be held in the custody of the law?

Seventh. It must be the case that there is power in a court of equity, and also when necessary in a court of law, to pass orders which shall have the effect to hold things as they are and prevent any subsequent change in the situation of things, which shall be disastrous to the plaintiff or to the public, and fatal to the relief which is sought.

The law of Louisiana is very explicit in this regard.

See, La. Cr., art. 307; *De La Croix v. Villero*, 11 La. Ann., 39; *White v. Cazenave*, 14 La. Ann., 57; *Knabe v. Fernot*, 14 La. Ann., 360.

Eighth. What power then has the Supreme Court of the United States in the premises?

Take the illustration put by the counsel for the plaintiff in error. A prisoner under sentence of death sues out a writ of error. The counsel says: "Shall he be hung while his writ of error is pending?"

It is not necessary to say "yes;" because it may well be that this court has power to issue a writ for the purpose of holding things as they are; of preventing execution of the final judgment. But does it follow that the prisoner shall go at large?

It is perfectly plain, in the case supposed, that this court cannot order the discharge of the prisoner while the writ of error is pending.

"Why not? Is he not held on final sentence?"

The answer is, that the *supersedeas* attaches to so much of the final sentence as determines the ultimate rights of the party.

In *Bryan v. Bates*, 12 Allen, 218, a case in Massachusetts, much considered and well reasoned out; one who had been convicted of a misdemeanor and sentenced to imprisonment thereon, and committed to jail in pursuance of that sentence, sued out a writ of error in a United States Court, and then applied for his discharge of *habeas corpus* on the ground that the writ of error was a *supersedeas*. The court decided that although the writ of error was a *supersedeas*, yet they had authority to hold him until he should give bail.

See, also, *Naver v. Thomas*, 18 Allen, 574; *Fleming v. Clark*, 12 Allen, 191, in the latter of which cases the same question was argued, but not decided.

Tenth. It is constantly held that only final judgment and decrees can be re-examined and reversed on writs of error. The cases are numerous where this court has refused to entertain any application to deal with preliminary decrees.

A striking case, in some respects analogous to the present, was that of *Gibbons v. Ogden*, 6 Wheat., 448. There a bill was filed in the State Court, to restrain the defendant from navigating steamboats upon certain waters, upon which the Legislature had granted to Livingston and Fulton, the exclusive right to navigate steamboats. On filing the bill, a preliminary injunction was granted. The defendant set up a right under the laws of the United States and moved to dissolve the injunction. This motion was denied. An appeal was taken to the highest court of the State, and that court also refused to dissolve the injunction. The defendant then appealed to the Supreme Court of the United States, on the ground that a question under United States laws was involved; but as no final decree had been made in the State Court, the appeal was dismissed for want of jurisdiction.

So the preliminary injunction stood, and was not interfered with.

See, also, *Verden v. Coleman*, 18 How., 86 (59 U. S., XV., 212); *Boyle v. Zacharie*, 6 Pet., 656, *et seq.*, and numerous other cases.

Tenth. The United States Circuit of 1789, section 23, recognizes that preliminary injunctions shall stand. The statutes provides that a writ of error shall be "a *supersedeas* and stay of execution in case," etc. Executions are not to issue;

that is, precepts to enforce the final judgment of the state courts are not to issue.

It is only the final and ultimate rights, and not the incidental rights of parties, that writs of error are designed to vindicate.

Mr. Justice Clifford delivered the opinion of the court:

All persons and corporations, except the Crescent City Live Stock Landing and Slaughter House Company, are prohibited, by an Act passed by the Legislature of the State of Louisiana, to land, keep or slaughter any cattle, beeves, calves, sheep, swine or other animals, or to have, keep or establish any stock landings, yards, pens, slaughter houses or abattoirs at any point or place within the City of New Orleans or the Parishes of Orleans, Jefferson and St. Bernard, or at any place on the east bank of the river within the corporate limits of the city, or at any point on the west bank of the same above the railroad depot therein mentioned and designated.

Said Act was passed on the 8th day of March, 1869, and is entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock Landings and Slaughter Houses, and to Incorporate 'the Crescent City Live Stock Landing and Slaughter House Company.'" Though approved on the day mentioned, still the Act did not go into operation till the first day of June following but it appearing that the Company created and organized under the Act intended to enforce the prohibition, the plaintiffs in the suit first mentioned, on the 26th of May of that year, filed a petition or bill of complaint in the Sixth District Court of New Orleans against that Company, alleging that for more than thirty years past there had existed in the Parish of Orleans and the adjacent parishes the lawful trade of butchering domestic animals to supply with meat the markets of the city and the adjacent parishes, and that the regular pursuit of that trade involved the necessity of collecting, feeding and sheltering such animals before they were slaughtered, and of preparing and preserving their meat for use or sale for food, and their hides, tallow and other valuable parts of the animals for the market; that a thousand persons throughout that period have been engaged in that trade without interruption and unmolested prior to the organization of that Company by any ordinance, regulation or enactment from any public authority; that they, the petitioners, are duly incorporated under a law of the State, and that for more than two years they have been and are in the lawful exercise of that trade and employment, and that they have constructed and erected for that purpose and now hold, within those parishes, places for landing cattle and for sheltering the same, and slaughter houses for butchering the animals for market, and have secured stalls and such other privileges in the market places as are necessary and convenient to the prosecution of the business; that the respondents, though they must well know that the Act is in violation of the Constitution of the United States, openly declare that it is their intention to execute its provisions and to compel the complainants to abandon the objects of their incorporation, and to destroy the value of their investments, and render it neces-

sary for them to relinquish their lawful pursuit, and the prosecution of their legitimate business.

Wherefore they pray that the respondents may be enjoined from any such interference with the petitioners, and from interfering, directly or indirectly, by suit or otherwise, with their customers in purchasing, slaughtering or butchering animals of any kind used for meat, during the pendency of the suit, and also for process; and that they, the complainants, may have judgment against the respondents in damages for the sum of \$10,000.

On the same day the respondents in that suit instituted in the Fifth District Court of New Orleans a counter suit against the complainants in the suit commenced against them in the Sixth District Court of the same municipality. They allege in their petition that "The sole and exclusive privilege of conducting and carrying on the live stock landing and slaughter house business in that city and its environs is vested in their Company, as is fully set forth in the Act of their incorporation; that the Corporation named in their petition, as respondents, are about to land, shelter and protect cattle, etc., intended for slaughter, and to conduct and carry on the live stock landing and slaughter house business within the limits of the city as prohibited by law and in violation of their exclusive rights and privileges. Wherefore they pray that the respondents, the complainants in the suit pending in the Sixth District Court, may be enjoined and prohibited from landing, stabling and sheltering cattle, etc., and other animals destined for sale and slaughter in that city, and from conducting and carrying on the live stock landing and slaughter house business within the limits of the parishes described in their charter, and from molesting and interfering with the petitioners in the exercise and enjoyment of their exclusive rights and privileges; and they also claim damages in the sum of \$4,000, and for general relief."

Judgment in the first suit was rendered for the petitioners, and it was ordered that the injunction previously issued in the case against the respondents should be made perpetual. Pursuant to the suggestion of the respondents in that case, that there was error to their prejudice in the final judgment of the Sixth District Court, it was ordered "that a suspensive appeal be granted herein to the defendants, returnable to the Supreme Court of the State."

Hearing was also had in the suit commenced in the Fifth District Court by the Crescent City Live Stock Landing and Slaughter House Company against the Butchers' Benevolent Association of New Orleans, and it was ordered, adjudged and decreed in that case that there be judgment in favor of the petitioners, and that the Corporation respondents, their president and members, be forever enjoined and prohibited, as prayed in the petition.

Exceptions having been filed to certain rulings of the court, it was also ordered, on motion of the respondents, that they, the respondents, be allowed a suspensive appeal, to the Supreme Court of the State, as in the preceding case.

Separate suits were also commenced in the Seventh District Court of the city against the Crescent City Live Stock Landing and Slaughter House Company by Hotair Imbau *et al.*, and by the Live Stock Dealers' and Butchers' As-

sociation of New Orleans, as appears by the transcripts filed here in those cases. Injunctions were prayed and granted against the respondents in both of those cases, and they, the respondents, were allowed suspensive appeals to the Supreme Court of the State from the respective judgments.

Suit was also commenced in behalf of the State by the Attorney-General against Paul Estebeu *et al.*, in which it is alleged that they have, without authority of law, formed themselves into a Corporation by the name of the Live Stock Dealers' and Butchers' Association of New Orleans; that they, as such Corporation, are about to lease or purchase a certain tract of land partly in the city and partly in the Parish of St. Bernard, and that they are about to commence the erection of buildings and structures thereon for the purpose of collecting, landing and sheltering beef cattle designed for food, to be sold in the Parishes of Orleans, Jefferson and St. Bernard, contrary to the Act of the General Assembly of the State. Wherefore the petitioner prays that a writ of injunction may issue restraining and enjoining the respondents from using that tract of land for the purpose set forth in the petition and from slaughtering any beef cattle or any other animals intended to be sold for food in those parishes. Final judgment in the case was rendered in favor of the State, and it was also ordered, adjudged and decreed, that the respondents be forever enjoined and restrained, as prayed by the petition. Attempt was made by the respondents to secure a re-hearing, but the motion was denied, and on their petition it was ordered that they be allowed a suspensive appeal to the Supreme Court of the State, as in the preceding cases.

These several appeals, together with one other which it is unnecessary to describe, were duly entered in the Supreme Court of the State, and were, by the written agreement of the parties, submitted for decision at the same time. They were submitted on the 28th of January, 1870, and the opinion of the appellate court was delivered on the 11th of April following. Pursuant to that opinion, the judgment of the Sixth District Court, as rendered in the first case, was reversed, and the directions of the Supreme Court of the State were, that the injunction granted by the subordinate court should be dissolved, and that the demand of the petitioners should be rejected, with costs in both courts. They also rendered a judgment of reversal in the same form and with the same directions in the third and fourth cases, being the two appeals from the judgments rendered in the Seventh District Court. Judgments of affirmance were also rendered on the same day in the second and fifth cases, in the order herein adopted, with costs of appeal.

Where the decision in the court below sustained the pretensions of the Crescent City Live Stock Landing and Slaughter House Company the judgment of the subordinate court was affirmed, but the judgment of the subordinate court was reversed in each case where the decision of the subordinate court was adverse to those pretensions, and the injunctions in those cases were dissolved.

Petitions for re-hearing were filed by the losing parties, on the 26th of April, 1870, and on the 9th of May following an entry was made in

each case, that the petition for re-hearing was refused. Writs of error to the State Court were subsequently prayed by the same parties, and on the 18th of May last the writs of error were allowed by the Associate Justice of this court allotted to that circuit, and they were duly filed on the 16th day of the same month, as appears of record.

Filed, as the writs of error were, within ten days from the date of the entry refusing the petition for re-hearing, it is claimed by the plaintiffs that the several writs of error operate as a *supersedeas* and stay execution, under the 23d section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of *Brockett v. Brockett*, 2 How., 288, the question must be considered as settled in accordance with the views of the plaintiffs. *Rubber Co. v. Goodyear*, 6 Wall., 155 [73 U. S., XVIII., 768].

Sufficient bonds were given in each of these cases, which is necessary in every case, in order that the appeal or writ of error may operate as a *supersedeas* and stay execution on judgments removed into this court for re-examination. What is necessary is, that the bond shall be sufficient, and when it is desired that the appeal or writ of error shall operate as a *supersedeas* the bond must be given within ten days from the date of the decree or judgment. *Rubber Co. v. Goodyear* [*supra*].

Suppose the writs of error were seasonably sued out and that they operate in each case as a *supersedeas* and stay execution, as provided in the 23d section of the Judiciary Act, still the court is of the opinion that the several motions under consideration must be denied upon other grounds, and for reasons which are entirely satisfactory.

Controversies determined in a State Court which are subject to re-examination in this court, are such and such only as involve some one or more of the questions enumerated and described in the 25th section of the Judiciary Act, and which have passed to final judgment or decree in the highest court of law or equity of a State in which a decision in the suit could be had, as provided by the Constitution and laws of the State. Appeals were taken in the cases before the court from the respective district courts, where they were commenced, to the Supreme Court of that State before the writs of error granted by this court were sued out, and the decrees or judgments brought here for re-examination are the final decrees or judgments of the Supreme Court of the State in those cases.

Writs of error issued under the 25th section of the Judiciary Act have the same effect as if the judgments or decrees were rendered in a circuit court, and they operate as a *supersedeas* and stay execution only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree. 1 Stat. at L., 85.

Such a writ of error is in the nature of a commission, by which the judges of one court are authorized to examine a record upon which a judgment or decree was given in another court, and on such examination to reverse or affirm that judgment or decree. When regular in form, and duly served, the writ of error operates upon

the record of the court to which it is addressed in the case described in the writ, and it has the effect to remove that record into the court granting the writ of error and to submit it to re-examination, and the 23d section of the Judiciary Act provides to the effect that where all the conditions prescribed in that section concur in the case the jurisdiction of the court where the record remained when the writ of error was sued out and served shall be suspended until the cause is determined by or remanded from the appellate tribunal. *Cohens v. Va.*, 6 Wheat., 410; *Suydam v. Williamson*, 20 How., 487 [61 U. S., XV., 982]; *Barton v. Foreyth*, 5 Wall., 192 [73 U. S., XVIII., 546].

Exceptional cases arise where the judgment or decree given on appeal in the highest court of a State is required by the law of the State to be returned to the subordinate court for execution, and in such cases it is held that the writ of error from this court may operate as a *supersedeas*, if granted and served at any time within ten days from the return entry of the proceedings in the court from which the record was removed, but in all other cases the writ of error must be issued and served within ten days from the date of the judgment or decree, in order that it may operate as a *supersedeas* and stay execution. *McGuire v. Com.*, 3 Wall., 386 [70 U. S., XVIII., 166]; *Gelston v. Hoyt*, 3 Wheat., 246; *Green v. Van Buskirk*, 3 Wall., 450 [70 U. S., XVIII., 245].

Appeals and writs of error do not become a *supersedeas* and stay execution in the court where the judgment or decree remains by virtue of any process issued by this court merely as such, but they are constituted such by the Act of Congress when the conditions prescribed in the 23d section of the Judiciary Act are fulfilled. Where those conditions are complied with, the Act of Congress operates to suspend the jurisdiction of the court to which the writ of error is addressed, and stay execution in the case pending the writ of error and until the case is determined or remanded. *Hogan v. Ross*, 11 How., 296; *U. S. v. Addison*, 22 How., 188 [63 U. S., XVI., 305]; *Hudgins v. Kemp*, 18 How., 535 [69 U. S., XV., 518]; *Adams v. Law*, 16 How., 148.

Power to issue a *supersedeas* to a judgment rendered in a subordinate court does not exist in this court where the writ of error is not sued out and served within ten days from the date of the judgment, except where the aggrieved party is obliged to sue out a second writ of error in consequence of the neglect of the clerk below to send up the record in season, or where the granting of such a writ is necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district. *Hogan v. Ross*, 11 How., 296; *Ex parte Mishouakes R. R. Co.*, 5 Wall., 188 [72 U. S., XVIII., 678]; *Stockton v. Bishop*, 2 How., 74; *Wallen v. Williams*, 7 Cranch, 279; *Saltmarsh v. Tuthill*, 12 How., 389; *Hardeman v. Anderson*, 4 How., 640.

Undoubtedly, the writs of error in these cases were seasonably sued out and served, and it is equally clear that the parties in whose favor they were granted complied in each case with all the conditions prescribed in the Act of Congress as necessary to give the writ effect as a *supersedeas* and stay execution, as contended by

the plaintiffs in the pending motions. Such proceedings operate as a stay of execution, and it is well settled that if the subordinate court, under such circumstances, proceeds to issue final process, it is competent for this court to issue a *superseas*, as an exercise of appellate power to correct the error. *Stockton v. Bishop*, 2 How., 75.

Doubt upon that subject cannot be entertained where it appears that the court to which the writ of error was directed has made the return of the same to the proper term of the court, pursuant to the commands of the writ, and the same has been duly entered on the calendar. Objection is made, however, that the motions before the court are premature, as the return day of the writ of error is the first day of the next term, but we are of the opinion that the court possesses the power to grant a remedy in such a case, even before the return day of the writ of error, where it appears that the court to which it was addressed has made return to the same, and that the plaintiff has filed in the clerk's office a copy of the record duly certified as required by law.

Except in a case of urgent necessity, the court, in the exercise of a proper discretion, might well decline to exercise the power before the return day of the writ; but the better opinion, we think, is, that the jurisdiction for such a purpose attaches from the time the party in whose favor the writ of error is granted has complied with all the conditions prescribed in the Act of Congress to make the writ of error operate as a *superseas* and stay of execution. *R. E. Co. v. Bradley* [ante, 274].

Grant all this, still the court is of the opinion that the motions cannot be granted, as it is conceded that nothing has been done by the Supreme Court of the State since the writs of error were served and became a *superseas*, inconsistent with the prohibition contained in the Act of Congress which gives the writs of error that effect. Argument upon that topic is unnecessary as the affidavits filed in support of the motions affirm nothing of the kind, nor do the plaintiffs set up any such theory.

Incorporated as the respondents in the motions are by the General Assembly of the State, they claim the sole and exclusive privilege of conducting and carrying on the live stock landing and slaughter house business within the limits described and the privileges granted in the Act giving them corporate powers. On the other hand, the plaintiffs contend that the Act granting them such exclusive privileges is in violation of the Constitution of the United States, and void; and that they, the plaintiffs, have equal right to establish a live stock landing, and to erect slaughter houses, and to conduct and carry on that business as if no such special privileges had been granted to the respondents.

Injunctions were obtained by each party against the other in the courts where the suits were commenced, but appeal was taken, in each case, by the losing party, to the Supreme Court of the State, where the injunctions previously granted against the respondents in the motions were dissolved and those previously granted against the plaintiffs were made perpetual. Judgments of reversal on the one side and of affirmance on the other were, accordingly, rendered by the Supreme Court of the State in the

respective causes, as before explained, and it is to those judgments and to that court that the writs of error in question were directed and addressed. Those judgments remained in the Supreme Court of the State when the respective writs of error were sued out and became a *superseas* and stay of execution, and the records show that that court has neither reversed nor modified the judgments, nor any one of them, nor has that court done anything to vary or impair the rights of the parties or to carry the judgments into effect.

Subsequent to the commencement of these several suits, but before the judgments were rendered in the Supreme Court, the General Assembly of the State created another court in that city, called the Eighth District Court, and conferred upon that tribunal the exclusive original jurisdiction of injunction causes, and also made provision in the same Act for the removal of such causes from other courts to that jurisdiction.

Superseas writs of error having been sued out by the plaintiffs to the respective judgments rendered in the Supreme Court, they claimed that the injunctions against them granted by that court were inoperative, and their theory was and still is that the writs of error had the effect to dissolve or suspend the injunctions granted by the Supreme Court of the State and to restore and render operative the injunctions decreed in the subordinate courts.

Governed by these views, the plaintiffs denied that the respondents could claim to exercise any such exclusive privileges as those described in their charter, and proceeded to make the necessary preparations for carrying on the same business. Opposite views were entertained by the respondent Corporation and by the State authorities, and especially by the Attorney-General, and for the purpose of testing the question, he moved, in the Fifth District Court, that the fifth case embraced in the motions, as here classified, should be removed into the Eighth District Court, and the motion was granted.

Application was then made by him to the latter court to enforce the judgment rendered on appeal in that case by the Supreme Court of the State, making perpetual the injunction originally granted by the court from which the cause was removed, but the court refused to grant the motion, because, as the court held, the writ of error sued out in the case operated as a *superseas*.

Attempt is not made to call in question the correctness of that decision, but the Attorney-General on the same day obtained a rule in that court against all the respondents in that case, except one, to show cause, if any, why they should not be punished for contempt, as having violated the injunction granted in the case before the same was appealed to the Supreme Court of the State. Service was made under the rule and the respondents appeared, and were fully heard, but it appearing that the respondents had acted under the advice of counsel, the court refused to inflict any punishments. Directions, however, were given to the sheriff in the form of an order to enforce the preliminary injunction granted by the Fifth District Court.

Proceedings of an original character were also instituted by the present respondents in the

same District Court, in which they prayed that the board of metropolitan police might be enjoined to prevent all persons, except the petitioners in that case, from conducting or carrying on the live stock landing and slaughter house business within their chartered limits. Accompanying that petition was an affidavit of merits, and upon that petition and affidavit an injunction was granted as prayed.

Three days later, to wit: on the 6th of June last, the Attorney-General intervened for the State in the suit and adopted the petition and prayed that the injunction might be made perpetual. Various motions were made by parties opposed to the proceedings to dissolve or modify the injunction, but they were all overruled and denied by the court. No appeal was taken to the Supreme Court of the State, nor does it appear that any attempt was made by the respondents, in any form, to cause the proceedings to be re-examined in the court of last resort. They regarded it as unnecessary to seek any such revision of the proceedings, as they insist that the legal effect of the writ of error issued from this court to the Supreme Court of the State was to vacate the injunction granted by the latter court and to continue in force the suspensive features of the appeals allowed by the subordinate courts.

Beyond doubt, the appeal, in the form granted by the subordinate court, operated as a stay of execution, and suspended the jurisdiction of the court to proceed further in the cause until the same should be determined or remanded, but the Supreme Court rendered a final judgment in the case and granted a perpetual injunction.

Whatever conditions were annexed to the appeal in the subordinate court were abrogated by the final judgment of the appellate tribunal, as the appeal was then fully executed. Had no writ of error been granted by this court, the plaintiffs, it is presumed, would admit the correctness of that rule, but they insist that the effect of the writ of error, if made a *superedeas*, is, that it suspends the judgment of the Supreme Court and leaves the judgment of the subordinate court in full operation during the pendency of the writ of error.

Independent of statutory regulations, the term "*superedeas*" has little or no application in equity suits, as the rule is well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court. *Huguenin v. Buseley* (Gen. Or.), 15 Ves., 184; *Waldo v. Caley*, 16 Ves., 209; *Willan v. Willan*, 16 Ves., 216; 2 Dan. Ch. Pr., 1547.

Proceedings are stayed in the courts of New York by appeal in a chancery suit to the extent that if the party desires to proceed, notwithstanding the appeal on the point from which the appeal was taken, he must make application to the *Chancellor* for leave. *Green v. Winter*, 1 Johns. Ch., 80.

Different rules upon the subject prevail in different jurisdictions, but the Act of Congress provides that appeals in the Federal Courts shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error. 2 Stat. at L., 244.

Appeals do not lie from a State Court to this court in any case, as the Act of Congress gives

no such remedy. Rules and regulations prescribed by law of course control and furnish the rule of decision, but it seems to be well settled everywhere, in suits in equity, that an appeal from the decision of the court, denying an application for an injunction, does not operate as an injunction or stay of the proceedings pending the appeal. Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as matter of right, either in a suit at law or in equity. *Hart v. Mayor*, 3 Paige, 381; *Graves v. Maguire*, 6 Paige, 380; *Merced Min. Co. v. Fremont*, 7 Cal., 131; *McGarrahan v. Maxwell*, 28 Cal., 91; La. Code Pr., art. 307; *Delacroix v. Villere*, 11 La. Ann., 39; *White v. Casenave*, 14 La. Ann., 57; *Knabe v. Fernot*, 14 La. Ann., 60.

Separate examination of the several cases before the court as respects the effect of the writs of error upon the judgments removed into this court, may well be omitted, as the plaintiffs were the losing party in all the appeals from the courts of original jurisdiction to the Supreme Court. They prevailed in three of the suits in the District Courts, but they were defeated in the Supreme Court in all the cases.

Viewed in any light, it is clear that a writ of error to a State Court cannot have any greater effect than if the judgment or decree had been rendered or passed in a Circuit Court, and it is quite certain that neither an injunction, nor a decree dissolving an injunction, passed in a Circuit Court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.

Judgments and decrees of the Circuit Court are brought here for re-examination, and so are the judgments and decrees of a State Court, and the only effect of the *superedeas* is to prevent all further proceedings in the subordinate court except such as are necessary to preserve the rights of the parties.

Reference is also made to the 5th section of the Act of the 2d of March, 1793, as conferring power upon this court to enjoin the proceedings in the Eighth District Court; but the conclusive answer to that suggestion is, that there is no appellate relation between a subordinate State Court and the Supreme Court of the United States, and where no such relation is established by law the prohibition of that section—"nor shall a writ of injunction be granted to stay proceedings in any court of a State"—applies to the Supreme Court as well as to the Circuit Court. 1 Stat. at L., 335.

Final judgments or decrees in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, may be removed here for re-examination if they involve some one or more of the questions specified in the section conferring the jurisdiction, and otherwise come within the rules which regulate that jurisdiction. Appeals lie, it is conceded, from the District Courts of that State to the Supreme Court, as fully appears also from the records in these suits, which shows to a demonstration that this court possesses no power to grant any relief to the plaintiffs under the Act of Congress on which these motions are founded.

Motions denied.

Mr. Justice Bradley, dissenting:

I dissent, with some diffidence, from the opinion of the court, on the following grounds:

1. That, notwithstanding the Act of Congress declares that a writ of error shall be a *superseas* if certain conditions are performed, the judgment of the court has the effect of leaving many classes of decrees and judgments in equity, though appealed from, entirely effective and operative between the parties, whereas the writ of error ought to suspend the effect and operation thereof until the case is heard in this court.

2. That the judgment of this court will have the effect to allow subordinate State Courts to evade the *superseas* of a writ of error in all cases where the court of last resort remits the record to them for execution. The judgment of this court disclaims all jurisdiction over the acts of the subordinate State Courts and thereby, in my judgment, surrenders a very important power necessary to the effective support of its appellate jurisdiction.

3. That the judgment of the court remits the practice on this subject substantially back to the practice of the English courts of equity, in which it is conceded that an appeal does not suspend proceedings nor act as a *superseas* on the proceedings in the court appealed from; and, in effect, departs from the Act of Congress, which declares that a writ of error or an appeal in the Federal Courts shall be a *superseas*.

4th. That the effect of the judgment of the court is to disclaim its just control over the parties to the record.

Cited—12 Wall., 99; 16 Wall., 58; 33 U. S., 88; 111 U. S., 490; 1 Wood, 54; 9 Ben., 209; 33 Mich., 448.

WILLIAM H. FEILD, *Pf. in Er.*,

v.

WILLIAM M. FARRINGTON AND
HENRY B. HOWELL, Partners, as
FARRINGTON & HOWELL.

(See S. C., 10 Wall., 141-152.)

Ratification by principal—sales by factors—question for jury.

Where the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal, who has received a letter informing him what has been done on his account.

Where factors have made large advances on account of a consignment, the principal cannot, by any subsequent orders, control their right to sell at such a time as, in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor.

By leaving the agent's letter unanswered, the principal does not relieve the agent from the consequences of subsequent neglect, or want of good faith.

Whether a long delay in making the sale, in view of a falling market, was in the exercise of a sound discretion, good faith and reasonable diligence, was a question for the jury.

If the delay was unreasonable, it was in violation of the factors' duty, and they should bear the loss that resulted from it.

[No. 58.]

Submitted Nov. 22, 1870. Decided Dec. 6, 1870.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

See 10 WALL.

Suit was brought in the court below, by the defendants in error, to recover a sum of money alleged to be due for advancements made upon cotton. Judgment having been given for the plaintiffs, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Watkins & Rose, for plaintiff in error:

The instruction given by the judge was simply to say that if the letter was received and not answered, there was an end of the matter. No doctrine of estoppel ever went farther; and we submit, with entire confidence, that the cases on this subject do not go so far. This was to take the evidence of a thing for a thing itself. The law on this point, though stringent enough, has never been collated under the head of estoppels, whither it must be transferred if this instruction stands approved.

In *Prince v. Clark*, 1 Barn. & C., 186, a letter received by the principal May 29 was passed by in silence until Aug. 7. Bayley, J., said: "I am of opinion that the plaintiff's neglect to make inquiry from the 29th of May to the 7th of August was evidence to go to the jury, to show that he acquiesced in the purchase of the sugars made by Coffin & Clark."

See, also, *Bell v. Cunningham*, 8 Pet., 82; *Cairnes v. Bleeker*, 12 Johns., 300; *Courcier v. Ritter*, 4 Wash. (C.C.), 550; *Bredig v. Dubarry*, 14 Serg. & R., 27.

If Feild had written: "I have received your letter, and approve of your course," what was the course which would be thereby indicated? "You say that under certain conditions you will sell; I do not object; proceed under those conditions to sell." If they failed to sell in a reasonable time after the conditions attached—a question for the jury—themselves were derelict to that extent; and Feild should not thereby suffer; unless, indeed, the court will assess him with exemplary damages; and this, we submit, is not a case for that.

Mr. A. H. Garland, for defendant in error:

The first instruction asked for by Feild could not be given, for the reason, in itself law, that it had no application to the case at all. It was at best a mere abstract proposition, with nothing in the facts here to rest upon. If given, its only effect would have been to mislead or confuse the jury; and such instructions the courts never give.

Brooks v. Marbury, 11 Wheat., 78; *Tucker v. Moreland*, 10 Pet., 58; *Caldwell v. U. S.*, 8 How., 386; *Blackburn v. Craufords*, 3 Wall., 178 (70 U. S., XVIII., 186).

The third instruction asked by Feild is liable to the like objections, and to the further objection that it attempts to shield Feild by his own silence in not replying to the letters of his factors, which cannot be done, as will be seen when the instructions given by the court are considered.

The court is not bound to instruct the jury in terms required by either party. It is enough if so much thereof is given as is applicable to the evidence and the merits of the case; and if the court charge rightly upon the case generally, it is enough, although it does not instruct upon the specific request of counsel.

Clymer v. Dawkins, 8 How., 674; *Pitts v.*

Whitman, 2 Story, 609; *Mills v. Smith* (ante, 846).

If the charge upon the whole record is correct this is sufficient.

8 *Grah. & W., N. T.*, 767-772, *et seq.*

If a consignee inform his principal by letter of what he has done, the silence of the latter after a reasonable time, is approval of it.

Norris v. Cook, 1 Curt., 464; *Vianna v. Barclay*, 8 Cow., 281; *Cairnes v. Blecker*, 12 Johns., 800; *Towle v. Stevenson*, 1 Johns. Cas., 110; *Codwise v. Hacker*, 1 Cal., 526; *Armstrong v. Gilchrist*, 2 Johns. Cas., 481; *Brown v. McGran*, 14 Pet., 479; *Paley, Ag.* (by Lloyd), 81; *Prince v. Clark*, 1 Barn. & C., 186; *Bell v. Ounningham*, 3 Pet., 69-81; *Courcier v. Ritter*, 4 Wash. (C. C.), 549; *Bredig v. Dubarry*, 14 Serg. & R., 80; *Rich. Mfg. Co. v. Starks*, 4 Mas., 296; *Marfield v. Goodhue*, 8 N. Y., 63; *Owsley v. Woolhopter*, 14 Ga., 124; *Orane v. Bedwell*, 25 Miss., 507; *Lee v. Fontaine*, 10 Ala., 755; *Johnson v. Wingate*, 29 Me., 404; *Emerig. (Meredith)*, 116, 117; *Poth. Pand.*, lib. 14, tit. 6, n. 6; *Dig.*, lib. 14, tit. 6, 1, 16.

Mr. Justice Strong delivered the opinion of the court:

There is some conflict in the testimony respecting the instructions given to the plaintiffs below by the defendant, at the time when he obtained the advance on his consignment, and at the time when he last saw them, some fifteen days afterwards. It is claimed that he then gave them instructions to sell the cotton before the price should fall any lower, and that this direction was given not later than the 28th of October, 1865. It was upon this theory that his first prayer for instructions to the jury was framed.

That prayer was, that "if the jury find from the evidence that after the cotton was placed in the hands of the plaintiffs, Feild (the defendant), gave them instructions to sell before the price should fall any lower, and that the plaintiffs failed to do so, then the plaintiffs must suffer any loss occasioned by reason of their failure to sell at the time, and Feild is entitled to a credit for the amount the cotton would have brought if sold at the time such instructions were given." It is very obvious that no such directions, as that prayer asked for, should have been given to the jury. The prayer was based upon a very imperfect statement of the case. It overlooked material facts, without considering which it could not be determined to what amount of credit he was entitled. There was undisputed evidence that, on the 16th of November, 1865, some three weeks after the defendant's alleged directions were given to the plaintiffs, they wrote to him a letter informing him that they had not sold his cotton, as the market had been dull and on the decline every day since he left; that his cotton would not then sell for more than from forty-three to forty-four cents per pound, and that they would be compelled to sell unless he made other shipments, or remitted in cash as a margin, the money market being tight. They wrote further that they had held on thus far to meet his views, but that the declining tendency of the market induced them to write, and they asked to hear from him on his receipt of their letter. It was also in evidence that the defendant received this letter, and that he purposely declined to answer it. No allusion was made to

these facts in the defendant's first prayer for instructions to the jury. Yet it is manifest they ought not to have been overlooked by the court, for they bear directly upon the question, whether the defendant was entitled to credit for the sum for which the cotton would have sold if the plaintiffs had sold it before the price fell in the market. The effect of his refusal to reply to their letter within a reasonable time after he received it, was, undoubtedly, to raise a presumption that he approved of what his factors had done, so far as their letter informed him. In the absence of anything to rebut that presumption, he must be regarded as having consented to whatever delay had occurred in effecting a sale, even though it was contrary to his directions. He could not, therefore, hold his factors responsible for the consequences of acts which he had ratified. Mr. Livermore, in his *Treatise on Agency*, Vol. 1, p. 50, says that "When the relation of principal and agent does, in fact, exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what had been done on his account." And in *Story, Ag.*, sec. 259, it is said that: "In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other to answer the same within a reasonable time; and if he does not, it is presumed he admits the propriety of the acts of his correspondent, and confirms and adopts them." See, also, *Abbe v. Rood*, 6 McL., 106; *Norris v. Cook*, 1 Curt., 464. Whatever, then, may have been the instructions given to the plaintiffs by the defendant respecting the time of sale, even though they were disobeyed, and though the cotton was not sold before the price had fallen, his refusal or neglect to reply to the plaintiffs' letter of November 16th, 1865, which notified him of the fall in the market price, and informed him that they had not sold but had held on thus far to meet his views, must be deemed an approval of their delay, and equivalent to an antecedent authority. It has been argued that, at most, it raised a presumption of fact that should have been submitted to the jury. To this it may be answered there was nothing in the case to repel the presumption, and the jury would, therefore, have been bound by it had it been submitted. But the defendant's prayer for instruction ignored it and, in effect, called upon the court to withdraw it from the jury.

There is still another reason why the court should not have affirmed the defendant's first proposition. The plaintiffs had made large advances on the cotton consigned to them—advances very nearly, if not quite, equal to its value, and much more than its market value at any time after their letter to the defendant was written. They had, therefore, acquired a special property in the cotton, and they held it for their own indemnity as well as for the benefit of the defendant. Now, though it is true that factors are generally bound to obey all orders of their principals respecting the time and mode of sale, yet when they have made large advances or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their

right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor. Of course, they must act in good faith and with reasonable skill. This is the rule as laid down in *Brown v. McGraw*, 14 Pet., 479, in which it was said that "Where a consignment has been made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of sale, and the consignor has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary to the reimbursement of such advances or liabilities." In view of this, it is apparent that the jury had more to find than the fact that Feild gave instructions to sell the cotton before any fall in the price, in order to justify a credit to him for the amount the cotton would have brought if sold at the time the instructions were given. There was, therefore, no error in denying the defendant's first prayer for instructions to the jury.

And the second prayer was correctly refused for the reason that it allowed no effect to the letter of November 16, 1865, and the defendant's refusal to reply.

But we think there was error in refusing to affirm the defendant's third proposition, and the instruction which was given.

The third prayer of the defendant was as follows: "If the jury find from the evidence that the cotton was shipped by defendant to plaintiffs, as commission merchants, to be sold, and that the plaintiffs made large advances on the same, and that the plaintiffs wrote to the defendant that unless other shipments were made them, or the defendant made them remittances in cash, they would sell the cotton, then on the failure of defendant to write to plaintiffs in reply, the plaintiffs were bound to sell the cotton in a reasonable time; and the defendant is entitled to a credit on the plaintiff's demand for the amount which the cotton would have brought if sold within a reasonable time after failure of the defendant to answer said letter."

This the court refused to affirm, and in lieu thereof, charged the jury "that in case they find the defendant gave the plaintiffs instructions orally, to sell the cotton before any further fall in price, and that the plaintiffs failed so to do, but afterwards, on the 16th day of November, 1865, wrote the letter mentioned in the testimony of Mr. Farrington and Mr. Feild of that date, and that Mr. Feild refused to answer the same, then the plaintiffs are responsible for any loss sustained by reason of the fall in prices up to the time of the failure of the defendant to reply to said letter, but all losses sustained after that time must be borne by the defendant."

See 10 WALL.

U. S., BOOK 19,

This given, we think, was not sufficiently qualified. It gave undue effect to the plaintiffs' letter and to the defendant's neglect, or refusal to reply to it. Surely it cannot be maintained that, by leaving their letter unanswered, the defendant relieved the plaintiffs from the consequences of subsequent neglect, or want of good faith. His silence, at most, was an assent to what they had done up to the time when they informed him of their breach of his orders. It was a condonation of past neglect, not a permission given for future negligence or faithlessness. It did not relieve the plaintiffs from their continuing obligation to sell the cotton within a reasonable time, all the circumstances of the case being considered, and to sell at the best price that could be obtained. They were still his factors, and under the obligations of factors. Though the order to sell before a fall in the price had expired, they were still agents to sell, and without any particular instructions. It cannot be said that the letter of the plaintiffs proposed, or that the defendant by his silence assented to an indefinite or unreasonable postponement of a sale of the cotton. On the contrary, the letter threatened an immediate sale, unless other shipments were made or cash was remitted, and the silence of the defendant can be deemed no more than an assent to what his correspondents had done, and to what they proposed to do. Yet the charge of the court shielded them against all responsibility for good faith and diligence after the defendant neglected to reply to their letter, and threw upon him all loss sustained after that time, though it may have been occasioned in whole or in part by their failure to sell when they should have sold.

The plaintiffs held the cotton, without making a sale, nearly ten months after their letter of November 16, 1865, in which they notified the defendant that they would be compelled to sell unless he made other shipments or remittances. During this period the price of cotton was constantly falling in the market, until at last they sold what they said was worth in November, 1865, forty-three to forty-four cents, for thirty, twenty-five, and twenty cents. Whether this long delay, in view of a falling market was in the exercise of a sound discretion, good faith and reasonable diligence, was a question that should have been submitted to the jury. If the delay was unreasonable, if it was in violation of the plaintiffs' duty as factors, they, rather than the defendant, should bear the loss that resulted from it. Such was the instruction the defendant sought to obtain by his third prayer; but it was denied, and the jury were charged that he must bear all losses sustained after his refusal to answer the plaintiffs' letter, without excepting such portion of the loss as may have been caused by the fault of the plaintiffs. Herein we think was error.

It is true the court also charged that, as a general principle, the plaintiffs, as factors, were bound to use due diligence, care and skill in the sale of the cotton, and to obey instructions given them by the defendant in regard to the sale. But this was not said as a qualification of the specific instructions previously given, and the jury must have understood that if they found the facts as stated by the court, they must

charge the defendant with all the loss which accrued after his failure to answer the plaintiffs' letter.

The judgment must, therefore, be reversed, and a new trial ordered.

Judgment reversed and venire de novo awarded

THOMPSON DEAN, *Appt.*,

v.

THOMAS A. NELSON ET AL.

(See S. C., 10 Wall., 158-172.)

Sale of stock—what is—foreclosure as against defendant in Confederate lines, void.

*1. A sale of stock in a company at its par value, the consideration to be paid out of the net receipts of earnings of the stock, received quarterly by the company, and a note given therefor, with the condition that the principal should become due if the installments were not regularly paid; held, a valid sale under the circumstances.

2. Such a condition in the note is not a penalty, but is of the substance of the contract.

3. A mortgage to secure such note being given upon a grantee's interest as a stockholder in the property of the company, the equity of redemption is not extinguished by proceedings to foreclose the same during the war, when such proceedings were taken within the Union lines whilst the defendants were absent in the Confederate lines, and were prohibited from entering the Union lines.

[No. 32.]

Argued Nov. 2, 1870. Decided Dec. 6, 1870.

APPEAL from the Circuit Court of the United States for the District of West Tennessee.

The bill in this case was filed in the court below, by the appellees, for an accounting upon a certain contract and for the transfer of certain shares of stock. Judgment having been given for the complainants, the respondent took an appeal to this court.

The case is fully stated by the court.

Mr. Wm. S. Holman, for appellant:

The assignments of the two hundred four shares of stock by Pepper to Thomas A. Nelson, were made without any consideration whatever. There was no mutuality in the contracts. They impose no obligation on Nelson. His agreement to pay for the stock out of its own net earnings was not a valuable consideration for its assignment to him. If these contracts were executory, a court of equity would not interpose to enforce them.

Dorsey v. Packwood, 12 How., 126; *Gale v. Archer*, 42 Barb., 320; 1 Story, Eq. Jur., secs. 239, 742, 769, 775, 793, and authorities referred to.

Nelson, by these instruments, does in fact mortgage or re-assign these two hundred four shares of stock to Pepper, subject to be defeated by the payment of the quarterly dividends thereon, on the debt until paid. They were certainly intended to be and were chattel mortgages on the stock. Such stock, by the laws of Tennessee, is personal property. Code of Tenn., 1858, sec. 1487.

By the failure of Nelson to perform the conditions of the mortgage, the mortgagee acquired an absolute title to the stock. "This is well

established to be the legal effect of a mortgage of personal property."

Langdon v. Bud, 9 Wend., 80; 12 Wend., 61; 2 Hill, Mort., 535, 536; *Barfield v. Cole*, 4 Sneed, 465.

Upon the failure of Nelson to fulfill his contracts, if he possessed any right or interest in this stock, it was certainly only a right in equity to redeem the stock.

But the right of redemption arises from the payment or tender of payment of the debt. Here the appellees still retained the \$3,673 of dividends received on this stock, without payment or tender to the appellant of that sum, or of any portion of the debts. The claim set up is against equity and good conscience.

While the appellant insists that, in the case presented by the bill, answer, admitted facts and depositions, without reference to the proceedings between the parties before the Civil Commission at Memphis, the appellees are not entitled to relief in a court of equity, and are not entitled to relief upon the facts stated in the bill, he presents the record of that tribunal as a perfect and complete bar to the relief claimed by the bill.

Nor is there a question that this Civil Commission, as organized, with judges, recorder and Marshal, duly sworn and qualified, was, in fact, a court of justice.

That a military commander in a conquered district, in which the civil authority is overthrown or suspended, may, to aid him in the protection of private rights and to preserve civil order, establish courts of justice and other agencies of civil government, is scarcely open to discussion.

The validity of the proceedings of such tribunals, established by military power, is sustained by the writers on international law, and by an unbroken series of decisions in the courts of the United States.

Jecker v. Montgomery, 18 How., 496; *Cross v. Harrison*, 16 How., 164; *Leinsdorf v. Webb*, 20 How., 176 (61 U. S., XV., 891); *Hefferman v. Porter*, S. C. of Tenn., 9 Am. Law Reg. (N. S.), 41; *Rutledge v. Fogg*, 3 Cold., 554; *The Grapeshot v. Wallerstein* (ante, 651).

Messrs. P. Phillips, Kortrecht, and Craft, for appellees:

The law on this subject is well established. The mortgage may be more than a lien. The title on forfeiture may vest in the mortgagee; but, nevertheless, it is held by him merely as security for a debt.

Conard v. Ins. Co., 1 Pet., 441; *The Hampton*, 5 Wall., 374 (72 U. S., XVIII., 661).

Notwithstanding that, by the forfeiture, the title at law became absolute in the mortgagee, who then had the right to reduce it into possession, yet in equity the mortgagor even of personal property had still the right to redeem. This was considered as well settled, in the opinion delivered by Judge Nelson in the case of *Patchen v. Pierce*, 12 Wend., 62; *Hutchins v. King*, 1 Wall., 58 (68 U. S., XVII., 546); Story, Eq., sec. 1031; *Clark v. Rayburn* (ante, 354).

The same principles are maintained in England, as will be seen by reference to 3 Pow. Mort., 963.

There is, however, this difference between mortgages of real and personal property: in

*[Head notes by Mr. Justice BRADLEY.]

the former, the right to redeem can only be foreclosed by a proceeding in equity. In the latter, this right may be extinguished by a sale, unaided by the court.

But to make this sale effective, it is absolutely essential that due notice of time, place, etc., be given to the mortgagor.

2 Story, Eq., sec. 1081; *Patchen v. Pierce*, 12 Wend., 63; *Charter v. Stevens*, 8 Den., 85; *Hart v. Ten Eyck*, 2 Johns. Ch., 100; 4 Kent, Com., 189.

But failing to make good his title to the stock, by virtue of the default, he claims title under a decree in a foreclosure suit, filed by him before a Civil Commission, organized under the orders of a brigadier-general, for the District of Memphis, Apr. 25, 1863.

This title we assail on the ground: first, that the court had no jurisdiction of the cause.

In the case of *The Grapeshot* (ante, 651) the court held, that the power to appoint such a court while occupying the territory of the belligerent was vested in the President, as Commander-in-Chief intrusted, as such, with the direction of the military force by which the occupation is held.

The position maintained by defendant goes far beyond this. He contends that it is sufficient if the court be authorized by military power, and says he is sustained in this by an unbroken series of decisions.

The case of *Jecker v. Montgomery*, 18 How., 515, involved the validity of the decree of a prize court established at Monterey. Taney, Ch. J., held that, notwithstanding the order of the President established the court, its decrees were invalid, as no such authority could be conferred in prize causes.

In *Cross v. Harrison*, 16 How., 189, the opinion expressly states that authority was given by the Executive to the Commander-in-Chief, on that station, to establish port regulations and regulate import duties.

In *Leitenad v. Webb*, 20 How., 176 (61 U. S., XV., 891), it is stated that Kearney acted under the sanction and authority of the United States; and the head note states the case thus: "The Executive authority of the United States properly established a provisional government, which ordained laws and instituted a judicial system, etc."

These constitute the unbroken series of decisions, relied on by appellant to show that any officer, however subordinate his rank, when in the exercise of a military command during the late civil war, had authority to establish courts with full civil, as well as criminal jurisdiction.

Admitting that this commission had jurisdiction of the subject-matter, we yet maintain the invalidity of the decree, on the ground that Nelson, the defendant, was never served with process and could not, under the circumstances, be made a party to the suit.

The law of nations, the Acts of Congress, nay, the direct command of this "military power" itself forbade Nelson from appearing, even if accident had brought the publication to his notice. The law cannot create a default when the law forbids a performance.

Sir Alexander Don's case, 5 Cl. & F., 21; *Ins. Co. v. Hall*, 16 Am. L. R., 606.

In a very recent case Judge Blatchford considers very fully the whole subject and says: See 10 WALL.

"The object of the notice must be held to have been given to apprise the debtors. If the presumption be that they did not see it because, by reason of hostilities it could not reach them, it would be a fraud on them to uphold a sale made on a notice so given."

See, *Cuyler v. Ferrill*, decided in Georgia, 8 Am. L. Reg. (N. S.), 100.

Mr. Justice Bradley delivered the opinion of the court:

Thompson Dean, of Cincinnati, prior to the breaking out of the late rebellion, was the owner of a large amount of capital stock in the Memphis Gas Light Company, a corporation of Tennessee, located and doing business at Memphis in that State. In May, 1861, he transferred his entire stock to James H. Pepper, secretary of the company, to enable him (Pepper), to make some disposition of it in view of approaching hostilities. On the 11th day of June, 1861, Pepper sold and transferred fifty shares of \$100 each, to Thomas A. Nelson, then of Memphis, at par, receiving, for the consideration, Nelson's note under seal, dated June 11th 1861, whereby he promised to pay to the order of Pepper, \$5,000, with interest at six per cent. per annum, out of the net receipts of earnings in the sum of \$5,000 of the capital stock of the company, payable in quarterly installments, the interest being first paid and the balance of said net receipts then to be applied on the principal, which installments should amount to such sum of money as should be equal to the quarterly net receipts of earnings on \$5,000 of the capital stock of the company. It was further expressed in the note, that it was given for the purchase money of \$5,000 of the capital stock of the company, sold and transferred to Nelson by Pepper, and that if Nelson failed to pay any of the installments quarterly as aforesaid, after the receipt by the company of said net earnings, then the full sum of \$5,000, with interest, less interest and installments paid, should become due and payable.

To secure the payment of this note, Nelson on the same day executed to Pepper a paper in the ordinary form of a mortgage, conveying to Pepper, his heirs and assigns, the following real and personal property, viz.: so much of Nelson's individual interest, right, title and estate in the property and premises of and belonging to the Memphis Gas Light Company as should be represented by and equal to \$5,000 of capital stock of said company at par, then describing the real and personal property which the company owned, being gas works and other property in Memphis, concluding with the usual condition, to be void on the payment of the note according to the tenor and effect thereof. This mortgage was duly acknowledged and recorded in the registry of mortgages for Shelby County. On the 20th day of July, 1861, Pepper sold and transferred to Nelson, one hundred fifty-four additional shares of said company at the par value of \$15,400, and received a similar note and mortgage for the consideration thereof. It appears from the evidence in the case, that Pepper sold this stock to Nelson, and the remainder of Dean's stock to other persons, when he did under apprehension that it would be confiscated by the Confederate authorities, as was threatened to be done, and from a de-

sire to leave Memphis for his own personal safety. But Nelson swears that he made the purchase of the stock in good faith, and he received it without any trust or pledge for its return.

The war soon began to rage with severity, and all intercourse between the States in rebellion (including Tennessee) and the other States of the Union, was not only interrupted, but was prohibited by President Lincoln's Proclamation of August 16, 1861, made in pursuance of the Act of Congress of the 18th July previous.

Nelson continued to reside at Memphis, within the Confederate lines, and receive the regular quarterly dividend on two hundred four shares of stock, but did not and could not make any payment to Pepper or to Dean, to whom Pepper assigned the notes and mortgages, they both being within the Union lines. The amount of dividends thus received by Nelson was \$3,672.

On the 1st of June, 1862, Nelson transferred one hundred ninety-four shares of the stock to his wife, having previously transferred ten shares to May. Both transfers were without consideration, except that the object of the transfer to May was to make him a director, and the professed object of the transfer to Nelson's wife was, to make her a separate provision for maintenance.

On the 6th of June, 1862, the Federal forces entered the City of Memphis and held military possession of that part of Tennessee until the close of the war. Dean visited Memphis during the summer and fall of 1862, and saw Nelson there, who failed to make any payment on the notes. Nelson swears that Dean refused to receive any payment, alleging that the stock was absolutely forfeited by the failure to pay. Dean swears that he asked Nelson what he proposed to do about the payment of the net earnings which he had received, and that Nelson answered that he was not disposed to pay it, because he might have to pay it again to the Confederate Government. From the evidence in the case (the testimony of Fitch), we are inclined to believe that this ground was assumed by Nelson, and that he did not make an unequivocal tender of the money due; and while it is probably true that Dean insisted that the stock was forfeited, we are not satisfied that his conduct was such as to obviate the necessity of a tender by Nelson, if the latter wished to prevent the principal from becoming due. At that time Nelson was allowed to remain peaceably within the Union lines and there was no reason why he should not have paid the money to Dean.

On the 5th of April, 1863, Nelson with his family was ordered to remove south of the lines of the United States forces, and not to return. This order was made in retaliation for some outrages committed by guerrillas in the vicinity. In pursuance of it, Nelson and his family removed within the Confederate lines, and remained therein during the remainder of the war; and was not permitted to re-enter Memphis, although Nelson at one time requested permission to do so. The other complainant, May, was within the Confederate lines during the entire contest.

On the 25th of April, 1863, General Veatch,

then commanding the Military District of Memphis, by a special order established and organized a Court of Civil Commission for the hearing and determination of all complaints and suits instituted by loyal citizens for the collection of debts, enforcement of contracts, prevention of frauds, recovery of the possession of property and, generally, to do whatever can be done by a court deriving its powers from military authority. Before this Court of Civil Commission, on the first day of September, 1863, Dean filed a petition for the foreclosure and sale of the two hundred four shares of stock, in order to raise the amount due on the note. The present appellees, Nelson and wife and May, were made defendants, but were returned "Not found," and publication of notice to them to appear was made, in accordance with the laws of Tennessee existing prior to the rebellion. No appearance being effected, a decree was made, execution issued, and the stock was sold by the Marshal on the 23d day of October, 1863, to one Hanlin, and was subsequently transferred to him on the books of the company by the secretary, pursuant to an order of the Civil Commission. Hanlin immediately transferred the stock to Dean. From that period to the institution of this suit, Dean drew the dividends on the stock.

The appellees filed the bill in this case in June, 1865, praying, in substance, that the stock might be decreed to belong to them, and that Dean might account for all the dividends received by him, to be applied to the payment of the notes, etc., and for general relief.

The appellant, defendant below, in his answer sets up and insists upon two grounds of defense: First. The forfeiture of the condition of the mortgage which, under the circumstances of the case, and from the unconscionable nature of the transaction, he insists should be held to be an absolute forfeiture without benefit of redemption; in other words, that the instrument should be regarded as a conditional assignment or transfer, and not as a mortgage. Second. The defendant sets up the proceedings before the Civil Commission, by which, as he contends, even if the instrument were a mortgage, all equity of redemption in the stock was foreclosed. The appellees, on the contrary, insist that the paper was a mere mortgage; that the condition in the note making the principal due if the installments were not regularly paid, was in the nature of a penalty and should not have been enforced in an equitable proceeding; that the court or Civil Commission was illegal and without authority; that it never had any jurisdiction of the person of the appellant, nor of the property attempted to be foreclosed; that the existence of the war and the residence of the appellees within the Confederate lines forbade any legal proceeding against them or their property; that therefore, they have been illegally dispossessed of the latter, and are entitled to have it restored to them without condition; and finally, that the appellant is accountable to them for the dividends received by him, to be credited on the notes.

In determining the questions raised by this record, the court is of opinion in the first place, that Dean must be regarded as concluded on the question of the sale of his stock. Had the transaction been merely an agreement for a sale

upon the terms on which the sale was actually made, and this a bill by the vendees for a specific performance, we should find great difficulty in distinguishing this case from that of *Dorsey v. Packwood*, 12 How., 126. But here the sale was actually made, and the stock was actually transferred to Nelson, so that, in the absence of fraud, it became absolutely his. And in support of the *bona fides* of the transaction, it may be said, that in view of all the contingencies of the situation, the arrangement was at the time an advantageous one for Dean. At all events, he chose, on the whole, to acquiesce in it, and in his bill to foreclose the stock, presented before the Civil Commission, he makes no claim but that of holder of the mortgage, affirming and claiming under Nelson's title throughout. And in his answer to the present bill he nowhere hints that Nelson was guilty of any bad faith in the transaction, or made any agreement to hold the stock for him, or in any other way than as a *bona fide* purchaser thereof. And it is hardly correct to say that Nelson incurred no obligation in the transaction. He agreed to pay the whole amount immediately in case of failure to pay any installment after the receipt by the company of the net quarterly earnings. And this condition was not in the nature of a penalty, as surmised by the appellees; but was of the substance of the contract. So that, on failure to pay or tender the money received by him, or by the company, on account on account of the stock purchased, the whole debt became due and payable as a personal obligation of Nelson.

But, at all events, the stock was actually sold and transferred, and became the property of Nelson, and was possessed by him. The contract was an executed contract, and that transaction cannot now be impeached.

The next question relates to the character of the instrument given by Nelson to Pepper as security for the payment of his notes. Was it a conditional sale, or was it a mortgage? On this question hardly a doubt can be raised. The court is asked by the appellant, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to consider the instrument as a conditional conveyance of the stock, and not a mortgage. But the court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the court to declare it a mortgage; and if it is a mortgage, it has, perforce, all the incidents and privileges of a mortgage; and that it is a mortgage there is no room for question. The principal engagement is contained in the note, which creates a debt as soon as earnings or dividends are received. The other instrument is secondary, and is intended as security for the payment of the note. The appellee himself, in his proceedings before the Civil Commission, treats his claim as a debt, and the instrument of security as a mortgage. He calls it a mortgage; and the doctrine of "once a mortgage, always a mortgage," applies to it.

Then, being a mortgage, whether of real or personal property, the mortgagor has an equity of redemption, unless it has been extinguished in some legal way. The great question of the cause is, whether the equity of redemption has been extinguished.

See 10 WALL.

It is unnecessary to decide whether the mortgage was one of real or of personal estate, or whether it was a legal or only an equitable mortgage. As no attempt has been made to cut off the equity of redemption, in any other manner than by legal proceedings, the question is reduced to the simple one, whether those legal proceedings are valid and effectual for the purpose.

It is objected that the court or Civil Commission was not legally established; but it is not necessary to determine that question, as the proceedings themselves were fatally defective. The defendants in the proceedings (the appellees here) were within the Confederate lines at the time, and it was unlawful for them to cross those lines. Two of them had been expelled the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see nor obey it. As to them, the proceedings were wholly void and inoperative.

This leaves the equity of redemption in the mortgaged property unextinguished; and it is, therefore, the right of the appellees to redeem it.

In the opinion of the court, the whole principal and interest of the notes have become due and payable, and a redemption and re-transfer of the stock should be decreed only on condition of the payment of principal and interest in full, after giving to the appellees credit for the sums received by the appellant; legal interest on each side to be allowed.

The decree of the Circuit Court, therefore, will be so far modified that, instead of requiring the appellant to forthwith transfer the stock, as directed in the decree, he be decreed to transfer it to the defendants, Miriam W. Nelson and Benjamin May, respectively, as therein directed, upon payment by the appellees to the appellant of the amount which shall be found to be due to him on the said two notes, after taking and stating the account in the said decree afterwards directed; neither party to recover costs of the other in this appeal.

Cited—11 Wall., 589; 17 Wall., 439; 18 Wall., 110; 96 U. S., 306; 3 Hughes, 389; 2 Wood, 41; 66 Ill., 295, 296; 9 Kan., 679; 11 Kan., 644; 65 Mo., 447; 27 Ohio, 623; 9 Am. Rep., 650 (35 Ind., 159); 26 Am. Rep., 234 (13 Bush., 644).

E. E. DOWNHAM AND HENRY GREEN,
Partners, as DOWNHAM & Co., *Plffs. in*
Err.

THE CITY COUNCIL OF ALEXANDRIA.

(See S. C., 10 Wall., 178-176.)

Licenses for selling beer, not unconstitutional—what question this court will not consider.

Special license tax imposed by a city for the privilege of selling, in casks, beer manufactured in the State, is not obnoxious to the Constitution.

This court will not consider a question which the record does not show has arisen, nor one which depends upon the construction of local statutes and

does not involve the consideration of any Act of Congress nor any provision of the Constitution of the United States.

[No. 59.]

Argued Nov. 28, 1870. Decided Dec. 6, 1870.

IN ERROR to the Fourth Judicial District of the State of Virginia.

Suit was brought by the defendant in error, in a circuit court in and for the County of Alexandria, to collect a certain license fee and tax. Judgment having been given for the plaintiff in that court, and upon appeal by the defendant, affirmed by the district court of that judicial district, the said defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Geo. Wm. Brent and C. W. Wattles, for plaintiff in error.

Mr. D. L. Smoot, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

An ordinance of the City Council of Alexandria, Virginia, passed in June, 1867, for the purpose of raising revenue for that year, imposed a license tax in proportion to the capital invested, upon all merchants commencing business, and a tax proportioned to their sales, upon all merchants who had been carrying on business for one year, prior to the first of June. The same ordinance also imposed a special license tax upon commission merchants commencing business and a tax in proportion to the commissions received upon those who had been doing business for one year prior to the first of June. The ordinance further imposed a license tax of \$200 on all agents or dealers in beer or ale by the cask, not manufactured in Alexandria, but brought there for sale.

The defendants in the court below, the plaintiffs in error in this court, were—at the commencement of this action, in August, 1867, and had been from the first of the previous June—conducting the business of liquor merchants and commission merchants in Alexandria, and at the same time had been dealing on commission in beer and ale by the cask, which was not manufactured in the City, but was brought there for sale. They obtained, as required by the ordinance, a license from the Mayor of the City, as merchants and commission merchants for the year ending June 1st, 1868, and paid the liquor tax; but they did not obtain a license to deal in beer and ale by the cask, which were not manufactured in Alexandria, but were brought there for sale; nor did they pay the tax of \$200 required by the ordinance for such license. It was to recover the latter sum that the present action was brought. It was submitted to the Circuit Court of Alexandria County, upon an agreed statement of facts, the parties waiving all matters of form and pleading, and expressing a desire to present for the decision of the court two questions.

1. Whether the City Council of Alexandria had exceeded its authority in imposing the tax upon dealers in foreign ale or beer.

2. Whether the license of the defendants, as merchants and commission merchants, authorized them to deal in ale and beer by the cask, which was not manufactured in Alexandria but brought there for sale, when the ordinance

imposed a specific license tax upon this particular branch of the trade.

The circuit court gave judgment for the City and the district court affirmed the judgment, and this latter court being the highest court of law of the State, in which a decision could be had, the case was brought here for review.

It was contended in the court below, by the defendant's counsel, and it is urged here by them, that the ordinance, in the imposition of a tax upon dealers in beer or ale by the cask, when not manufactured in the City of Alexandria, but brought there for sale, is in conflict with that clause of the Constitution which declares that "Congress shall have power to regulate commerce with foreign nations, and among the several States," and the clause which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

The argument of counsel proceeds upon the supposition that the beer and ale in which the defendants dealt was manufactured either in a foreign country or in another State of the Union; but there is nothing in the record to warrant the supposition. The first question that the parties desired to present in the agreed statement is not, in truth, raised by the facts admitted. It is not alleged in the statement that the defendants were dealers in "foreign beer or ale," or even in beer or ale manufactured without the State of Virginia. It is only alleged that they were dealers in beer and ale by the cask, which was not manufactured in the City of Alexandria. For anything which appears, the beer and ale in which they dealt may have been manufactured in other parts of the State. If manufactured within the State, the exaction of the special license tax for the privilege of selling them in casks in Alexandria, would not, of course, be obnoxious to either clause of the Constitution cited. In that case it would not interfere with any regulation of commerce with foreign nations, or between the States, or with any authority to make regulations for such commerce. Nor would it, in that case, impair any privileges or immunities of citizens of other States, who, equally with citizens of Virginia, and upon the same terms, could deal in the City of Alexandria in similar goods. It is only equality of privileges and immunities between citizens of different States that the Constitution guaranties.

The defendants have, in fact, presented for our consideration, a possible but not an actual question, one which may hereafter arise under the ordinance, but which has not arisen as yet; at least the record does not aver any facts which show that it has arisen and we cannot indulge in presumptions to supply the omissions of material averments.

The second question presented in the statement, depends for its solution upon the construction of local statutes, and does not involve the consideration of any Act of Congress, or any provision of the Constitution of the United States.

We are of opinion that no question is raised by the record which this court can consider under the 25th section of the Judiciary Act, and the writ of error must, therefore, be dismissed.

And it is so ordered.

JOSEPH A. COOPER, *Plff. in Err.*,

v.

ROBERT REYNOLDS' LESSEE.

(See S. C., 10 Wall., 808-821.)

Judgment in evidence—jurisdiction, how obtained—in attachment cases—defective affidavit—writ and levy essential to jurisdiction.

A court cannot disregard a judgment in another suit given in evidence before it, or refuse to give it effect on any other ground than a want of jurisdiction in the court which rendered it.

Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it.

In attachment cases, the levy of the writ of attachment on the property is the one essential requisite to jurisdiction.

Though the affidavit preliminary to issuing the writ may be defective, that cannot deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

When the writ has been issued, and the property seized, condemned and sold, this court cannot hold that the court below had no jurisdiction for want of a sufficient publication of notice.

Where there is a sufficient writ and levy, a judgment of the court, a sale and sheriff's deed, they must be held valid, when given in evidence in another action.

[No. 37.]

Argued Nov. 16, 1870. Decided Dec. 6, 1870.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

This case arose upon an ejectment suit brought in the court below, by the defendant in error. Judgment having been given in favor of the plaintiff by that court, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Thos. A. R. Nelson and Horace Maynard, for plaintiff in error:

His Honor erred in instructing the jury that "There was no authority for the rendition of said judgment, and that the levy of the attachment, the judgment of the court, and the sale by the sheriff, were utterly null and void" and that the sheriff's deed conveyed no title.

The Supreme Court of Tennessee has always recognized the distinction between process which is irregular and voidable and that which is absolutely void for want of jurisdiction.

Stevenson v. McLean, 5 Humph., 332; *Lee v. Crossen*, 6 Humph., 281; *Reams v. McNail*, 9 Humph., 542; *Etheridge v. Edwards*, 1 Swan, 426; *Mason v. Vance*, 1 Sneed, 178.

It has been repeatedly decided that a judgment which is not void upon its face, cannot be collaterally attacked.

Britain v. Cowen, 5 Humph., 315; *Thacker v. Chambers*, 5 Humph., 318; *Hall v. Heffly*, 6 Humph., 444.

If the court rendering the decree had jurisdiction of the subject-matter and person, the same will not be held void when collaterally attacked, although the proceedings were irregular and erroneous and reversible on appeal or error.

Greenlaw v. Kernahan, 4 Sneed, 371; *Kelley v. Mize*, 8 Sneed, 59; *Pinson v. Levy*, 1 Yerg., 296; *Kirkland v. Brown*, 4 Humph., 174.

Under the Code (sec. 4225) the Circuit Courts of Tennessee are courts of general jurisdiction. By secs. 2746 and 2815, they have jurisdiction

of actions of tort by summons, which may be aided by the ancillary attachment under the sections above referred to. In *Tipton v. Harris*, Peck, 424, it was long since decided that every court of superior jurisdiction is the judge of its own authority under the general law, and that the jurisdiction does not depend upon incipient process or publication, but upon the general law. In *Matthews v. Weeden*, 4 Yerg., 166, it was held that a court of general jurisdiction is to be presumed to have acted correctly, and the burden of showing the contrary is upon him who alleges it.

Mr. J. W. Moore, for defendant in error: The Supreme Court of the State of Tennessee in the case of *Woodfolk v. Whitworth*, 5 Cold., 561, says:

"An auxiliary writ of attachment is void, unless it is stated in the affidavit and alleged in the attachment that a suit has been brought by the plaintiff against the defendant, the nature thereof, the tribunal in which it is depending, the amount of damages laid in the action, and that the cause of the action is just."

This decision is but a repetition of the same construction which that court has invariably given to the attachment laws of the State, as will be seen by the cases cited, to wit:

Thompson v. Carper, 11 Humph., 543; *Morris v. Davis*, 4 Sneed, 452; *Smith v. Foster*, 8 Cold., 140; *Haynes v. Gates*, 2 Head., 598.

Not only were the proceedings by attachment in this case fatally defective for want of a proper affidavit, but there was no personal service on the defendant, Reynolds (the appellee), not even by an order of publication.

Mr. Justice Miller delivered the opinion of the court:

On the trial of this action of ejectment in the circuit court, it was admitted that the plaintiff, Reynolds, had title to the land in controversy, unless it had been divested by certain judicial proceedings under which the defendant, Cooper, asserted title and held the possession.

The record of these proceedings, which were had in one of the courts of the State of Tennessee where the land was situated, was introduced in evidence, and the court instructed the jury that they were null and void for want of jurisdiction, and a verdict and judgment was rendered for the plaintiff, Reynolds.

The only question which we are to decide is, whether this instruction of the court was right.

The proceeding under which Cooper claims title was an action of trespass brought by Brownlow against Reynolds and other defendants, in which a writ of attachment was issued at the same time that the writ of summons was, and was levied upon the land which is sought to be recovered in the present suit. The case proceeded to judgment, which was for \$25,000, and by that judgment the land attached was ordered to be sold, and afterwards, under a *venditioni exponas*, the sheriff did sell it, and made a deed to Cooper, as directed by Brownlow, the purchaser.

Cooper was put in possession of the land by a writ in the nature of a writ of *habere facias*, issued from the same court in the same proceeding, and has held it under these proceedings ever since.

No process was ever served on Reynolds, nor

was there any appearance for him at any stage of the proceedings.

The objections taken to the proceeding on attachment are: 1. That by the law of Tennessee the attachment could not be issued at the beginning of the suit where the action was *ex delicto*, but could only be issued after suit commenced. 2. That the affidavit was defective. 3. That there was no publication of notice, as required by the statutes.

The question of the conformity of these proceedings to the requirements of the statutes under which they were had, has been very fully discussed by counsel, and if we were sitting here as on a writ of error to the judgment of the state court under which the land was sold, we might not find it easy to affirm or reverse the judgment on satisfactory grounds, notwithstanding the abundant citation of authorities from the Tennessee courts. But we occupy no such position. The record of this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law. But that its applicability to the present case may be thoroughly understood, reference is made to the most important of the decided cases in this court and in the Supreme Court of Tennessee. *Kempe v. Kennedy*, 5 Cranch, 178; *Thompson v. Tolmie*, 2 Pet., 157; *Voorhees v. Bk. of U. S.*, 10 Pet., 449; *Grignon v. Astor*, 2 How., 819; *Harvey v. Tyler*, 2 Wall., 328 [69 U. S., XVII., 871]; *Florentine v. Barton*, 2 Wall., 210 [69 U. S., XVII., 783]; *McGoon v. Scales* [ante, 545]; *Stevenson v. McLean*, 5 Humph., 383; *Brittain v. Cowen*, Humph., 315; *Lee v. Crossna*, 6 Humph., 281; *Kilcrease v. Blythe*, Humph., 378; *Reams v. McNail*, 9 Humph., 542; *McGavock v. Bell*, 2 Cold., 512.

It is necessary, therefore, in the present case to inquire, whether the errors alleged affect the jurisdiction of the court.

It is as easy to give a general and comprehensive definition of the word "jurisdiction" as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.

Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.

It is to be observed that in reference to jurisdiction of the person, the statutes of the States have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So, also, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing and, in effect, subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court.

When we come to the application of these principles to the case before us, that which leads to some embarrassment is the complex character of the proceeding which we are to consider.

Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued, and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

That such is the nature of this proceeding in

this latter class of cases, is clearly evinced by two well established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendants out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.

Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it, unquestionably, is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has served its purpose and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

So, also, of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made and, undoubtedly, if there has been no such publication, a Court of Errors might reverse the judgment.

But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice.

We do not deny that there are cases which, not partaking of the nature of proceedings *in rem*, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the Legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction.

It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the State, and that
See 10 WALL.

such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction. If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction.

Such departures from the rules which should guide the court in the conduct of a cause are not errors which render its action void.

The case of *Voorhees v. Bk. U. S.*, 10 Pet., 449, was much like this, and required stronger presumptions in favor of the jurisdiction of the court to sustain its acts than the one before us.

The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case. No affidavit was produced, nor publication of notice, nor appraisal of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the Act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects we have mentioned, and that they were not fatal in a collateral proceeding.

In the present case there is a sufficient writ of attachment, its levy and return, the judgment of the court, on trial by jury, the order to sell the property, the sale under the *venditioni exponas*, the writ of possession, sheriff's deed and actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decision in this court, to unsettle titles to vast amounts of property, long held in reliance on those decisions and, in our judgment, would be to sacrifice sound principle to barren technicalities; and, after a careful examination of the reported cases on this subject, we believe this to be the law, as held by the courts of Tennessee.

The judgment of the Circuit Court is reversed, and a new trial ordered.

Mr Justice Field, dissenting:

I dissent from the judgment in this case. I am of opinion that the State Court of Tennessee never acquired jurisdiction in the case of *Brownlow v. Reynolds*.

Cited—11 Wall., 344, 349, 587; 23 Wall., 463; 94 U. S., 669; 95 U. S., 724, 744; 105 U. S., 429; 109 U. S., 219; 110 U. S., 189; 2 Dill., 277, 420; 4 Dill., 343; 1 Woods, 210, 212, 281; 3 Hughes, 383; 3 Sawy., 113; 5 Sawy., 481; 38 N. J. L., 465; 51 Ind., 382; 72 N. Y., 239; 49 Mo., 282, 324; 51 Mo., 245; 53 Mo., 195; 55 Mo., 138, 201; 20 Am. Rep., 697 (55 Me., 251); 28 Am. Rep., 145 (72 N. Y., 217).

ROBERT S. STEPHENS, *Plff. in Err.*,

v.
VICTORIA SMITH.

(See S. C., "*Smith v. Stephens*," 10 Wall., 321-327.)

Indian lands—how sold—sale by individual Indian.

Under the Act of May 28, 1860, which forbade the sale of the lands of the Kansas Indians, except by the Secretary of the Interior, an individual Indian had no capacity to alienate his land; and the sale

was void and the deed conveyed no title to the purchaser.

A Joint Resolution, passed nearly two years after this transaction, removing the restriction on alienation, cannot relate back and give validity to a conveyance which, when executed, was void.

[Nos. 44, 45, 46.]

Argued Nov. 16, 1870. Decided Dec. 6, 1870.

IN ERROR to the Supreme Court of Kansas. The history and statement of the case appears in the opinion of the court.

Messrs. J. R. Doolittle, J. H. Bradley, J. W. Denver and James Hughes, for plaintiff in error:

The language of the 6th article of the Treaty (7 Stat. at L., 245) is as follows: "From the lands above ceded to the United States, there shall be made the following reservations, of one mile square, for each of the half-breeds of the Kansas Nation, viz.: To be located on the north side of Kansas River, in the order above named, commencing at the line of the Kansas Reservation, and extending down the Kansas River for quantity."

Upon the survey and location of these sections respectively, and for the delivery of possession to the respective reservees, they were, by the terms of the Treaty, respectively clothed with a fee simple title in the reservations, and that a patent was not necessary to complete the title.

U. S. v. Jehiel Brooks, 10 How., 442.

Here the reservation was to the Caddoes, "Their heirs and assigns, forever." But that is not material. *Doe v. Wilson*, 23 How., 457, 458 (84 U. S., XVI., 584).

Here were no words of perpetuity.

If the title did not pass by the Treaty, it did pass in fee by the Act of Congress, May 26, 1860 (12 Stat. at L., 21), and the reservees, after that Act, had the right to make a deed in fee.

It enacts "That all the title, interest and estate of the United States is hereby vested in the said reservees; but nothing herein contained shall be construed to give any force or efficacy or binding effect to any contract, in writing or otherwise, for the sale or disposition of any lands named in said Act, heretofore made by any of said reservees or their heirs."

The words of conveyance are very comprehensive. They do not prohibit future alienation.

It was thought, however, by the court below, that the 2d and 3d sections of this Act were and so are intended to be restraints on the disposing power of the grantees, and to limit that power to an application to the Secretary of the Interior, by whom the sale was authorized to be made. This would have been a plain violation of one of the canons of the law relating to real estate, and unless the intent is too clear to admit of doubt, such construction cannot prevail. These two sections are susceptible of a different construction, in perfect harmony with the construction already put upon the first section.

The government had already conveyed these lands to the Indians, with an unincumbered title. But they desired to protect the Indians against their own improvidence; and to do so, imposed this trust on the Secretary, to be exercised on the application of the owner of the lands. It was a new duty assigned to the Secretary; but, neither in terms nor by necessary

intendment, does it fetter the right of the Indian to dispose of his lands as he may see fit.

Mr. J. S. Black, for defendant in error:

The land described in the deed was reserved to the defendant in error, by the provisions of the Treaty of June 8d, 1825.

7 Stat. at L., 245; 12 Stat. at L., 21.

By the 11th article of the Treaty, it is stipulated that the said Kansas Nation shall never sell, relinquish, or in any manner dispose of the lands therein reserved to any other Nation, person or persons whatever, without the permission of the United States, for that purpose, first had and obtained.

7 Stat. at L., 245-247, arts. 6 and 11.

Section 1 of the Act of Congress, approved May 26, 1860, 12 Stat. at L., 21, vested the title of the United States in the reservees. Section 1 provides against giving any force to any contract for the sale of the lands theretofore made by the reservees or their heirs.

The stipulation in the Treaty of 1825 is positive that the Nation should not sell without the consent of the United States. This restriction in the Treaty applies to the individual members of the tribe, as well as to the Nation, else the Nation might sell to one of its own members, and then he might sell and defeat the whole restriction.

Goodell v. Jackson, 20 Johns., 694.

The Act of 1860 did not attempt to abrogate the restrictions of the Treaty. The prohibition continued in force, and the manner of selling these half-breed lands was specifically pointed out—which was, not by the Indians themselves, but by the Secretary of the Interior. There is no ambiguity in the Act. It needs no interpretation. The statute was affirmative, and having provided the way in which the land could be sold, it by implication prohibited it from being sold in any other way.

12 Iowa, 158; *Shawnee Co. v. Carter*, 2 Kan., 115; see, also, the opinion of the court in this case, 2 Kan., 248.

A contract that contravenes the policy and spirit of a statute, or attempts to defeat its operation, is equally void as if against its positive provisions.

Hunt v. Knickerbacker, 5 Johns., 332; *Petit's Adm'r v. Petit's Distributees*, 32 Ala., 288; *St. Regis Indians v. Drum*, 19 Johns., 127; *Lee v. Glover*, 8 Cow., 189; *Jackson v. Wood*, 7 Johns., 290; 3 Ind., 494; 8 Ind., 6.

Mr. Justice Davis delivered the opinion of the court:

Victoria Smith, a half-breed Indian, brought an action of ejectment against the plaintiff in error, in a local state court in Kansas, to recover possession of a tract of land reserved to her use by the United States. The defendant, in bar of the suit, offered in evidence a deed from the plaintiff to him, dated August 14, 1860, of the land in controversy, which the court excluded from the jury on the ground that the plaintiff, by virtue of an Indian Treaty and a law of Congress on the subject, was prohibited from executing the deed. The Supreme Court of the State, on appeal, affirmed the ruling of the lower court, and the case is brought here to test the correctness of that decision.

It appears that on the 8d day of June, 1825, The United States concluded a Treaty with the

Kansas Nation of Indians, containing mutual cessions of territory.

See 7 Stat. at L., 245.

By the 6th article of the Treaty, there was reserved for the benefit of each of the half-breeds named in it (Victoria Smith being one of them), a certain specified allotment of land out of the quantity ceded by the Nation to the United States. The 11th article contains a stipulation that the Nation shall not sell these lands without permission of the government, and it would seem that the contracting parties intended this prohibition to apply to the individual members of the Tribe; for, if it were not so, the policy which dictated the restriction would be in danger of being defeated altogether.

It is, however, not necessary, for the purposes of this suit, to decide this point, as the deed in question was made after the passage of the Act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty. See, 12 Stat. at L., 21. This Act vested the title of the United States to the lands which the Treaty had set apart for the use of the half-breeds, in the reservees, if living, or, if dead, in their heirs, and declared void all prior contracts for their sale, and forbade any future disposition of them, except by the Secretary of the Interior, on the request of the party interested. There is no ambiguity in the Act, nor is it requisite to extend the words of it beyond their plain meaning in order to arrive at the intention of the Legislature. It was considered by Congress to be necessary, in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, cannot be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests against the superior capacity and adroitness of their more civilized neighbors. It was, manifestly, the purpose of Congress, in conferring the authority to sell (on the Secretary of the Interior), to save the lands of the reservees from the cupidity of the white race; and if the provisions of the Treaty were not enough for the purpose, the speedy action of Congress was demanded by the rapid settlement of the adjacent country. In 1826, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the country to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that had demanded their removal from organized communities, followed them to Kansas. In this condition of things Congress acted, and the necessity for legislation on the subject, if, indeed, there were need for any, is shown by the defense which is interposed to this suit.

It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way. The sale in question not only

contravened the policy and spirit of the statute, but violated its positive provisions.

It appearing, then, that by the Treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, and the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void, and that the deed conveys no title to the purchaser.

It is hardly necessary to say that a Joint Resolution (12 Stat. at L., 628), passed nearly two years after this transaction, removing the restriction on alienation, cannot relate back and give validity to a conveyance which, when executed, was void; nor have we any reason to suppose that Congress contemplated that any such effect would be claimed for its legislation on the subject.

We see no error in the judgment of the Supreme Court of Kansas, and it is, accordingly, affirmed.

Cited—12 Kan., 523; 16 Kan., 172.

NOTE.

ROBERT S. STEVENS v. PELAGIE
DE AUBRIE.
ROBERT S. STEVENS v. ADEL BEL-
LEMARDE.

These cases, Nos. 45 and 46, are, in all respects, like the case of *Stevens v. Smith*, decided at this term, and the judgment of the Supreme Court of Kansas in each of them is affirmed.

STEPHEN M. JONES, *Agpt.*,

JOSEPH J. ANDREWS ET AL.

(See S. C., 10 Wall., 827-834.)

Jurisdiction, what is necessary to—voluntary appearance—cross-bill.

- *1. What is a sufficient allegation of citizenship?
2. By the Judiciary Act of 1789, in a case where jurisdiction of the Circuit Court depended on citizenship, every defendant must have resided or been served with process in the district where the suit was brought; but by the Act of 1839 this is not necessary; a non-resident defendant may either voluntarily appear, or, if not a necessary party, his appearance may be dispensed with.
3. Appearing by counsel and moving to dismiss the bill for want of jurisdiction and also for want of equity, is a waiver of a non-resident's privilege, and amounts to a voluntary appearance.
4. A bill for injunction to restrain proceedings of garnishment against the complainant's property instituted in the Circuit Court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties, but on the cognizance of the original case.

[No. 89.]

Argued and submitted Nov. 9, 1870. Decided Dec. 6, 1870.

A PPEAL from the Circuit Court of the United States for the Western District of Tennessee.

*[Head notes by Mr. Justice BRADLEY.]

The bill in this case was filed in the court below, by the plaintiff in error, for an accounting and the cancellation of certain promissory notes. The bill having been dismissed by that court for want of jurisdiction, the complainant took an appeal to this court.

The case is further stated by the court.

Messrs. P. Phillips, Reverdy Johnson and Humes & McRae, for appellant.

Messrs. Albert Pike and Robert W. Johnson, for appellees:

There is no averment as to the citizenship of the complainant, Jones.

But in the caption of the bill we read, "Stephen M. Jones, citizen of Georgia, v. Joseph J. Andrews, citizen of the State of New York; P. Reed and W. H. Bryson, citizens of Tennessee." If this can be coupled with the averments as an allegation, the citizenship of each party is alleged.

Where the citizenship of the parties does not appear on the face of the bill, it will be dismissed for want of jurisdiction.

Dodge v. Perkins, 4 Mas., 435; *Jackson v. Ashton*, 8 Pet., 148.

Taking the whole together, the case is that the complainant, a citizen and resident of the State of Georgia, files his bill against a citizen of New York and two citizens of Tennessee, in a Circuit Court of the United States for a District in Tennessee. In such a case we do not think that the Courts of the United States have jurisdiction.

Mr. Justice Bradley delivered the opinion of the court:

The appellant filed in the Circuit Court of the United States for the District of West Tennessee, a bill in equity against the appellees, for injunction against a process of garnishment, and for relief by way of set-off, etc. The court dismissed the bill for want of jurisdiction over the parties, as well as for want of equitable jurisdiction over the subject-matter of the bill; but without prejudice to the right of the complainant to institute proper proceedings to assert his rights.

On the question of jurisdiction over the parties, the appellees contend, 1. That the citizenship of the parties was not sufficiently alleged in the bill. 2. That, if sufficiently alleged, the court had no jurisdiction over Andrews, the principal defendant, who was a citizen of New York, and not a citizen of Tennessee, where the suit was brought.

As to the allegation of citizenship of the parties, the bill commences thus: "To the Judges of the Circuit Court of the United States, presiding at Memphis, for the Western District of Tennessee: Stephen M. Jones, citizen and resident of Richmond County, Georgia, v. Joseph J. Andrews, citizen and resident of City and County and State of New York; P. Reed and H. W. Bryson, both citizens and residents of Shelby County, Tennessee, complainants, respectfully show Your Honor that, etc." The final paragraph commences as follows: "The premises considered, complainant prays that Joseph J. Andrews, a resident and citizen of the City, County and State of New York, and the said Reed and Bryson, both citizens and residents of Shelby County, in the State of Tennessee, be made parties defendant, etc."

Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of *Rep. Co. v. Kountze* [ante, 457], which was sustained by the court. All that is necessary is, that it fairly appear by the bill of what States the respective parties are citizens. In this case the form of the allegations leaves no room for reasonable doubt.

The other exception, that Andrews, the principal defendant, was not a citizen of the State where the suit was brought, is entitled to more weight. Though the Constitution declares that the judicial power of the Federal Government shall extend to controversies between citizens of different States, which would embrace the case before us (the plaintiff being a citizen of Georgia, and Andrews a citizen of New York) yet Congress has not established any court, except the Circuit Court, to take cognizance of such cases; and, by the Judiciary Act of 1789, which establishes that court, Congress only invested it with jurisdiction of cases where the suit is between a citizen of the State where the suit is brought, and a citizen of another State, and moreover declared that no civil suit should be brought before said court against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. 1 Stat. at L., 78. The case is certainly not within the purview of this statute. The suit is brought in West Tennessee, and neither Jones, the complainant, nor Andrews, the defendant, is a citizen of that State. Besides, the suit is brought against Andrews in a district of which he is not an inhabitant, and in which he was not found at the time of serving the writ. Under the Act of 1789 (1 Stat. at L., 78), and the ruling of the early cases, the court would, *prima facie*, be without jurisdiction. According to those cases the plaintiff, or each of the plaintiffs, if more than one, must be able to sue each of the defendants, if more than one. But by the Act of February 28, 1839 (5 Stat. at L., 321), it is enacted that where there are several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction; but the decree shall not conclude parties not served with such process, or not voluntarily appearing to answer.

This Act, by implication, confers jurisdiction over non residents of the district where the suit is brought, if they voluntarily appear therein. The suit can proceed against them if they voluntarily appear, or without them if they are not necessary parties. If, however, they are necessary parties, and do not voluntarily appear, the difficulty remains the same as before the Act of 1839 was passed. *Tobin v. Walkinshaw*, 1 McAll., 26. In this case Andrews was a necessary party, and he was not a resident of the district, and was not served with process, but he did voluntarily appear. It is true that as soon as he appeared, he moved a dismissal of the bill on two grounds. (1) That it did not show such facts in regard to the citizenship or

residence of the defendants as to give the court jurisdiction. (2) That it contained no equity. Whether, if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver, and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed.

But the case is stronger than this. The jurisdiction of the court did not depend on the residence or citizenship of the parties. The suit is, in its nature, not an original but a defensive or supplementary suit, like a cross-bill, or a bill filed to enjoin a judgment of the same court. The defendant, Andrews, recovered in the circuit court a judgment by default, a judgment against the other defendants, Reed and Bryson; and thereupon sued out a writ of garnishment against them, for the purpose of seizing in their hands certain notes of the complainant, Jones, which he had passed to them, but which, as he alleges, they had transferred to Andrews, in payment of his claim against them. So that, according to the allegation of the complainant, Andrews had no claim against Reed and Bryson. The judgment recovered by him against them was by collusion, and was contrived for the purpose of garnisheeing complainant's notes, pretended to be in their hands. The complainant alleges that all this was done to avoid, on the part of Andrews, a direct suit against him, by reason of the fact that, as against Andrews, the complainant had a good defense to the notes, and a set-off that would largely exceed their amount. His bill is filed for an injunction against the garnishee proceedings under the suit at law for the delivery up of the complainant's notes, and for the establishment of his set off against Andrews. This is, in substance, its character, and if the facts charged furnish a sufficient ground of equity for the relief asked, as to which the court refrains from expressing any opinion, the complainant had a right to file it against the defendants, and the court had a right to take cognizance of it as a defensive or supplementary proceeding, growing out of, and having direct reference to, the proceedings of the defendants in the same court against him. The case, in this respect, as before said, is analogous to that of a cross bill or bill of review, or a bill for injunction against a judgment at law in the same court, of which the court has jurisdiction irrespective of the residence of the parties. *Logan v. Patrick*, 5 Cranch, 288; *Simms v. Guthrie*, 9 Cranch, 25; *Clarke v. Mathewson*, 12 Pet., 164; *Dunlap v. Stetson*, 4 Mas., 349. As to bills for injunction against judgments at law rendered in the same court, *Justice Story*, in *Dunlap v. Stetson*, says: "I believe the general, if not universal, practice has been, to consider bills of injunction upon judgments in the Circuit Courts of the United States, not as original, but as auxiliary and dependent suits, and properly sustainable in that court which gave the original judgment, and has it completely under its control. The court itself possesses a power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means

of rendering such further redress, as equity and good conscience required."

Let the decrees of the Circuit Court be reversed, and the cause remitted for further proceedings, each party to pay his own costs on this appeal.

Cited—14 Wall., 81, 82; 18 Wall., 219; 23 U. S., 205; 1 Dill., 538; 9 Bank. Reg., 307; 18 Bank. Reg., 159; 13 Blatchf., 291; 13 Blatchf., 30; 2 Filipp., 506.

UNITED STATES, *Puff. in Err.*,

v.

WILLIAM HODSON ET AL.

(See S. C., 10 Wall., 395-409.)

Distiller's bond, construction of—not in language of statute—illegal conditions—construction of revenue statutes.

A distiller's bond conditioned that he should faithfully conform to all the provisions of the Internal Revenue Act of June 30th, 1864, required him to keep an exact account in writing of the number of gallons sold, or removed for sale and consumption, and the proof thereof.

What is implied in a statute is as much a part of it as what is expressed.

Revenue statutes are to be construed liberally, to carry out the purposes of their enactment.

A bond not conditioned in the precise language of the statute, yet if it be voluntary, and not prohibited by the statute, nor contrary to public policy, and founded upon a sufficient consideration, is valid.

Where a bond contains conditions, some of which are legal and others illegal, and they are separable, the latter may be disregarded and the former enforced.

[No. 50.]

Argued Nov. 17, 1870. Decided Dec 6, 1870.

IN ERROR to the Circuit Court of the United States for the District of Wisconsin.

Suit was brought in the court below, upon a penal bond. Judgment having been given for the defendants, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Messrs. Amos T. Akerman, Atty-Gen., C. H. Hill, Asst. Atty-Gen., and B. H. Bristow, Solicitor-Gen., for plaintiff in error:

It nowhere appears in the record that the bond in question was exacted or extorted by the collector, in the particular form in which it was given. The rule which avoids a bond taken by a public officer *colore officii*, who has illegally exerted his authority, and thereby compelled the obligor to enter into an obligation not required by law, has no application here.

That part of the condition which requires the principal obligor to "truly and faithfully conform to all the provisions" of the Act of 1864, *ex vi termini* includes the various duties enumerated in the section describing the bond; and the instrument, being thus in substantial though not in literal compliance with the statute, is good as a statutory bond.

Bk. v. Kendrick, Dudley (Ga.), 66; *Gardener v. Woodyear*, 1 Ohio, 170; *Yale v. Flanders*, 4 Wis., 96; *Nunn v. Goodlett*, 5 Eng., 89.

When the substance of a bond is prescribed by statute, if the bond be so drawn as to include all the obligations imposed by the statute, and to allow every defense given by law, it will be valid, though variant from the form prescribed.

Rhodes v. Vaughan, 2 Hawks, 167; *Cobb v. Com.*, 3 Mon., 391.

The bond being given with reference to the statute, must be construed by the statute.

Baker v. Morrison, 4 La. Ann., 378; also, 9 Rob., 585; 16 La., 188.

Accordingly, no breaches are properly assignable thereunder, for anything not within the requirements of the statute.

Hall v. Cushing, 9 Pick., 895.

The case of *Ohio v. Findley*, 10 Ohio, 51, which arose under the law of that State passed in 1881, prescribing the duties of county treasurers (see Swan, Rev. Stat., Derby's ed. of 1854, p. 1008), is precisely in point. It was held in that case, that a bond given by a county treasurer under that Act, conditioned that he should "faithfully and impartially discharge all the duties of his said office agreeably to law," is a good statutory bond for so much as is prescribed by the statute and comprehended in the condition, even though it may be void for the residue.

If this bond is not good as a statutory bond, yet having been voluntarily given, and being neither prohibited by the statute nor against the policy of the law, it is valid as a common law obligation.

U. S. v. Tingey, 5 Pet., 115; *U. S. v. Linn*, 15 Pet., 290; *Greathouse v. Dunlap*, 3 McLean, 308.

In *Bank v. Smith*, 5 Allen, 415, it is said by Bigelow, Ch. J.: "The rule of law is well settled, that a bond given for the faithful performance of official duties, or in pursuance of some requirement of law, may be valid and binding upon the parties, although not made with the formalities or executed in the mode provided by the statute under which it purports to have been given. This rule rests on the principle that, although the instrument may not conform to the special provisions of a statute or regulation, in compliance with which the parties executed it, nevertheless, it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law and, therefore, it is obligatory on the parties to it, in like manner as any other contract or agreement is held valid at common law." Citing *Morse v. Hodsdon*, 5 Mass., 314; *Burroughs v. Lowder*, 8 Mass., 373; *Sweetser v. Hay*, 2 Gray, 49.

In support of this doctrine, the following additional authorities may be cited:

Dunbar v. Dunn, 10 Price, 54; *Justices v. Smith*, 2 J. J. Marsh., 478; *Hoy v. Rogers*, 4 Mon., 225; *Lane v. Kasey*, 1 Met. (Ky.), 410; *Gathwright v. Callaway Co.*, 10 Mo., 663; *Horn v. Whittier*, 6 N. H., 88.

Mr. Matt. H. Carpenter, for defendant in error:

Under the Act of June 30, 1864 (18 Stat. at L., 242), no person could carry on the business of distiller without giving a certain bond, the condition of which is with great particularity provided for by the 53d section. The bond sued on was exacted by the Government, as a condition precedent to the prosecution of the defendant's business. It is, therefore, not true that the bond was given voluntarily. It was required to be given, and was given only because it was required.

This Act imposes various duties upon the distiller, the performance of which is enforced by

penal sanctions, but for the performance of which the distiller is not required to enter into bonds.

One thing required by the Act is, that the distiller shall, from day to day, "enter in a book to be kept for that purpose, * * * the number of gallons placed in warehouse, and also the number sold or removed for consumption and sale, and the proof thereof."

Sec. 57, 18 Stat. at L., 248.

One of the breaches of this bond is alleged to be, that the defendant did not, from day to day, "make true and exact entry thereof," in a book kept for that purpose, of the number of gallons by him placed in warehouse, and the number of gallons by him sold and removed for consumption and sale, and the proof thereof."

This, by the Act, he was required to do, but the Act did not require him to give a bond that he would do so.

In *U. S. v. Tingey*, 5 Pet., 115, this court held that where a bond, not required by law, was exacted by an officer of the Government from his subordinate, as a condition of his holding his office, the bond was void.

The principle of that decision ought to control this case. Here the Act required a certain bond to be given, as a condition precedent to the right to carry on this business. The officers of the Government produced blank bonds and required them to be executed. The defendant was informed by the law that he must give a bond or forfeit his property; the officer to whom the bond is required to be given presents the blank to be executed under the law. The defendant acts at his peril. If he misjudges as to the right of the Government to have this precise form of bond, his property is forfeited, and he is to be punished criminally. Therefore, he gives the bond, which no law required; a bond which completely superseded the provisions of the Act, and adopted a totally new system. The bond is, therefore, void.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Wisconsin. The action was debt upon a penal bond in the sum of \$5,000. The condition was not set out and no breaches were alleged in the declaration. The declaration was framed to recover the penalty. The defendants cravedoyer of the condition, and it was given. It is set out in the record, and is substantially as follows:

That William Hodson had applied to the Collector of Internal Revenue for the Second Collection District in the State of Wisconsin for license as a distiller at Turtleville, in that State, and that if the said William Hodson should faithfully conform to all the provisions of an "Act to Provide Internal Revenue to Support the Government, and to pay interest on the Public Debt, and for other purposes," approved June 30, 1864, ch. 173 (18 Stat. at L., 242), and such other Acts as now are or may be hereafter in this behalf enacted, then the above obligation to be void; otherwise to remain in full force.

The defendants pleaded performance. The plaintiffs thereupon replied and assigned the following breaches in their replication:

(1) That the defendant, Hodson, did manu-

facture a large quantity of distilled spirits, to wit: 100,000 gallons, and did neglect to make a true entry and report of the same, and did not from day to day make a true entry in a book kept for that purpose of the number of gallons by him distilled, and also of the number of gallons by him placed in warehouse, and of the number of gallons by him sold and removed for consumption and sale, and the proof thereof, and that he did not cause the same to be done.

(2) That the said Hodson did not conform to the provisions of said Act and Acts in this, to wit: that he did sell and remove from his distillery, for consumption and sale, a large quantity of distilled spirits manufactured by him, to wit: 50,000 gallons, and did neglect to render to the assessor or assistant assessor of the said Second Collection District, etc., a true account in duplicate, taken from his books, of the number of gallons of spirits distilled by him, and also of the number of gallons sold and removed for consumption and sale.

(3) That the said Hodson did not conform to the laws aforesaid in this, to wit: that he did remove from his distillery a large quantity, to wit: 100,000 gallons of spirits, then and there by him manufactured, upon which duties were by law imposed, and which duties he neglected to pay.

(4) And that the said Hodson did not conform to the provisions of the laws aforesaid in this, to wit: that he did manufacture a large quantity of spirits, to wit: 100,000 gallons, and did remove the same from his distillery for consumption and sale, before the same were inspected, gauged and branded by an inspector appointed to perform such duties, and did neglect to cause the spirits so removed to be inspected, gauged and branded before the same were removed, as aforesaid.

The defendants filed a rejoinder, specially traversing each of the breaches assigned, and concluded to the country. This put the cause at issue. Upon the trial the United States offered in evidence the bond and proof of the several breaches. The defendants objected to the evidence upon the ground that the conditions were not required by, and were not in conformity with, the statutes of the United States. The court sustained the objection and excluded all the evidence. A verdict and judgment were thereupon rendered for the defendants. The United States excepted, and have brought this ruling here for review.

The only inquiry presented for our consideration is the validity of the bond upon which the suit was founded.

It would have been more regular to raise the question by a demurrer after oyer or by a motion in arrest of judgment. But if the bond were void it was competent for the defendants to raise the objection at any stage of the trial. The court was not bound to proceed further, when it became clear that, whatever the verdict, the plaintiff could not recover. To proceed with the trial under such circumstances would have been idly to waste the time of the court and trifle with the forms of justice.

The bond was taken under the 58d section of the Act of June 30th, 1864, ch., 173 (13 Stat. at L., 242). That section required a bond to be

given by every licensed distiller, and prescribes its conditions. They are, substantially:

That if the distiller shall use any additional still he will report the fact to the assessor.

That he will from day to day enter in a book to be kept for that purpose, the number of gallons that may be distilled, and the quantity of grain he may use; and that the book shall be open at all times to the inspection of the assessor.

That he will render to the assessor on the 1st, 11th and 21st days of each month an account in writing of the number of gallons distilled, of the number placed in warehouse, and of the number sold or removed for consumption and sale, and also of the quantity of grain used for the fractional part of a month next preceding the report, and the proof thereof, which report is to be verified by affidavit.

That he will not sell, or permit to be removed for consumption and sale, any spirits distilled under his license until they have been inspected, gauged, proved and entered upon his books, as aforesaid.

And that he will at the time of rendering his account to the collector pay the duty imposed by law upon such spirits.

It is not denied that all the breaches are within the requirements of the statute touching the bond, except that part of the first one, which is, that the licensee did not, from day to day, "make true and exact entry thereof in a book to be kept for that purpose, of the number of gallons by him placed in warehouse, and the number of gallons by him sold and removed for consumption and sale, and the proof thereof." It is said the statute required him to do this, but did not require him to give a bond that he would do so. The statute required the bond to be conditional that he would, from day to day, enter in a book to be kept for that purpose, the number of gallons distilled; that the book should be open to the inspection of the assessor; that he would render, at the time specified, "an exact account in writing" of the number of gallons sold or removed for sale and consumption, and the proof thereof; and that he would not sell, or permit to be sold or removed, for consumption or sale, any spirits distilled by him until the quantity had been "duly entered upon his books, as aforesaid." Considering these provisions together, we think the implication clear, that they require such an account to be kept as the breach alleges was not kept, and that if the conditions, as prescribed, had been set out at length in the bond, such would have been their legal effect. The first part of the 57th section is silent as to the bond, but is explicit as to the account, and strongly supports the conclusion at which we have arrived. The question must be considered in the light of the entire context bearing upon the subject. What is implied in a statute is as much a part of it as what is expressed. *U. S. v. Babbitt*, 1 Black, 55 [66 U. S., XVII., 94].

Revenue statutes are not to be regarded as penal and, therefore, to be construed strictly. They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactment. *Cluquot's Champagne*, 3 Wall., 145 [70 U. S., XVIII., 121].

We hold this, like all the other breaches, to be within the conditions which the statute enacts the bond shall contain.

In one view of the case, this facts is important; in another and perhaps more important one, it is no wise material. Both will be presently considered.

The record is silent as to any coercion or duress. The bond is, therefore, to be considered a voluntary one. *U. S. v. Bradley*, 10 Pet., 345. A bond in this form is not prohibited by the statute, nor is it contrary to public policy. It was founded upon a sufficient consideration, and was intended to subserve a lawful purpose.

In *U. S. v. Tingey*, 5 Pet., 127, the suit was upon the bond of a purser in the Navy. The statute declared "that every purser, before entering on the duties of his office, shall give bond, with two or more sufficient sureties, in the penalty of \$2,000, conditioned faithfully to perform all the duties of purser in the Navy of the United States." Act of Mar. 30, 1812, ch. 47, 2 Stat. at L., 699. The court said "It is obvious that the condition of the present bond is not in the terms prescribed by the Act * * * and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him, and for all public property committed to his care, whether officially as purser or otherwise." The bond was held to be valid. The decision was put upon the grounds that the Government had the capacity to make the contract, that the United States were a body politic, and that, as incident to its general right of sovereignty, it was competent to enter into any contract not prohibited by law, and found to be expedient in the just exercise of the powers confided to it by the Constitution. *Dugan v. U. S.*, 8 Wheat., 172, was referred to as sustaining this proposition. It was remarked that a different principle would involve a denial to the General and State Governments of the ordinary rights of sovereignty. In conclusion, it was said, in relation to the bond there in question, "The United States have a political capacity to take it. We see no objection to its validity in a legal or moral view." *Tingey*, who was a surety, pleaded, among other things, in the court below, that the bond "was under color and pretense of said Act of Congress and, under color of office, required and extorted from the said Deblois, and from the defendant, as one of his sureties, against the form and effect of the said statutes, by the then Secretary of the Navy." The United States demurred. The court overruled the demurrer, and gave judgment for the defendant. The United States prosecuted a writ of error. This court held the plea sufficient and affirmed the judgment.

In the case of *U. S. v. Bradley*, 10 Pet., 343, the views of the court expressed in *U. S. v. Tingey* [supra] were re-stated and, upon the fullest consideration, were re-affirmed.

U. S. v. Linn, 15 Pet., 290, was an action against a receiver of public moneys and his sureties. The statute in that case required that the receiver should "give bond, with approved security, in the sum of \$10,000, for the faithful discharge of his trust." The instrument given was without seal and was, therefore, not the security required by the statute. The counsel for the defendants insisted that the instrument was void for the reasons, among others, that it was not the form of security required by the

statute; that the prescribing of one security was an implied prohibition of all others, and that if the instrument in question could be sustained, the statute might in all cases be disregarded and a mortgage of realty or personally or any other imaginable security might be substituted for that which the statute required. The court responded: "If this is a contract, entered into by competent parties and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law." "A mortgage, or any other approved security voluntarily given, would, no doubt, be valid."

These cases are conclusive of the question before us. Their authority has not been shaken by any later adjudication; we think they rest upon the soundest principles, and are in accordance with a wise and salutary policy. We feel no disposition to re-examine the propositions they affirm.

A narrower view of the instrument in question may be taken, which will also maintain its validity to the extent of the breaches assigned in the declaration. It is a settled principle of law that where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced. Applying this principle to the case before us, all which this instrument contains with reference to statutes other than the Act of 1864, under which it was taken, may be rejected, and the generality of the reference to that Act may be so limited as to include only what is covered by the conditions prescribed by the statute, as if those conditions were incorporated and set out in the bond *in hac verba*. An authority exactly in point, for this construction is found in the well considered case of *Ohio v. Fidelity*, 10 Ohio, 51. The principal in the bond in that case was a county treasurer. The bond was conditioned that he should perform his official duties according to law. The statute, as in the case before us, was specific in its requirements as to what the bond should contain, and the condition, it was admitted, largely exceeded them. The court said: "That part which is legal is marked out in the statute book itself, and is, therefore, as completely severable from the rest as if the two parts were separated in the condition of the bond."

But we prefer to place our judgment upon the broader ground marked out by the adjudications of this court, to which we have referred. Everyone is presumed to know the law. Ignorance standing alone can never be the basis of a legal right. If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal enjoys the benefits which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the Government and of the liability of the obligors.

The judgment of the court below reversed, and the cause will be remanded with an order to issue a venire de novo.

Cited—14 Wall., 502; 17 Wall., 74; 97 U. S., 422, 423; 102 U. S., 420; 106 U. S., 151; 21 Minn., 449; 77 N. Y., 366; 28 Am. Rep., 233 (125 Mass., 511).

[No. 53.]
NOTE.—UNITED STATES
v.
HODSON ET AL.

This also is a writ of error to the Circuit Court of the United States for the District of Wisconsin.

The record presents the same questions which have just been decided in the case of *The United States v. Hodson et al.*, No. 50. The result in this case must be the same.

The judgment below is reversed, and the cause will be remanded, with directions to issue a venire de novo.

JAMES F. PENDERGAST, CHARLES H. PENDERGAST, AND HENRY A. FENWICK, Appts.,

THE OWNER AND CLAIMANT OF THE STEAMER KALORAMA.

(See S. C., "*The Kalorama*," 10 Wall., 204-218.)

Lien on vessel, not dependent on registry or possession—lien for supplies—ports of other States proof of necessity of supplies—lien for supplies ordered by owner.

A lien on a vessel for repairs or supplies is a privilege in the thing and is not dependent upon possession or registry.

For repairs made on and supplies furnished to a foreign ship, the party has a lien on the ship itself for security, and he may maintain a suit *in rem* in the admiralty, to enforce his rights.

Ports of States, other than those where the vessel belongs, are for that purpose considered as foreign ports.

The repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies.

The necessity for credit must be presumed where the repairs and supplies were ordered by the master, and they were necessary for the ship.

The owner can order repairs and supplies on the credit of the vessel.

[No. 70.]
Argued Nov. 30, 1870. Decided Dec. 12, 1870.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed by the appellants, in the District Court of the United States for the District of Maryland, to recover for repairs and supplies.

That court entered a decree in favor of the libelants, which, upon appeal, was reversed by the circuit court, whereupon the libelants took an appeal to this court.

The case is sufficiently stated by the court. *Messrs. S. Teackle Wallis and John H. Thomas*, for appellants:

There was an express agreement for liens, as security for all the items of the accounts.

See 10 WALL. U. S., Book 19.

If there were no such express contracts, implied liens arose from making the advances under the circumstances proven.

The Grapeshot (ante, 651).

If there are items in the accounts which cannot be maintained as maritime liens, the credits more than extinguish them, leaving a balance due for claims of an unquestionably maritime character. The law, in that event, ought to appropriate the credits to the most precarious debts—to those which are unsecured—leaving still due the balances for which there are maritime liens.

2 Greenl. Ev., sec. 583; *Field v. Holland*, 6 Cranch, 8.

The attachments issued out of the Superior Court of Baltimore City, were proceedings *in personam*, and no bar to the right to maintain these libels *in rem*. Creditors making advances to ships in a foreign port, are entitled to three-fold remedies—against the ship, the master, and the owners. These are cumulative, not alternative, and may all be pursued simultaneously.

Logs of Mahogany, 2 Sumn., 589; *The Paul Boggs*, 1 Sprague, 369; *Harmer v. Bell*, 22 Eng. L. & E., 70.

The fact that the owner was in Baltimore when some of the debts were contracted, and that he ordered some of the articles from which they arose, did not prevent the accrual of a lien therefor.

The James Guy, 1 Ben., 112; *Young Fall v. The James Guy*, 5 Int. R. R., 109; *The Hilarity*, 1 Blatchf. & H., 90.

In the case of *The Sultana*, the lien was refused on other grounds, which would not have been alleged if the fact of the articles having been ordered by, or in the presence of, the owner had been sufficient objection.

Pratt v. Reed, 19 How., 359 (60 U. S., XV., 660); *The Grapeshot*, ante, 651.

The reduction of the amount in dispute by recoveries from other sources since the appeal, does not affect the jurisdiction of this court.

Cooke v. U. S., 2 Wall., 218 (69 U. S., XVII., 755).

Mr. Wm. Shepherd Bryan, for appellee:

The advances were made in pursuance of a contract entered into with the owners personally. By this contract the appellants assumed entire charge of the steamers for a series of voyages, and were to receive the specified compensation of ten per cent. commission on the gross freights. They became the agents of the owners; freighted the ships, collected the freights, and paid their expenses.

James Pendergast speaks of it as an "enterprise" in which Pendergast, Fenwick & Co. were engaged. He also speaks of the firm as the "agent" of the owners. This agent appointed captain, officers and crew, ordered supplies, and stood in the place of owners generally. As said by this court on a similar occasion: "There is nothing in the nature of a maritime contract in the case."

Minturn v. Maynard, 17 How., 477 (58 U. S., XV., 235); see, also, *Ward v. Thompson*, 23 How., 330 (63 U. S., XVI., 249).

The claim maintained in the libels is for a tacit or implied hypothecation.

All the authorities show that no one but the master can create these liens. The owner himself cannot do it, except where he also sustains the character of shipmaster or captain. This

is established in *The St. Jago de Cuba*, 9 Wheat., 409-416; and is not controverted in any of the subsequent cases.

It is declared both in the opinion of the court and in the dissenting opinion in *Thomas v. Osborn*, 19 How., 22 (60 U. S., XV., 534), and seems to be assumed as settled law in *The Grapeshot*.

In the present cases, the owners specially contracted with the appellants that they should make the disbursements.

The contract contemplated a series of voyages, and provided a large compensation to the appellants, to be paid out of the freights coming to their hands. Everything was defined, and nothing left to implication.

If the other circumstances in evidence favored the implication of a lien on the ships, it would be repelled by the proof showing the excellent credit of the owners at the time and place where the advances were made, and the fact that the appellants must have known it.

Mr. Justice Clifford delivered the opinion of the court:

Advances for repairs and supplies to the steamer named in the pleadings were made by the libelants to an amount much larger than the sum claimed in the libel, and allowed in the decree of the district court.

Payments made before the suit was instituted were deducted from the claim as set forth in the libel, and it was ordered, adjudged and decreed by the district court, that there was due to the libelants at the date of the decree the sum of \$5,132.36 as a lien upon the steamer, for which the stipulators for value were liable.

Process was duly served in the district court, and the owner of the steamer appeared as claimant and filed an answer setting up several defenses, as follows: (1) That the repairs and supplies were not necessary, as alleged in the libel. (2) That they were not made and furnished on the credit of the steamer. (3) That the steamer was not chargeable with the moneys advanced for the repairs and supplies described in the libel, as they were not made and furnished under a maritime contract. (4) That the libelants brought a common law suit for the same cause of action before the libel was filed, and that the same is still pending and undecided.

None of these defenses call in question the correctness of the charges in the account, and no motion was made to refer the cause to an assessor to report the amount of the expenditure, nor was any exception taken to the finding of the district court in that behalf.

Appeal was taken by the owner and claimant of the steamer from the decree of the district court to the circuit court, where the decree of the district court was reversed.

Remarks respecting the correctness or incorrectness of the accounts exhibited in the record may well be omitted, as it is not pretended that in view of the evidence, there can be any well founded doubt that the advances were made as therein set forth.

Distinct issues of law are presented in the pleadings, and the district and circuit courts differed as widely as the parties; the former holding that the advances were a lien upon the steamer under the general rules of the maritime law. On the other hand, the circuit court, in

deference to certain expressions contained in the opinions of this court in the two cases of *Thomas v. Osborn*, 19 How., 22 [60 U. S., XVI., 534], and *Pratt v. Reed*, 19 How., 359 [60 U. S., XVI., 660], held that the advances were the mere personal debt of the owner, that they did not constitute a lien upon the steamer, and accordingly dismissed the libel which was a libel *in rem* against the steamer, setting up a maritime lien; whereupon the libelants appealed to this court, and now seek to reverse that decree.

Before examining the special defense set up by the respondent, growing out of the contract of the libelants to employ the steamer in two or more trips between Baltimore and Charleston, it becomes necessary to define with some precision what is meant by a maritime lien as affording a security for such advances, and under what circumstances it arises where repairs are made or supplies are furnished to a vessel engaged in commerce and navigation.

In considering that question it will be sufficient to state that the owner of the steamer throughout that period was a resident of the City of New York, and that the Port of New York was the home port of the steamer, as conceded by both parties. Proof satisfactory to both courts was introduced, showing that the steamer needed the repairs and supplies when the advances were made by the libelants, and that they were made while the steamer was lying in the Port of Baltimore, where the libelants resided, to enable the steamer to continue her regular trips as contemplated by her owner; that her master had no funds which he could apply to that purpose, nor could he procure any on the credit of the owner, and that all of the advances were made at the request of the master, in the absence of the owner, or by the owner in person when he was present.

Contracts or claims for service or damage purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. Wherever a maritime lien arises in such a contract or claim, as in controversies respecting repairs made or supplies furnished to a ship, or in case of collision the injured party may pursue his remedy whether it be for breach of a maritime contract or for a marine tort, by a suit *in rem* against the vessel, or by a suit *in personam*, at his election, against the owner, or against the master and owner in cases where they are jointly liable for the alleged default. *The Belfast* [*ante*, 271].

By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, whether the vessel was at her home port or abroad when the repairs and supplies were made and furnished. Dig. 14, 1: 1 Valin, Com., 363; 3 Kent, Com., 166; W. & B., Adm. Pr., 155.

But the only lien which the common law recognizes in such cases, independent of statutory regulations, is the possessory lien, which arises out of and is dependent upon the possession of the ship, as in cases where goods are delivered to an artisan or tradesman to be repaired or manufactured. Such a lien, as understood at common law, did not attach unless the ship was in the possession of the person who set up the claim, and the extent of the privilege

which it conferred was that he might retain the ship in his possession until he was paid the money due him for the repairs made and the supplies furnished. Until paid he might refuse to surrender the ship, but if he relinquished the possession of the ship his lien was displaced and extinguished. *Westerdell v. Dale*, 7 T. R., 312; *Justin v. Ballam*, 1 Salk., 34; *Walkinson v. Bernadiston*, 2 P. Wms., 867; 3 Kent. Com., 169; *Maude & P., Ship*, 64; *The Zodiac*, 1 Hagg. Adm., 320; *Spartaki v. Benecke*, 10 C. B., 223.

In jurisdictions where the rules of the common law prevail, the shipwright who works upon the ship, without taking possession of it, or if he parts with the possession before collecting what is due for his services, is not deemed to be a privileged creditor, nor is the merchant so considered who furnishes the ship with necessary supplies unless the ship is placed within his control. *MacLachl., Ship*, 101; *Doddington v. Hallet*, 1 Ves., 497.

Important alterations have recently been made in those rules of decision by Acts of Parliament; but it is not necessary to pursue that inquiry, as those rules were never regarded as rules of decision in the admiralty courts of this country exercising jurisdiction under the present Constitution and the laws of Congress. On the contrary, some of the Federal Courts, immediately after their organization under the Judiciary Act, decided that repairs made and supplies furnished to a ship, if made and furnished on the credit of a ship, were a lien upon the ship, whether she was at the time in her home port or in a foreign port. Other district judges were of the opinion that a maritime lien did not arise if the repairs were made and the supplies were furnished in the home port of the vessel, and some uncertainty for a time prevailed upon the subject until the same was examined by this court, when the question was put at rest. *The Gen. Smith*, 4 Wheat., 443.

Such a lien is a privilege in the thing, and is not dependent upon possession or registry, nor is it displaced, as in a contract of affreightment, when possession is relinquished, unless the circumstances are such as to show that it was waived; nor is it lost by delay, unless for such a time as to show gross laches, and to afford a reasonable presumption that it was abandoned. *The Paragon*, 1 Ware, 322; *The Young Mechanic*, 8 Ware, 58; 8 C., 2 Curt., 404.

Where repairs had been made and supplies furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, said *Judge Story*, following the civil law, gives the party a lien on the ship itself for security, and he may well maintain a suit *in rem* in the admiralty to enforce his right.

Many of the rules of the general maritime law are, doubtless, drawn from the civil law; but it is not quite correct to say that the maritime law of the United States, as laid down in that case, follows the civil law in respect to the lien conceded to the shipwright and tradesman who make repairs and furnish supplies to ships engaged in commerce and navigation, as the civil law extends that privilege to such repairers and furnishers without any such distinction between domestic and foreign vessels as that which is constantly maintained in the decisions of this
See 10 WALL.

court. 2 Pars. Ship., 312; *The Marion*, 1 Story, 68; *The Chusan*, 2 Story, 455; *The St. Jago de Cuba*, 9 Wheat., 409.

Ports of States other than those where the vessel belongs are, for that purpose, considered as foreign ports and, of course, the port where the steamer in this case was lying when the repairs were made and the supplies were furnished must be regarded as between the parties in this controversy, as a foreign port. *The Grapeshot* [ante, 631].

Controversies respecting such liens usually arise in cases where the repairs or supplies were ordered by the master without any express directions from the owner, and in such cases the repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies, as the authority of the master in such a case is implied from the necessity for the repairs or supplies, the want of funds for that purpose, the inability to procure the same, and the absence of the owner.

Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the presumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances, and it is clear that the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers and lenders of the money knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.

Subject to those conditions, the master, in the absence of the owner, is vested with the authority to order necessary repairs and supplies, but it is no objection to his authority that he acted on the occasion under the express instructions of the owner, nor will the lien of those who made the repairs and furnished the supplies be defeated by the fact that his authority emanated from the owner instead of being implied by law.

When the owner is present the implied authority of the master for that purpose ceases, but if the owner gives directions to that effect the master may still order necessary repairs and supplies, and if the ship is at the time in a foreign port, or in the port of a State other than that of the State to which she belongs, those who make the advances will have a maritime lien, if they were made on the credit of the vessel.

Grant all these several propositions, still it is contended by the respondent that no such lien arises in this case, because, as he insists, the repairs were made and supplies furnished in pursuance of a contract with the owner, by which the appellants assumed the entire charge of the steamer for a series of trips and were to receive the specified compensation of ten per cent. commission on the gross freights.

Doubtless, some of the repairs and supplies

were ordered by the owner, and the respondent contends that the appellants, by virtue of the arrangement, became the agents of the owner, and that it was in that capacity that they freighted the steamer and paid the expenses of the repairs and supplies, without any other lien upon the steamer than that given by the common law.

Strong doubts are entertained whether the written agreement, even if it had continued in force without alteration, and if the advances in question had been made under it, would support the theory set up by the respondent, but it is not absolutely necessary to decide that point, as it is quite clear that the repairs were made and supplies furnished in every case either by the order of the master or the owner, and with the express understanding that they were so made and furnished on the credit of the steamer.

They employed the steamer, in the first place, under the written agreement of the 14th of March, 1866, for two trips between Baltimore and Charleston, and it was agreed that they were to receive ten per cent. commissions on the gross freights, and that they should disburse the steamer, but they also stipulated to have the freights and disbursements insured for the benefit of the owner, which shows, to a demonstration, that they were not owners for the voyage. Suggestion is made that they changed the master and selected some of the crew, but the evidence shows that all those acts were performed by the consent of the owner and subject to his approval. Much the larger portion of the advances was paid before the libel was filed, and additional payments have since been made.

Viewed, as the state of the case was, at the date of the decree entered in the district court, it is not doubted that an amount much greater than the amount allowed in that decree had been disbursed by the libelants for repairs and supplies to the steamer subsequent to the two trips made under the written agreement. Suppose the libelants had no lien for the disbursements made under that agreement, which is not admitted, still it is fully proved that the appellants, subsequent to the two trips, refused to make further advances on the credit of the owner, and that the owner expressly requested that the advances should be made on the credit of the steamer.

Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise.

Undoubtedly, the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners and save the vessel and cargo from the perils of the seas. *The Guy* [ante, 710].

More stringent rules apply as between one part owner and another, but the case is free from all difficulty if all the owners are present and the advances are made at their request or by their directions, and under an agreement, express or implied, that the same are made on the credit of the vessel. Were it not so, mariners would refuse to ship for distant ports if the owner was to remain with the ship, either as

supercargo or passenger, unless it was known that he had credit everywhere, as in case the ship should become disabled and need repairs and provisions, the most reliable means of relief would be withdrawn; and it is not difficult to imagine a case where life and property might be lost, because the owner was on board and without personal credit.

Decree of the Circuit Court reversed, and the cause remanded, with directions to enter a decree affirming the decree of the District Court.

Cited—13 Wall., 335; 17 Wall., 669; 21 Wall., 539; 5 Hughes, 484; 4 Dill., 443; 3 Biss., 101; 8 Biss., 132; 11 Blatchf., 466, 472, 473; 13 Blatchf., 508; 14 Blatchf., 35; 7 Ben., 181; 8 Ben., 23; 1 Bro., 529, 541; 40 N. J. L., 291; 15 Am. Rep., 197 (27 Mich., 408); 29 Am. Rep., 339 (11 Vroom., 288); 38 Am. Rep., 171 (43 Mich., 150).

JAMES F. PENDERGAST, CHARLES H. PENDERGAST AND HENRY A. FENWICK, *Appts.*.

v.

THE OWNERS AND CLAIMANT OF THE STEAMER GENERAL CUSTER.

(See S. C., "*The Custer*," 10 Wall., 204-218, *Note*.)

Necessity of credit for supplies, when presumed—agreement of owners—action in State Court, when no bar.

Where proof is made of necessity for repairs and supplies, or for funds raised to pay for the same, and of credit given to the ship, a presumption will arise, of necessity for credit.

The owners in person may agree that the advances shall be furnished on the credit of the steamer.

The commencement of an action for the advances in a State Court, and the pendency of such an action is no bar to a suit in a Federal Court.

[No. 71.]

Argued Nov. 30, 1870. Decided Dec. 12, 1870.

APPEAL from the Circuit Court of the United States for the District of Maryland.

This case is in all respects like the preceding in its history and facts. It was argued with that case by the same counsel, and reference is made to that case for an abstract of the arguments presented.

Messrs. S. Teackle Wallis and John H. Thomas, for appellants.

Mr. Wm. Shepherd Bryan, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

Jurisdiction, it is conceded, is vested in the district courts, by the 9th section of the Judiciary Act, to enforce maritime liens by a suit *in rem* in all cases where such liens arise, whether the libel is for the breach of a maritime contract or to recover damages for a marine tort.

Repairs were made and supplies furnished by the appellants to the steamer named in the pleadings, and the owners of the steamer refusing to pay for the same, the appellants filed their libel in the District Court for the District of Maryland, and caused the steamer to be arrested, claiming that the repairs and the sup-

plies were a lien upon the steamer. Appearance was entered by the owners of the steamer, as claimants of the same, and they filed an answer setting up the same defenses as those pleaded by the owner of the steamer in the suit just decided. Testimony was taken by both parties in the two suits, as exhibited in the transcript of the other suit, and the parties entered into a stipulation that reference might be made in the trial of this suit to the depositions printed in the other, and that both should be heard at the same time.

Two principal questions, it seems, were discussed in the district court: (1) Whether the evidence showed that the credit for the repairs and supplies was or was not given to the steamer, under the rules of the maritime law as understood and administered in the Federal Courts. (2) Whether the repairs made and the supplies furnished, in view of the circumstances, became a lien upon the steamer. Both of those questions were answered by the district judge in the affirmative, and the court entered a decree for the libelants in the sum of \$6,496.68 against the owners of the steamer and the stipulators for value. Appeal was taken by the respondents to the circuit court, where the decree of the district court was reversed, upon the ground that the evidence in the transcript, if tested by the rules laid down in *Thomas v. Osborn*, 19 How., 22 [60 U. S., XV., 584] and in the case of *Pratt v. Reed*, 19 How., 860 [60 U. S., XV., 661], does not show the existence of any such lien.

Since that ruling was made the whole subject has been very fully reconsidered by this court in the case of *The Grapeshot* [ante, 651] in which the opinion was given by the Chief Justice. Viewed in the light of that decision, and of the opinion of the court in the case of *The Lulu* [ante, 906] delivered at the last term, as the case must be, it is clear that further discussion of the same is unnecessary, as it is conclusively settled that "where proof is made of necessity for the repairs and supplies, or for funds raised to pay for the same, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit;" or, in other words, the necessity for credit must be presumed where it appears that the repairs and supplies were necessary, unless it is shown that the master had funds, or that the owner had sufficient credit, and that the person or persons making the advances knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence in that behalf they would have ascertained that the master was not authorized to obtain any such relief on the credit of the steamer.

Suppose that defense cannot be sustained, still the respondents insist that the steamer is not liable for the advances made by the appellants, because the decree, as they contend, falls within the rule laid down in the case of *Minturn v. Maynard*, 17 How., 477 [58 U. S., XV., 235] where it was held that a libel *in personam* could not be maintained to recover a balance of account, consisting of moneys paid, laid out and expended for the respondents in payment for repairs and supplies to a steamer owned by

the debtors, together with charges for commissions and for advertising the steamer.

Examples might easily be given where a party may sue in the admiralty or in the common law courts at his election, but it is unnecessary to express any doubts as to the correctness of the rule laid down in that case, as it is clear that it does not control the case before the court even if the rule be admitted to be correct without any qualification. *The Belfast* [ante, 872]; *Davis v. Child*, Dav., 71; *The Grapeshot* [ante, 651]; *Merritt v. Brewer*, 14 Law Rep., 452.

Undoubtedly, the appellants took charge of the steamer for two trial trips between Baltimore and Charleston, and by the terms of the written agreement entered into at that time they were to receive for the services rendered in those trips a commission of ten per cent. on the gross freights of the steamer, but they also stipulated to disburse the steamer, and to insure the freights and disbursements for the benefit of the owners. They took the steamer on trial for those two trips with a view to purchase her in case they were "satisfied with the vessel," but they elected not to make the purchase, and subsequently refused to disburse the steamer on the credit of the owners. Uncontradicted as the evidence is upon this point, it does not seem necessary to reproduce it, especially as it is all one way.

Objection is also made that the advances cannot be held to be a lien upon the steamer, because some of the repairs and supplies were ordered by the owners in person, but the objection is entitled to no weight, as the evidence shows that it was expressly agreed that the advances should be furnished on the credit of the steamer. *The Grapeshot* [supra]; *The Guy* [ante, 710]; *S. C.*, 1 Ben., 112. *The Lulu* [supra].

Payments have been made by the respondents since the decree was entered in the district court, but the court here is not asked to revise the finding of the district court as to the amount, nor to deduct the payments since made, as those matters will be adjusted under the stipulations executed between the parties.

Suggestion is also made that the lien was waived by the commencement of an action for the advances in the State Court, but the record shows that the action is still pending, and it is well settled law that the pendency of such an action is no bar to a suit in a Federal Court. *Loring v. Marsh*, 2 Cliff., 320; *Wadleigh v. Veazie*, 8 Sumn., 165; *White v. Whitman*, 1 Curt., 494; *Lyman v. Brown*, 2 Curt., 559; *The Paul Boggs*, 1 Sprague, 369; *The Highlander*, 1 Sprague, 610.

Had the judgment been rendered it might be different, but is clear that the rule "*transit in rem judicatam*" cannot apply during the pendency of the action. *Murray v. Lovejoy*, 2 Cliff., 197; *Lovejoy v. Murray*, 8 Wall., 16 [70 U. S., XVIII., 183].

All sums collected in that proceeding have been duly credited in this case, and it is fully proved that the whole amount included in the decree of the district court was properly cognizable in the admiralty.

Decree of the Circuit Court is reversed, and the cause remanded, with directions to enter a decree affirming the decree of the District Court.

Cited—21 Wall., 589; 8 Bias., 108.

CHARLES CLARK AND THE BUCKEYE
MUTUAL INSURANCE COMPANY, *Appts.*,

THE STEAMER ADMIRAL FARRAGUT.

(See S. C., 10 Wall., 334-339.)

Want of lookout, when does not defeat action for collision.

The master or owners of a vessel should not be made liable for the consequences of an accident, by reason of not having a special lookout, where the collision or loss could not have been guarded against by a lookout, or where it is clear that the absence of a lookout had nothing to do in causing it.

[No. 68.]

Argued Nov. 29, 1870. Decided Dec. 12, 1870.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The libel in this case was filed in the District Court of the United States for the Southern District of Illinois, to recover for the loss of a canal-boat and cargo.

That court having entered a decree dismissing the libel, and the circuit court, upon appeal, having affirmed the decree, the libelants took a further appeal to this court.

The case is fully stated in the opinion of the court.

Mr. L. Proudfoot, for appellants:

"There must be a man specially detailed, to have a trustworthy and constant lookout stationed at the part of the vessel best adapted for that purpose, and whose whole business is to keep such lookout. An omission in case of collision would be *prima facie* evidence of fault. The wheel-house is not a proper place for such lookout; neither is the hurricane deck; and the captain of the watch is not such a lookout as is required by law."

The New York v. Rea, 18 How., 225 (59 U. S. XV., 361); *St. John v. Paine*, 10 How., 585; *Chamberlain v. Ward*, 21 How., 570 (62 U. S. XVI., 219); *The James Gray v. The John Fraser*, 21 How., 191 (63 U. S. XVI., 109); *Genesee Chief*, 12 How., 462; *Haney v. S. P. Co.*, 23 How., 292 (64 U. S. XVI., 563); *Trans. Co. v. Nav. Co.*, 22 How., 471 (63 U. S. XVI., 390); *The Ottawa*, 8 Wall., 273 (70 U. S. XVIII., 167); *Sturgis v. Boyer*, 24 How., 118, 120 (65 U. S. XVI., 593, 594); *Goslee v. Shute*, 18 How., 467 (59 U. S. XV., 464); *Culbertson v. The Southern Belle*, 18 How., 587 (59 U. S. XV., 495); *Pretz v. Bull*, 12 How., 471; *Pearce v. Page*, 24 How., 228 (65 U. S. XVI., 623); *New Philadelphia*, 1 Black, 63, 74 (66 U. S. XVII., 84, 87); *Wells v. Nav. Co.*, 8 N. Y., 375; *Ashmore v. Trans. Co.*, 4 Dutch., 180; *Alexander v. Greene*, 7 Hill., 533.

Story, Bailment, section 25, says: "By inevitable accident, commonly called the act of God, is meant any accident produced by any physical cause which is irresistible; such as a loss by lightning or storms, by the perils of the seas, by an inundation or earthquake, or by sudden death or illness."

Redfield, Railways, ch. 16, p. 232, says: "The term is limited to accidents which come from a force superior to all human agency, either in their production or resistance."

See, also, *Abb. Ship.*, 472, 486; *The Virgil*, 2 W. Rob., 205.

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"It is a loss happening in spite of all human effort and sagacity."

8 Kent, Com., 217.

Mr. L. Trumbull, for appellees:

This court has said: "In cases of collision, the testimony is often conflicting and irreconcilable. Each party can make out a plausible case, supported by some evidence. In such cases we have frequently decided, that where the districts and circuits concur in opinion on the facts, and there is testimony supporting their decision, we will not reverse it on doubts raised by the ingenuity of counsel."

The Hypodame, 6 Wall., 233 (73 U. S. XVIII., 796); *Newell v. Norton*, 8 Wall., 267 (70 U. S. XVIII., 273).

A lookout on the forward deck could have been of no possible use in this case.

In the case of *The James Gray v. The John Fraser*, 21 How., 198 (62 U. S. XVI., 110), this court says: "A lookout on board The John Fraser would be of little or no value, for the view ahead was obstructed by the steam tug."

Mr. Justice Bradley delivered the opinion of the court:

The appellant, Clark, libeled the steamer, Admiral Farragut, for causing the destruction of the canal-boat Ajax, and her cargo, on the 8th day of March, 1866. The Buckeye Mutual Insurance Company having paid Clark \$1,500 insurance on the canal-boat, came in by petition, and were made parties libellant, and subrogated to Clark's rights in the cause to the amount thus paid. The principal charges of the libel are, that the steamer Admiral Farragut, being engaged in running between Beardstown, Illinois, and St. Louis, Mo., on the Illinois and Mississippi Rivers, on the 7th of March, 1866, took the canal-boat Ajax, loaded with wheat, corn and oats, in tow at Beardstown; that the owner or master of The Farragut contracted to tow The Ajax safely to St. Louis and return for \$180, and caused it to be lashed to the side of the steamer, and proceeded down the Illinois River until about four o'clock in the morning of the 8th of March, when, in attempting to pass through the railroad bridge at Meredosia, the steamer was so carelessly and negligently managed, that she caused The Ajax to come in contact with the pier of the bridge, whereby boat and cargo sank and became a total loss.

The answer alleges that the canal-boat was unsound and rotten; that the only contract between the parties was a verbal contract to tow The Ajax to St. Louis for \$65, made with reference to the general usage on the Mississippi and Illinois Rivers, by which contracts for towing, in the absence of special agreements, are contracts to tow safely, except the usual dangers and hazards of river navigation, and do not involve the liabilities of a common carrier. The answer denies that the steamer was carelessly and negligently managed, or that the loss of The Ajax was attributable to the unskillfulness, negligence or fault of any person having charge of her, and alleges that it was due to the usual dangers of river navigation; that the bridge in which the loss occurred is located at a bend in the river, which there changes its course from southeast to southwest; that this bend renders it difficult to pass the draw of the bridge at any

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time without striking the eastern pier; that this difficulty is greatly enhanced at high water by a cross-current which strikes it diagonally across the draw, and that at the time of the loss complained of, this current was at its worst; that the captain of the steamer himself, Charles S. Ebaugh, who was a skillful pilot of the river, took the helm on this occasion, and was steering the vessel when the accident occurred, but that by the strength of the diagonal current she was forced towards the piles protecting the east pier, with which the canal-boat came into contact, and was stove and sunk, without any want of care or skill on the part of the owner or those in charge of the steamer. It is further alleged that the said piles formerly yielded to pressure, so that a sound boat rubbing against them received no serious damage therefrom, but that, during the preceding winter, the piles had been stiffened up with braces, so that when the unsound and rotten timbers of The Ajax came in contact with them, they were crushed.

The district and circuit courts were both satisfied that the evidence in the case fully supported the defense, and this court concurs in that conclusion, unless the position strenuously insisted on here by the appellants' counsel can be maintained, to wit: that the absence of a special lookout is evidence of negligence, which renders the owners of the steamer *prima facie* liable.

It is, undoubtedly, true that the absence of a special lookout would, in many cases, perhaps in most cases, be regarded as evidence of great negligence. The last rule prescribed by Congress by the Act of April 29, 1864 (13 Stat. at L., 61), declares that "nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout," etc.; thus intimating that a "proper lookout" is one of the ordinary precautions which a careful navigation involves. But it would be against all reason to contend that the master or owners of a vessel should be made liable for the consequences of an accident by reason of not having a special lookout where the collision or loss could not have been guarded against by a lookout, or where it is clear that the absence of a lookout had nothing to do in causing it. Suppose that a sunken rock, dropped from a cargo of quarried stone, and unknown to the navigators of the channel, were the cause of the accident; could the presence of a lookout have the least tendency to guard against it? A hundred such instances might be suggested where the presence or absence of a lookout would have no influence whatever on the happening of the catastrophe. We are not to shut our eyes and to accept blindly an artificial rule which is to determine, in all cases, whether the navigator is liable to the charge of negligence in causing any loss or damage that may happen. A lookout is only one of the many precautions which a prudent navigator ought to provide; but it is not indispensable where, from the circumstances of the case, a lookout could not possibly be of any service. The object of a lookout is to discover dangers that are unknown, the advance of an approaching vessel, the appearance of a light on the coast, the discovery of a dangerous ob-

ject, and many other things, the existence and presence of which could not be so easily and quickly known to a pilot as to a person whose sole business it was to make and communicate such discoveries. The cases referred to, taken in connection with the particular circumstances of each, cannot receive a different interpretation.

In the case before us no lookout could have been of any possible advantage. No lookout would have ventured or presumed to interfere with the captain, who had the helm at the time. It would probably have been rather an interference and a hindrance to the safe management of the boat for any third person in such an emergency to have diverted his attention. The obstacle was there in plain sight. Its position was better known to the captain than to any other person. No lookout could have aided him in the emergency. But if a lookout were needed, we have the evidence of the mate that he was on the hurricane deck watching the course of the steamer at the time; and had it been possible for any lookout to have been of any service, he would have rendered it. Clark, the captain of the canal-boat, was also on the watch as well as Nolte, the ship's carpenter, and one of the owners of the steamer. It is perfectly evident that the absence of a special lookout had nothing at all to do with the happening of the accident and, therefore, it can have nothing to do with fixing the liability of the parties.

It is also evident that the loss was occasioned by the violence of the cross-current, which was due to the great height of water prevailing at the time and was, therefore, the result of one of the ordinary dangers of river navigation.

The decree of the Circuit Court will be affirmed, with costs.

Cited—23 Wall., 177; 92 U. S., 36, 436; 104 U. S., 191; 2 Hughes, 144; 2 Flipp., 161; 6 Sawy., 123; 7 Sawy., 493; 59 N. Y., 298; 7 Am. Rep., 469 (47 N. Y., 176).

EDWARD G. HANRICK, Administrator of
EDWARD HANRICK, Deceased, *Plff. in Err.*,

v.

JOSEPH NEELY ET AL.

(See S. C., 10 Wall., 364-366.)

Deed authorized by decree—proof of decree not necessary—presumption of delivery.

Where one made a deed under the authority of a decree, it is good without producing the decree, which could add nothing to its validity.

Where a deed was delivered in obedience to the decree of the court, proof of the decree was not necessary to support the delivery.

Where a grantee is in possession of a deed, which upon the face of it is regularly executed, and has had it recorded, the presumption is that it was duly delivered.

[No. 87.]

Argued Nov. 28, 1870. Decided Dec. 12, 1870.

IN ERROR to the Circuit Court of the United States for the Western District of Texas. The case is fully stated by the court.

Mr. W. G. Hale, for plaintiff in error. (No counsel appeared in this court for defendants in error).

Mr. Justice Davis delivered the opinion of the court:

This was an action of trespass, according to the local practice of Texas, to try the title to several leagues of land, in Falls County, in that State.

On the trial of the case before the jury, the plaintiff proved title in one Pedro Zarsa, to the lands in controversy, and gave in evidence a letter of attorney, executed in 1831, from Zarsa to McKinney, authorizing him to sell the lands, or to substitute another person in his stead for that purpose. McKinney did not execute the power conferred on him, but in 1833, delegated it to Robert M. Williamson by a letter of substitution, which was also received by the court in evidence. In further derivation of title the plaintiff offered in evidence a deed of the property made in the name of Zarsa, in 1851, by Williamson, under the substituted power, to Edward Hanrick, the plaintiff's intestate.

This deed was rejected by the court on the ground that as it was made and delivered in pursuance of a decree of the District Court of the United States for the Eastern District of Texas, the decree was necessary to support the deed, and without proof of it, which was not furnished, the deed could not be read in evidence to the jury. There was other evidence offered, rejected and exceptions taken, but the only point in the case we deem it necessary to notice, relates to the ruling of the court excepted to at the time, excluding this deed from the consideration of the jury. The main question is, whether the deed was good without the decree.

It is quite clear, from the evidence, that Williamson, on behalf of Zarsa, had contracted to sell the several tracts of land to Hanrick, and that the sale was not completed, owing to differences which had arisen between the parties concerning it. These differences produced litigation, which resulted in the court decreeing that Williamson, on behalf of his principal, should convey to Hanrick. It may be true that the deed was executed because of the decree, and that it would not have been made if the decree had not been rendered, but it does not follow that the decree was necessary to its validity.

The fee of the lands was in Zarsa, and the power of Williamson, his attorney in fact, to sell and convey them to Hanrick, was plenary, and did not require, to be employed, that a court of justice should act on it. If Williamson was stimulated by the decree to exercise the power thus vested in him by Zarsa, what right have the defendants to question his action or complain of it? They are not concerned with the reasons that induced him to act, nor with the nature or result of the litigation with Hanrick. All that they are interested to know is, that Zarsa had title to the lands, that he authorized Williamson to sell, and that the conveyance to Hanrick was in due form of law. The decision by this court in *Games v. Stiles*, 14 Pet., 322, is a direct authority against the position taken by the court below. In that case, Buchanan, the purchaser from the United States of lands in Ohio, sold them to Sterling, but recited in his deed, that the conveyance was made in pursuance of a decree of the Circuit Court of the United States for the District of Virginia. The court held that it was not necessary to prove the decree to sustain the deed;

that as Buchanan was the patentee of the land, although he had made the deed under the authority of the decree, yet the deed was good without the decree, which could add nothing to its validity. If anything, the case at bar is stronger than the case just cited because Zarsa does not recite in the body of the deed that the conveyance is made in consequence of the decree, and we only learn the fact that it was so, by an indorsement on the back of the deed.

One other point remains to be noticed. It seems that the court based its rejection of the deed also on the ground that it was delivered by the clerk to Hanrick, in obedience to the decree of the court, and that, therefore, proof of the decree was necessary to support the delivery. But the deed was not complete without delivery, and the decree of the court was no more essential to give validity to the delivery than it was to any other formality necessary to the full execution of the instrument. Williamson authorized the delivery, and has acquiesced in it, and no one else can object to the mode by which the act was accomplished. All that the defendants are interested in, is the fact of delivery, and about this there is no dispute. They are no more concerned with the considerations that induced Williamson to deliver the deed to Hanrick, through the clerk of the court, than they are with the motives that prompted him to affix his signature and seal to the instrument.

Apart from this, Hanrick, the grantee, being in possession of the deed, which upon the face of it is regularly executed and, having had it recorded, the presumption is that it was duly delivered. *Carver v. Jackson*, 4 Pet., 84; *Ward v. Lewis*, 4 Pick., 520.

It is, therefore, clear that the Circuit Court erred in rejecting the deed, and on that account its judgment is reversed and a venire de novo awarded.

THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, *Pf. in Err.*,

v.

ISAAC R. TRIMBLE AND ANN C. TRIMBLE, HIS WIFE, AND GEORGIANA PRESSTMAN.

(See S. C., 10 Wall., 367-383).

Where defendant was never brought before the court, decree void—construction by parties of contract—assignment of patent right—contracts, how varied.

A decree in an action in equity, wherein defendant was never brought before the court, was *coram non jure* and void.

Where there is doubt as to the proper construction of an instrument, the construction put upon it by the parties is entitled to great consideration, but where its meaning is clear, the error of the parties cannot control its effect.

An assignment of all the patentee's title and interest in the inventions secured to him by two pat-

NOTE.—Judgment; service of notice to appear and defend when necessary to its validity. See note to *Hollingsworth v. Barbour*, 29 U. S. (4 Pet.), 468.

Patents; assignment before issuing and re-issuing patents; when assignment transfers extended term. See note to *Gayler v. Wilder*, 51 U. S. (10 How.), 471.

ents, and of all the right and title which should be secured to him for alterations and improvements in the inventions from time to time thereafter, is an assignment of the entire inventions and all alterations and improvements and all patents relating thereto, whensoever issued.

Contracts under seal, where the Statute of Frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties.

[No. 56.]

Argued Nov. 28, 1870. Decided Dec. 12, 1870.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

Suit was brought in the court below by the defendants in error as assignees, to recover damages for an alleged infringement of a certain patent for truss frames of bridges. The patent was obtained in 1840 by Wm. Howe. In 1844 he assigned to Isaac R. Trimble in these words: "All the right, title and interest which I have in said invention as secured to me by said letters patent; and also all right, title and interest which may be secured to me for alterations and improvements in the same from time to time." "The same to be held and enjoyed by the said I. R. Trimble, etc., to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me, had this assignment and sale not been made." Howe having died, his administrator, Joseph Stone, Sep. 15, 1854, in order to "secure to I. R. Trimble more perfectly his legal rights, and tend to a more speedy adjustment of any disputed claim," assigned to Trimble the same interest in the patent of 1846 which he held in the others. The assignment recites that the alterations and improvements secured by the patent of 1846 already belong to Trimble, "who has used and paid for the same since the year 1846, as understood at the time." On the application of the same administrator, Stone, the patent of 1846 was extended for seven years from Aug. 28, 1860. May 30, 1861, Trimble executed a deed of "all his property and estate, whatsoever and wheresoever, of every kind and description," to the defendants in error, Ann C. Trimble, his wife, and Georgiana Prestman, in trust: 1. To pay his debts; 2. For the benefit of Mrs. Trimble, and 3. To convey to such persons as Mrs. Trimble might designate, by deed or will. This deed was recorded July 26, 1861, in the proper office in Baltimore City, but was not recorded in the Patent Office until March 4, 1868, a short time before this suit was brought. The right of the plaintiffs to recover rested, therefore, upon the ground that the assignment from Howe to Trimble passed Howe's interest in the extension of the patent of 1846, the alleged infringement having taken place pending such extension.

The plaintiff in error (defendant below) gave in evidence (subject to exception) an assignment dated Apr. 1, 1861, from Howe's administrator, Joseph Stone, to a certain Daniel Stone, of Philadelphia, of all the administrator's interest in the patent of 1846, and its extension for the States above mentioned. When this assignment was recorded does not appear. This was followed by proof of an agreement between Trimble and Daniel Stone, dated Sep. 30, 1846, and recorded July 27, 1864. Stone obligates himself to pay Trimble one half of

the consideration money remaining due from Trimble to William Howe, for the purchase of his patents; and Trimble binds himself, in consideration thereof, to sell and transfer, and "doth hereby sell and transfer," to Stone, one equal half part of his interest in these patents. The agreement further witnesses that the parties have joined themselves as partners to carry on the business of bridge builders, "under, and in accordance with," the Howe patent rights and privileges, etc.

Next followed (subject to the same exception) an assignment from a certain John E. Shaw, receiver, to Aaron E. Burton, of all the interest of Daniel Stone and Trimble, as partners in the Howe patents. This assignment bears date June 11, 1864, and was recorded July 27, 1864, being the same day on which the partnership articles above referred to were recorded, as has been stated.

The plaintiff in error then produced an assignment from Joseph Stone, administrator of Daniel Stone, to the same Aaron E. Burton, dated Mar. 6, 1865, in which he transfers to the assignees all the interest of the deceased in the Howe patents and extension. This assignment was not recorded until May 29, 1868, after the institution of this action. In order to sustain the assignment from Shaw as receiver, already referred to, the plaintiff in error then gave in evidence (subject to the same exception) a transcript of the record in an equity proceeding in the Supreme Court of Pennsylvania, instituted Mar. 10, 1864, by Joseph Stone, administrator of Daniel Stone, against Trimble, as "formerly of said City of Philadelphia." It alleges a partnership between Daniel Stone and Trimble, etc. It then charges that Trimble, "On or about the 29th day of Apr., 1861, absconded to parts unknown, abandoning the said copartnership business, and took up arms against the government," etc. The bill then prays an account, injunction, receiver, etc., and a subpoena against Trimble. The court, *Judge Agnew*, Mar. 26, 1864, sixteen days after the filing of the bill, appointed Mr. Shaw receiver, and ordered him to sell the partnership property. He filed an inventory, in which the Howe patent, as extended, was set down as the only assets of the partnership, and a sale of it for \$300 was reported. He then filed a petition for the confirmation of the sale of the patent and extension to Burton and, June 11, 1864, said sale was absolutely confirmed, and the receiver directed to execute the assignment to Burton of the Howe patent, "to the full end of the time for which said letters patent have been extended."

The case is further stated by the court.

Messrs. Wm. Schley and Thomas Donaldson, for plaintiff in error:

The plaintiffs below did not adduce any evidence of title in the extended term of the patent. The alleged infringements occurred during the said extended term. There is nothing in the agreement, nor in the assignment above referred to, which would justify the conclusion that the parties had in contemplation the possible extension of the patents, or any of them. The defendant's 2d and 8th prayers ought to have been granted.

Wilson v. Rousseau, 4 How., 682; *Wilson v. Simpson*, 9 How., 109; *Bloomer v. McQueenan*,

14 How., 539; *Hartshorne v. Day*, 19 How., 211 (60 U. S., XV., 605); *Chaffee v. Belting Co.*, 23 How., 223 (68 U. S., XVI., 242); *Day v. Rubber Co.*, 3 Blatchf., 491, 504.

Even if there had been, in the said agreement or said assignment, or in both, a covenant providing for an interest in any extension, it would only, as respects third parties, have vested a mere equitable right. By estoppel, the subsequently accruing right feeding the estoppel, it might, in a suit *inter partes*, even at law, have clothed the covenant with a legal right. But, however this might be in such case, it could not create a legal right to be enforced by the covenantor or his assigns, in an action at law, against a stranger to the covenant.

Hartshorne v. Day, 19 How., 220 (60 U. S., XV., 610).

But even if Trimble had an inchoate right in the possible extension of the patent of 1846, his agreement with Daniel Stone passed to Daniel Stone one half of said inchoate right; and of course, the plaintiffs, assuming said agreement to be operative, would not have such exclusive title as would enable them to maintain this suit.

The evidence of Mr Trimble, as a witness, is not competent legal evidence to destroy said agreement, or to re-vest in him, said Trimble, the moiety which he had transferred to said Stone. An assignment of a legal interest in a patent, or of an interest therein, can only be made by writing. Even if the facts stated by witness would avail in equity, as a ground for a decree setting aside the deed, still, in a suit at law, they cannot annul the agreement.

R. R. Co. v. Stimpson, 14 Pet., 461; *Iron & Nail Fact. v. Corning*, 1 Blatchf., 472.

Without entering into any discussion of the merits of the suit, in the Supreme Court of Pennsylvania, it was shown that it was still pending; and that said court, by a receiver, had taken the possession of the interest of said Trimble in said patent right, long before the commencement of this suit.

Coming into question, collaterally, in this suit, comity requires that the action of said court should not be declared a mere nullity in law. It was a proceeding in a court of equity, and partnership matters are properly cognizable in equity. It was a case in a matter within its jurisdiction. The appointment of a receiver is an ordinary exercise of power, for the purpose of preserving property, pending litigation; and it is the province of every court having possession of a cause, to decide for itself, whether, upon the state of case before it, it is expected to exercise the power. The averments of the bill presented a strong case for prompt interference.

Messrs. B. C. Presatman and S. T. Wallis, for defendants in error:

The assignment of Aug. 8, 1840, from Howe to Trimble, of itself, and *a fortiori* with the confirmatory assignment from Howe's administrator on Sep. 18, 1854, passed to Trimble a legal and exclusive right within the territory named, to the patents original and extended, which right passed from Trimble to his grantees by his deed of May 3, 1861.

Wilson v. Rousseau, 4 How., 646; *Gayler v. Wilder*, 10 How., 493; *Hartshorne v. Day*, 19 How., 220 (60 U. S., XV., 611); *Gibson v. Cooke*, 2 Blatchf., 149; *Phelps v. Comstock*, 4 McLean, 355; *Case v. Redfield*, 4 McLean, 526; *Olum v.*

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Brewer, 2 Curt., 506-508; *Pitts v. Hall*, 3 Blatchf., 201; *Hodge v. R. R. Co.*, 6 Blatchf., 89.

See, also, MSS. case of *Stone v. Piper*, decided by the late Mr. Justice Grier, in Philadelphia, in which the identical question here in dispute was the sole point of controversy, and was determined in favor of the right of Trimble to the benefit of the extension, and against the right of Daniel Stone, under the assignment of Howe's administrator.

The agreement between Trimble and Daniel Stone, even if it be taken to contain the words of absolute transfer, which are not in the copy filed with the Pennsylvania bill in equity, did not pass any title which precluded the recovery of the plaintiffs under the facts proven in rebuttal, and put before the jury by the prayer of the defendants in error, under which the verdict was found. The agreement was a private paper, *inter partes* only, and unrecorded during the lifetime of Stone and the term of the proposed partnership. The stipulated transfer of one half of the patent right was purely incidental to the partnership, which never went into operation, and the paper itself remained on the proof, in Stone's hands, a confessed escrow, under which he claimed nothing.

The whole proceeding in Pennsylvania, and the receiver's deed executed under it, are mere nullities, of no effect and entitled to no respect. Not only was the equity suit a sham on its face, for reasons already assigned, but no subpoena was issued; no publication made; no notice whatever given or pretended to be given to the defendant. It was founded, moreover, on the false and fraudulent allegation that Trimble was "formerly of Philadelphia," while it is distinctly proven in this case, that he never was at any time a citizen or resident of Pennsylvania. Neither had the patent right any locality in Pennsylvania, to give a jurisdiction from its *situs*, which did not exist over the person of the defendant. It was a mere personal right, and even as such it was specifically exercisable in other States as well as in Pennsylvania.

The entire proceeding, then, is not only *ex parte* but *coram non iudice* as to Trimble, whose assignees and co-plaintiffs were not even made parties.

D'Arcy v. Ketchum, 11 How., 165; *Harris v. Hardeman*, 14 How., 339; *McGoon v. Scales* (*ante*, 545); *Bischoff v. Wethered* (*ante*, 829).

While it is not denied that an assignee, in order to recover, where defense is properly taken, must have an exclusive right; yet, if the plaintiff has such exclusive right jointly with another, the non-joinder of that other must be pleaded in abatement, as the omission of a proper co-plaintiff is required to be, on familiar principles of pleading, in all actions purely *ex delicto*.

The proceeding in the Supreme Court of Pennsylvania concedes throughout that Trimble's interest covered the extended patent. This admission is flatly made by Joseph Stone (administrator of Daniel Stone), the complainant. It is part of the court's decree prescribing the form of the receiver's deed, and is set forth in that deed as accepted and recorded by Burton, the purchaser. And it could not have been otherwise on the very showing of the bill, for not only did the complainant aver the non-user of the patent as a ground of irreparable injury

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(which, of course, could refer only to the extended patent, the original one having expired), but he charged that the partnership had gone on until Trimble left it, or about Apr. 29, 1861, which was eight months after the extension; the sole and exclusive business of the firm, meanwhile, being to build bridges, "Under and in accordance with the rights and privileges acquired by Trimble from Howe," and none other. Nor can it be tolerated that the plaintiff in error, while relying upon the proceeding in which Joseph Stone, as administrator of Daniel Stone, thus claims the extension to have been in Trimble and Daniel Stone, as partners, by virtue of their partnership agreement and Trimble's original rights, should still be permitted to claim that the said Joseph Stone, as administrator of Howe, had previously conveyed the extension to the same Daniel Stone, Apr. 1, 1861, and had afterwards vested it in Burton, the vendee of the receiver, by the deed of Mar. 6, 1865, executed by him, the same Joseph, in his capacity of administrator of Daniel Stone, and by virtue of his own deed to Daniel, as aforesaid.

All these pretended outstanding rights are set up by the plaintiff in error, a conceded and sheer wrong-doer, to protect it from the penalties of a confessed infringement, for which no license is claimed to have been given it by the parties on whose rights it relies. It certainly is entitled to no favorable constructions.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Maryland.

The controversy between the parties in this court is confined to questions relating to the title of the defendants in error under the extended patent of August 28, 1860, alleged to have been infringed by the plaintiffs in error. The instructions given, and those refused by the court below, which are brought under review, must be examined in the light of the facts which the bill of exceptions discloses. Before proceeding to consider the main questions in the case, we deem it proper to dispose of others arising upon the record in regard to which we have found no difficulty and entertain no doubt.

The deed of Isaac R. Trimble of the 30th of May, 1861, conveyed all his rights under the patent, whatever they may have been, to the grantees in that instrument. If his title was sufficient, theirs is so. This was not controverted by the counsel for the plaintiffs in error, and needs no further remark.

The assignment of the 11th of June, 1864, to Aaron E. Burton, made by John E. Shaw, as receiver appointed in the case in equity in the Supreme Court of Pennsylvania, wherein Joseph Stone, administrator of Daniel Stone, was complainant, and Isaac R. Trimble defendant, was a nullity, and as such may be laid out of view. Looking into the record we find no evidence of the issuing of any process against Trimble, or that he was notified of the pendency of the suit by publication or otherwise. It does not appear that there was any step whatever taken to bring him before the court. The entire proceeding, as disclosed, was *coram non judice* and void. It may be added that Trimble's deed to his co-plaintiffs was prior in date to the filing of the bill, and that the title of the grantees in that

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deed could not be affected by a proceeding to which they were not parties.

If Trimble, at the date of that deed, held the title under the extended patent, which the defendants in error insist he had, the deed of confirmation to him from Howe's administrator, of the 18th of September, 1854, touching the patent of 1846, extended by the one in question, was inoperative and useless. It was referred to in the argument, as showing the construction put by the parties upon the deed of Howe to Trimble of the 9th of July, 1844. Where there is doubt as to the proper construction of an instrument, this feature of the case is entitled to great consideration. But where its meaning is clear in the eye of the law, the error of the parties cannot control its effect. In this view of the subject, conceding that Trimble took this conveyance, not out of abundant caution and to solve in his favor a doubt which might otherwise possibly arise against him, but because he deemed it necessary to give him a title which he did not already possess, his legal rights in this controversy are just what they would have been if that instrument had not been executed.

If the construction given to the deed of Howe by the counsel for the defendants in error be correct, and no part of the title vested in Trimble by that deed passed to Daniel Stone by the agreement of the 30th of September, 1846, between him and Trimble, as the counsel for the defendants in error insist, there was nothing for the deed of Howe's administrator to Stone of the 1st of April, 1861, nor for the deed of Stone's administrator of March 6, 1865, to Burton, to operate upon, and both of them were also without effect upon the rights of the parties in this litigation.

This brings us to the examination of the deed of Howe to Trimble, and of the agreement between Trimble and Stone. They are the hinges upon which the controversy turns. The stress of the argument on both sides was properly confined to these subjects in their several aspects of fact and of law.

The deed from Howe recites that he had obtained from the United States two patents for new and useful improvements in the construction of truss bridges and other structures, one dated on the 10th of July, the other on the 3d of August, in the year 1840. The instrument is a deed poll. After setting out the consideration, it proceeds as follows: "I have assigned, sold, and set over, and do hereby assign, sell and set over, all the right, title and interest which I have in said invention, as secured to me by said letters patent, and also all right, title and interest which may be secured to me for alterations and improvements on the same from time to time, for, to and in the following States, viz., etc., * * * "the same to be held and enjoyed by the said I. R. Trimble for his own use and behoof, and for the use and behoof of his legal representatives to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not have been made." A careful analysis of these provisions eliminates the following results: Howe assigns to Trimble all his title and interest in the inventions secured to him by the two patents mentioned, in respect to the territory specified, and also all the right and title

which should be secured to him for alterations and improvements in the inventions, from time to time thereafter, for the same territory, to be held and enjoyed by Trimble to the full end of the terms for which patents had been theretofore, or might be thereafter, granted, in all respects as they would have been held and enjoyed by the assignor if the assignment had not been made.

The language employed is very broad. It includes alike the patents which had been issued and all which might be issued thereafter. No discrimination is made between those for the original inventions and those for alterations and improvements, nor between those which were first issues and those which were re-issues or renewals and extensions. The entire inventions and all alterations and improvements, and all patents relating thereto, whenever issued, to the extent of the territory specified, are within the scope of the terms employed. No other construction will satisfy them. Upon the fullest consideration we have no doubt such was the meaning and intent of the parties.

The effect of such a contract, we think, has been settled by this court in *Gayler v. Wilder*, 10 How., 477. Fitzgerald, the inventor, before the patent was issued, assigned his entire right to Enos Wilder. The assignment contained a request that the patent should be issued to the assignee, and was duly recorded in the Patent Office. This brought the case within the terms of the 6th section of the Act of 1836. Fitzgerald made no assignment after the patent was issued to him. Enos Wilder, his assignee, assigned to Benjamin Wilder, who was the plaintiff in the action. The defendants insisted that Enos Wilder had not the legal, but only an equitable title. Upon the question whether an assignment subsequent to the issuing of the patent was necessary to pass the former to the assignee, this court said: "We do not think the Act of Congress requires it, but that when the patent issued to Fitzgerald, the legal right to the monopoly and the property it created was, by the operation of the assignment then on record, vested in Wilder." The argument which controlled the judgment of the court may be thus stated: Fitzgerald had an inchoate right at the time of the assignment, the invention being then complete and the specification prepared. It appeared, by the language of the assignment, that it was intended to operate upon the perfect legal title, which he then had a lawful right to obtain, as well as upon the inchoate right which he then possessed. There was no sound reason for defeating the intention of the parties by restricting the assignment to the latter interest, and compelling the parties to execute another transfer, unless the Act of Congress required it, which, in the opinion of the court, it did not. The Act of 1836 declares that every patent shall be assignable in law. The thing to be assigned is not the mere parchment on which the grant is written, but the monopoly which the grant confers—the right of property which it creates. "And when the party has acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the assignment of his whole interest, whether executed before or after the patent is issued, is equally within the provisions of the Act of Congress." We concur in these views.

The rule laid down is the law of this tribunal upon the subject. There the patent was an original one; here it is an extension. The question before us arises under the 11th and 18th sections of the Act of 1836. But the arguments which controlled the decision in that case apply in this with equal force. The same considerations are involved in both. There is no substantial ground of distinction. The application of the same principle to the assignment of an extended patent, made before the extension, is an inevitable corollary from the reasoning and ruling of the court. Without, in effect, overruling that adjudication, we cannot hold that Trimble had not a legal title under the extended as well as under the original patent. In our judgment he had such a title.

In this connection our attention has been called by the counsel for the plaintiffs in error to *Wilson v. Rousseau*, 4 How., 682, and several other cases. None of them turned upon the question we have been considering, and neither of them contains anything in conflict with the proposition established by *Gayler v. Wilder*.

It remains to consider the contract between Trimble and Daniel Stone.

It recites the agreement between Trimble and Howe, and the payments thereby stipulated to be made by Trimble. Stone covenants to pay one half of the installments still unpaid as they should mature.

This clause follows:

"And the said Isaac R. Trimble, in consideration of the said payments, promises and agreements on the part of the said Daniel Stone as aforesaid, for and on the part of himself, the said Isaac R. Trimble, and his heirs, executors and administrators, covenants and agrees, and by these presents doth covenant and agree, to sell and transfer, and doth hereby sell and transfer, unto the said Daniel Stone, his heirs, executors and administrators, the one equal moiety or half part of all the right, title, claim, and interest of him, the said Isaac R. Trimble, of, in and to the patent right aforesaid, which he purchased as aforesaid of the said William Howe, the sale heretofore made to Reading excepted."

A copartnership between the parties in the business of building bridges under Howe's patents was then entered into, and it was agreed that if either party should at any time desire a dissolution, Trimble should name a sum which he would be willing to give or take for a moiety of the rights which he acquired from Howe, including the payments to Howe, and that Stone should thereupon decide whether he would buy or sell. It was further provided that the copartnership might be dissolved at the expiration of six months after notice by either party.

Trimble was examined as a witness, and testified as follows: Stone never made any of the payments which he was required to make by the contract. By common consent of the parties, the contract never went into operation in any way, because Stone was unable to comply with any of his engagements. Trimble was compelled to pay, and did pay, the full amount of the installments still due on his contract with Howe. Stone during his lifetime never claimed any right under the contract; but, on the contrary, always recognized Trimble's ex-

clusive right to the interest referred to in the agreement, and acted as Trimble's agent in building bridges, under a power of attorney, paying Trimble a part of the profits for the privilege. There was no other evidence on the subject. Trimble's testimony was uncontradicted.

The agreement was recorded in the Patent Office on the 27th of July, 1864, after Stone's death, and more than eighteen years after the date of its execution.

The words, "and do hereby sell and transfer," found in the copy from the Patent Office, which was used in evidence in the court below, are not in the copy annexed to the bill filed in the Supreme Court of Pennsylvania. But, conceding that they were in the contract as executed, and that the contract had the same effect in transferring to Stone a moiety of Trimble's rights and interests, which Trimble's contract with Howe had in transferring the whole to Trimble, then a question arose for the jury as to the effect of the facts disclosed in Trimble's testimony. Upon the trial the court, at the request of the plaintiffs, charged the jury in effect, that if they found the facts to be as testified by Trimble, the contract between Trimble and Stone "was not to be regarded as passing any title to Stone, which the defendant was entitled to set up in connection with any other evidence in the cause as a bar to the right of the plaintiffs to recover," provided they found also the execution and delivery of Trimble's deed to his co-plaintiffs. To this instruction the plaintiffs in error excepted.

If the facts were as alleged by Trimble, his contract with Stone was stillborn. It never had any vitality. Neither the legal representative of Stone nor anyone in privity with him asserts its validity in this litigation. It is vicariously put forward by the plaintiffs in error. They seek to give it life and vigor, and invoke its aid for their protection.

If a deed of real estate be executed and recorded, *prima facie* it conveys the legal title; but if it be shown it was not delivered, that destroys its effect. *Maynard v. Maynard*, 10 Mass., 456. A judgment may be assigned without written evidence of the transfer. *Ford v. Stuart*, 19 Johns., 842. A party may waive a constitutional provision which applies in his favor. *Baker v. Bramin*, 6 Hill, 48. Fraud or mistake in the execution of a deed may be shown at law. *Harishorn v. Day*, 19 How., 223 [60 U. S., XV., 612]. The most solemn contracts under seal, where the Statute of Frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties. *Emerson v. Staler*, 22 How., 41 [63 U. S., XVI., 365]. If Stone's administrator were to sue Trimble, and the facts should be established as Trimble alleged them to be, the action would be barred by estoppel *in pais*. We think the instruction was correct, and that it properly submitted this part of the case to the jury.

The plaintiffs in error submitted eight prayers for instructions. The 2d, 3d, 4th, 5th, 6th and 8th were refused. The refusal was excepted to. Some of the points which they present were not insisted upon in the argument at the bar. The others are sufficiently answered by what has already been said.

See 10 WALL.

We find no error in the record, and the judgment below is affirmed.

Cited—14 Wall., 457; 98 U. S., 553; 16 Blatchf., 457; 1 Holmes, 219; 31 Mich., 49; 27 Ohio St., 328; 6 Am. Rep., 309 (35 Md., 89); 18 Am. Rep., 146 (31 Mich., 49).

BRANCH T. MASTERSON, Assignee of
JOHN H. HERNDON, Appt.,

v.

VOLNEY E. HOWARD ET AL.

(See S. C., 10 Wall., 416-418.)

Parties in writ of error or appeal.

Where the judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, or it will be dismissed. Where one of the parties fails to appear, or if appearing, refuses to join on written notice and due service, the court may on that ground grant an appeal to the party who prays for it, as to his own interest.

[No. 66.]

Argued Nov. 28, 1870. Decided Dec. 1st, 1870.

A PPEAL from the Circuit Court of the United States for the Western District of Texas.

The bill in this case was filed in the District Court of the United States for the Western District of Texas, sitting with circuit powers, by the appellees' intestate, for perfecting title to certain lands. A decree having been entered in his favor against S. A. Maverick and John H. Herndon, the said Herndon took an appeal to this court, alleging in his petition therefor that "His co-defendant, Maverick, refuses to prosecute this appeal with him."

The case is further stated by the court.

Messrs. J. W. Harris and W. W. Boyce, for appellant.

Mr. P. Phillips, for appellees:

This is a joint decree against the two defendants. Can Herndon alone take an appeal?

In the case of *Williams v. Bk.*, 11 Wheat., 414, which was a writ of error sued out by one defendant to a joint judgment against three, the writ was dismissed.

In the case of *Owings v. Kincannon*, 7 Pet., 402, which was an appeal, this court held that, as the Act of 1803 subjected appeals to the same rules, regulations and restrictions as are prescribed by law in cases of writ of error, it followed that the same parties should prosecute the appeal as would be necessary in a writ of error.

This is not only the requirement of the statute, but also follows the general usage of chancery, to make a final decree binding on all the parties.

Owings v. Kincannon, 7 Pet., 402; *Wilson v. Ins. Co.*, 12 Pet., 140.

A proceeding, in which Maverick would be entitled to be heard as to this matter, is necessary.

Todd v. Daniel, 16 Pet., 523.

Mr. Justice Miller delivered the opinion of the court:

NOTE.—Parties in error, who necessary. See, note to *Owings v. Kincannon*, 32 U. S. (7 Pet.), 309.

It is objected by the appellee, that there is no valid appeal in this case, because the decree being a joint decree against Herndon and Maverick, Herndon alone has asked for an appeal.

A careful examination of the record satisfies us that the decree is a joint decree, and the appeal is clearly taken by Herndon alone.

It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. *Williams v. Bk. U. S.*, 11 Wheat., 414; *Owings v. Kincannon*, 7 Pet., 399; *Wilson v. Ins. Co.*, 12 Pet., 140.

In the case first cited the court says that where one of the parties refuse to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd v. Daniel*, 16 Pet., 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession, but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. *Brooke's Abr.*, art. 238, tit. Sev. and Sum.; 2 *Rolle's Abr.*, 488, same title; *Arch. Civ. Pl.*, 54; *Tidd, Pr.*, 129, 1136, 1169. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the circuit court for an appeal, that Maverick refused to prosecute the appeal with him.

We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or

the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested. We dismiss this appeal with the less regret as there is still time to obtain another on proceedings not liable to the objection taken to this.

It is ordered, accordingly, that this appeal be dismissed.

Cited—12 Wall., 251; 14 Wall., 404; 20 Wall., 157; 38 U. S., 419; 108 U. S., 15.

UNITED STATES, *Appt.*,

v.

THE HEIRS OF JUAN BAUTISTA VIGIL,
Deceased, ET AL.

(See S. C., 10 Wall., 428-427.)

Right of appeal, how secured—order, nunc pro tunc—effect of delay.

A prayer for an appeal made in due time, although not granted at the time by the court, secures the right of appeal and no delay by the court in its allowance can impair it.

An order for an allowance of an appeal may be made *nunc pro tunc*.

When delay in perfecting the appeal is accounted for, motion to dismiss will be denied.

[No. 217.]

Argued Dec. 9, 1870. Decided Dec. 12, 1870.

APPEAL from the Supreme Court of the Territory of New Mexico.

On motion to dismiss.

The petition in this case was filed in the Supreme Court of the Territory of New Mexico, by the appellees, for confirmation of title to certain lands. Judgment having been given for the petitioners in that court, the defendants took an appeal to this court.

The case is fully stated by the court.

Messrs. J. S. Watts and T. Ewing, Jr., for appellees.

Messrs. A. T. Akerman, Atty. Gen., and C. H. Hill, Asst. Atty. Gen., and J. A. Wells, for appellant.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion to dismiss an appeal taken on the part of the United States.

The suit was brought by Vigil and others, to recover a parcel of land in New Mexico under a special Act of Congress, passed June 21, 1860, which gave the right of appeal to either party, if asked for within one year from the rendition

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of the judgment. A judgment was rendered against the United States in the court below, from which an appeal was sought to be taken. The only question is as to its regularity. It is claimed on the part of the Government that the appeal was prayed for by the United States District Attorney in court at the time the judgment was rendered, namely: at the January Term, 1867, and was granted; but that the clerk, for some unexplained reason, neglected to make an entry of the same in the minutes.

This omission of the clerk does not appear to have been discovered by the district attorney until January Term, 1869. In the meantime, this officer in the Territory had retired from the office, and when the omission was brought to his notice by his successor he expressed his surprise and stated that he not only prayed for the appeal, but charged the clerk to make the entry and, as he believes, gave him a memorandum to that effect.

As soon as the omission came to the knowledge of his successor, he made an application to the court below to amend the record, so that it might appear that the appeal had been prayed for, according to the fact at the term in which the judgment was rendered.

The court granted the application and ordered that an entry be made *nunc pro tunc* of an appeal in the cause, asked for at the January Term, 1867, and that the same be granted. This action of the court below completed the appeal, and we think it was well sustained by the proofs before them.

The practice may be admitted (*Castro v. U. S.*, 3 Wall., 46 [70 U. S. XVIII., 163]; *Edmonson v. Bloomshire* [ante, 91], but there are exceptions to the rule. *U. S. v. Gomez*, 3 Wall., 762 [70 U. S., XVIII., 215], is an instance. There the proceedings on the appeal had been suspended for the purpose of a motion in the court below to set it aside, and the clerk also had refused to return and file the transcript. These facts were regarded as a sufficient excuse for the delay in filing the record in this court at a subsequent term. *U. S. v. Booth*, 21 How., 512 [62 U. S., XVI., 172], had already established an exception. That was the case of a writ of error and the clerk had refused to return or file the transcript, which occasioned the delay.

The same principle was adopted in the case of *Alvino v. U. S.*, 6 Wall., 457 [73 U. S., XVIII., 721]. The case had been dismissed at the December Term, 1866, for want of a citation. A motion was made at the succeeding term to re-instate it upon the docket on the production of proof that a citation had been signed by the judge and served on the United States District Attorney in due time. Objection was taken that the proof came too late, as, according to the settled practice of the court, the motion to re-instate must be made at the same term at which the motion to dismiss was granted. But it appearing from the proofs that the clerk's office, where the records were kept, had been partially destroyed by fire in July, 1866, which occasioned great confusion and some loss of the papers, the court regarded the facts as affording a sufficient excuse for the delay.

Now, in the case before us the fault of the clerk in not entering the prayer for the appeal See 10 WALL.

has mainly occasioned the delay in perfecting it. It is true the vigilance of the United States District Attorney might have corrected the error, but, unfortunately, he labored under the conviction that the appeal had been prayed for, and allowed, at the time the judgment was rendered, and that nothing was left to be done but the return and filing of the transcript by the clerk, and was not undeceived till his attention was called to the case by his successor.

This neglect of duty by the clerk and inattention of the district attorney led to the necessity of a motion to the court to amend the record, so as to make it appear thereon that the proper steps had been taken in due time to secure an appeal on the part of the Government. The prayer for an appeal in due time, although not granted then by the court, secures this right, and no delay by the court in its allowance can impair it. The order *nunc pro tunc* contains the allowance. It is true some considerable delay has taken place in perfecting this appeal, but the court is of opinion that it has been sufficiently accounted for from the facts and circumstances appearing on the face of the record. The Government is obliged to trust the conduct of cases, in remote parts of the country, to subordinate agents, and the distance in the present instance is so great from the seat of government that a very considerable lapse of time is required to communicate with the head of the department. In such cases some indulgence must be extended to the officers thus engaged, and this difficulty of communication should be taken into consideration in determining the question of delay in conducting the legal proceedings of the Government.

The want of a citation was mentioned on the argument as another ground of dismissal, but the answer is, the appeal was taken in open court at the term in which the judgment was rendered. In such cases no citation is necessary.

Motion denied.

THE RUTLAND MARBLE COMPANY,
Appt.,

v.

WILLIAM Y. RIPLEY ET AL.;

AND

WILLIAM Y. RIPLEY ET AL., Appts.

v.

THE RUTLAND MARBLE COMPANY.

(See S. C., 10 Wall., 339-363.)

Suit in equity by partner—annulling contract—insufficient grounds for—specific performance, when not decreed—adequate legal remedy—contract construed.

A court of equity will interfere by injunction to restrain one partner from violating the rights of his copartner.

NOTE.—Specific performance; plaintiff must show performance or readiness to perform and offer to perform. See note to *Hepburn v. Dunlop*, 14 U. S. (1 Wheat.), 180; and note to *Pratt v. Carroll*, 12 U. S. (8 Cranch), 471.

That one party to an executory contract partly executed has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled.

Nor is it any reason for rescinding the contract, that it has become more burdensome than was anticipated in its operation upon the complainants.

A decree for a specific performance will not be made in favor of a party who has himself been in default.

A personal contract to deliver marble of certain kinds and in blocks of a kind, being for a perpetual supply of marble, will not be enforced by decree of specific performance.

When a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other.

Nor will specific performance be decreed where the party who asks for it has an entirely adequate remedy, provided by the reservation in his deed and by the contract itself.

A reservation in a deed of, and an agreement for, all the marble from the land that the grantor might want to manufacture, is not a grant of an exclusive right.

[Nos. 42, 43.]

Argued Nov. 16, 1870. Decided Dec. 19, 1870.

APPEAL from the Circuit Court of the United States for the District of Vermont.

The bill in this case was filed in the court below by the Rutland Marble Company, for an injunction against interference with its use of a certain marble quarry, and for the rescission of a certain contract. A cross-bill was filed by the respondent, Ripley. The court having granted an injunction in favor of the complainant, but having refused to cancel the said contract, both parties appealed to this court.

The history and facts of the case are fully stated in the opinion of the court.

Messrs. B. R. Curtis and E. J. Phelps, for complainant:

The defendant's entry upon the complainant's quarry was not only unlawful but fraudulent; and the temporary injunction against it should be made permanent.

He had no right of entry. There had been no failure on the part of the complainant in the performance of the contract.

The most the defendant could claim was, that the supply should be delivered at such reasonable intervals as to enable him to saw and dispose of it as the contract contemplated.

If such temporary suspension did occur, the defendant was estopped by his own act from taking advantage of it. He persistently advised and urged the complainant to stand out against the strike, even if it resulted in a failure to supply him with marble for six months or a year.

The defendant's entry upon the quarry, shown upon all the foregoing grounds to be unlawful, was likewise fraudulent. It was not made in good faith; nor upon any belief that the protection of his rights required it; nor with any real intention of enforcing those rights.

The entire history of the transaction proves, that his purpose was to obtain an unjust advantage over the complainant and thereby to compel it to submit to his unwarrantable and unconscionable demands.

Whatever the defendant's right of entry might have been, he could not assert it with force and without legal process, while the complainant was in possession.

This rule is well settled in Vermont.

Dustin v. Cowdrey, 23 Vt., 681.

Nor is it necessary to enlarge upon the point that the defendants were, in fact, in possession.

A specific performance of this contract will not be decreed against the complainant, as claimed in the defendants' cross-bill, because the contract has been terminated by the defendants' violation of and refusal to perform it, and the complainant's election, thereupon, to withdraw from it.

Another sufficient reason against a decree for specific performance is to be found in the unconscionable and unequal character of the contract itself.

The enforcement of such a decree would be impracticable. The duration of the contract is perpetual. The parties must be constantly changing. The execution of a decree never could be completed, and would extend to the heirs, assigns and successors of the parties to remote generations. The case must, necessarily, therefore, remain perpetually in court for the purpose of administering the decree.

Story, Eq. Jur., secs. 786, 787.

"The specific performance of some agreements is refused on the ground that the court had no adequate means of enforcing their performance."

Smith, Prin. Eq., 245; *De Rivaftnoli v. Corsetti*, 4 Paige, 264; *Hamblin v. Dinnesford*, 2 Edw., 529; *Kemble v. Kean*, 6 Sim., 333; *Es parte Clark*, 1 Blackf., 123; *Waters v. Taylor*, 16 Ves., 416; *Coe v. R. R. Co.*, 10 Ohio St., 880; *P. C. R. R. Co. v. C. & T. R. R. Co.*, 18 Ohio St., 544.

"A party seeking specific performance must show himself without fault, or fully excuse any default on his part, upon the ground that he who seeks equity must, himself, do equity."

Benedict v. Lynch, 1 Johns. Ch., 375; *Bk. v. Hagner*, 1 Pet., 464; *Morgan v. Morgan*, 2 Wheat., 299; *Harvie v. Banks*, 1 Rand, 406; *Cornel v. Banks*, 10 Wheat., 181.

The objections to a decree for a specific performance already set forth, are equally decisive against the alternative prayer of the cross-bill, that the defendants be placed by decree in possession of the quarry.

It is not claimed that this remedy is secured to the defendants, by the contract, unless in the event that complainant shall be in default by failing to furnish the marble required.

The contract does not, even in that event, provide for a permanent transfer of the quarry to the defendants; but only till the complainant shall be ready and willing to fulfill the conditions of the contract on its part.

The defendants' claim that the complainant be enjoined from using their quarry except to supply contract, is unconscionable and preposterous.

Messrs. Wm. M. Evarts and Geo. F. Edmunds, for defendants:

We object to the novel demand of the actors, that that part of the arrangement which requires them to do anything and secures any rights to Ripley be annulled, while they hold on to the other part of it, which gives them the title to Ripley's share of the property.

There must be a new jurisprudence invented for such a claim.

The legal and equitable estate and rights of Ripley as part owner, being secured in his deed would revive in the event named in it and,

therefore, whether the event has happened or not, the condition, reservation and contract operate to secure to Ripley and his assigns all the rights provided by the contract and bind the estate and assignees of Barnes to fulfillment. This, judging from the pleadings and evidence, does not seem to be questioned.

Adam v. Iron Co., 7 Cush., 361; *Jeffreys v. Smith*, 1 J. & W., 298; *Rove v. Wood*, 2 J. & W., 558; *Quarrell v. Bickford*, 18 Ves., 557; *S. C.*, 1 J. & W., 649; *Bentley v. Bates*, 4 Y. & C., 183; 9 L. J. (N. S.) Exch., 80; *Bainb. Mines*, 403, 601, and cases cited. That the law of mines applies upon the facts of this case, see *Bainbridge*, 1, 2, and case cited.

The present method of accounting, so far as relates to getting back the "advances" made by defendant of twelve cents per foot on marble delivered, and getting the correlative twelve cents per foot for sawing, etc., is unjust.

It requires that Ripley advance to the orators twelve cents per foot as the marble is delivered, and that he shall be at the expense of sawing and fitting it for market, for which advances and expenses he shall not be allowed to reimburse himself, until each particular piece of the marble is sold and actually paid for. It is unavoidable, even with the exercise of the greatest care, that some marble will be sold to irresponsible parties, who will never pay for it. In this case the decree provides no relief whatever for Ripley, and no mode whereby the loss shall be apportioned between the parties.

The result of the decree is, that while the orators have constantly in their hands from \$7,000 to \$10,000, as advances on the marble delivered, Ripley is out, not only this amount which he has paid them, but an additional equal amount for sawing and expenses, which he can only get back at some remote future period, when all the marble shall have been actually paid for by the purchasers; and this in the face of the contract, which puts the advance for quarrying and the price for sawing and trimming on an equal footing, as a stipulated reimbursement for labor toward the common end.

The validity and importance of the defendant's right to a perpetual supply of marble from the quarry—until it shall be exhausted, under operations subordinate and conformed to the methods contemplated and prescribed by the contract for the defendant's continuous supply—are indubitable.

Ripley parts with his estate in the territory upon the consideration of an annual supply of marble therefrom, in form and manner as provided in the contract, *forever*. This right is secured by a covenant running with the land, and a clause of re-entry for its execution.

The proofs show that this quarry is easily exhaustible, and is rapidly being exhausted.

While the orators kept up the stipulated supply of the contract, there would be no right of re-entry; yet, all the while they might be exhausting the quarry by general sales. When, at last, Ripley's supply ceases, he might find all the quarry exhausted by the general sales. A re-entry, then, by Ripley, to supply himself, would be unproductive.

To defeat this subtraction and sale of the supply of marble which should be reserved to feed Ripley's contract, his remedy, by injunction, is clear.

Mr. Justice Strong delivered the opinion of the court:

On the 23d day of January, 1850, the defendants, William Y. Ripley and William E. Barnes, together owned a tract of land in the Township of Rutland and State of Vermont, containing about twenty-one acres, in which was a valuable marble quarry. On that day Ripley, by his deed, released and quitclaimed unto his co-tenant Barnes, in fee simple, the tract of land, together with other lands not important to this controversy. The deed contained a reservation to the releasor, his heirs, executors, administrators and assigns, of "the right to enter upon and take possession of the said twenty-one acres, for the purposes of digging, quarrying and carrying away all the marble he or they might want, according to the stipulations and conditions of the contract, that day made and concluded between the same Ripley and Barnes, in case the said Barnes, his heirs, executors, administrators and assigns, should refuse or fail on their part to fulfill the conditions and stipulations of the said contract." By the contract referred to, which was made on the same day, Barnes agreed "for himself, his heirs, executors, administrators and assigns, to quarry marble from the marble quarry, and draw and deliver at the mill of the said Ripley in Rutland, from the layers of marble usually denominated the white layers, all the marble that the said Ripley might want to saw, manufacture and sell, in good sound blocks of suitable size, shape and proportion, and to quarry to order as might be wanted to keep the mill fully supplied at all times, the amount to be not less than 75,000 feet per annum, and for so long a time as the said Ripley, his heirs, executors, administrators and assigns might want." It was also agreed that should Ripley, his heirs, etc., at any future time desire to increase the business, Barnes, his heirs, executors, administrators and assigns should furnish the blocks as aforesaid, to the extent of 150,000 feet per annum, of two inch marble slabs, on receiving one year's notice to that effect. It was also agreed that Ripley, his heirs, etc., or his or their agents, might have the privilege of dividing each lot of blocks as taken and drawn from the quarry, taking an average share as to quality, size or shape, before any block should be taken from the lots by any other person, the first choice being always taken by Ripley, or for his mill. It was also stipulated that Ripley might abandon the contract at any time, on giving one year's notice. The contract further stipulated that if Barnes, his heirs, executors, administrators or assigns should fail or refuse to fulfill the conditions, Ripley, his heirs, executors, administrators or assigns, or by his or their agents, might enter upon the quarry and the premises attached to and connected with it, and might quarry and dig, take and carry away, as much marble as they might want; and might have the use of, and enjoy all the rights, privileges and appurtenances belonging to or connected with the said quarry, without hindrance or obstruction, or in any way paying for the same, and might keep possession until Barnes, his heirs, executors, administrators or assigns, should be ready and willing to fulfill the conditions of the contract on their part; it being also provided that if, after making an entry as

aforesaid, Ripley or his heirs, etc., should make an opening or put the quarry in a better condition for getting out marble, Barnes, his heirs, executors, administrators or assigns, should not re-enter or resume possession until Ripley, his heirs, etc., should have had the benefit of the work done and money expended by them, unless Barnes should make payment for the same. It is further provided by the contract that Ripley, his heirs, executors, administrators and assigns, should receive the marble blocks so delivered at the mill; should saw, trim and prepare them for the market; should sell them, advancing from time to time to Barnes, as the blocks should be delivered, twelve cents per foot for two-inch marble, as payment for drawing or quarrying, and retaining from the proceeds of the sale of marble, an equal sum per foot, as payment for sawing and trimming, retaining also from the proceeds of sale, the expenses of transportation to market, and all the necessary expenses of doing the business and collecting payment for the marble (not including payment for his own time and labor), and should divide the remainder of the proceeds of sale equally between Barnes and himself as collected. Ripley further agreed to pay Barnes one cent per foot of two-inch marble, for drawing and transporting the marble from the quarry to the mill, the payment to be made from his own fund. The contract contained still another provision, evidently an alternative. It was that if the marble contained in that part of the ledge which Barnes was about to open for Allen and Adams should prove to be of better quality than the marble from the quarry then open and worked upon the land, Barnes should open on the south end of the lot conveyed to him, and furnish Ripley with marble from that place on receiving reasonable notice.

It was out of this contract that the present controversy between the parties to the suit has arisen. Barnes having thus become the owner in severalty of the land containing the quarry, conveyed it on the 1st of June, 1854, to sundry persons, expressly excepting the rights reserved by Ripley in his deed aforesaid, and reserving to himself a right of entry in case his grantee should fail to perform his contract with Ripley. By several *mesne* conveyances the property became vested in the Rutland Marble Company (the complainants), on the 31st day of October, 1863. In all the deeds, including that to the complainants, the right of entry reserved by Ripley in his conveyance to Barnes and his rights under the contract were expressly excepted, and the grantors reserved also a right of entry of the failure of their grantees to comply with the engagement of the contract of January 23, 1850.

Soon after the contract was made, Ripley gave notice that he required his supply of marble under it to be increased from 75,000 feet to 150,000 feet, and on the 24th day of July, 1854, he gave notice that he wanted the whole of his marble quarried from the south end of the ledge next to the opening of Allen and Adams, according to the contract. On the 22d of August, 1855, he again gave notice that he claimed under his contract of January 23, 1850, to be forever thereafter supplied with marble from a proper opening of the ledge for the purpose on the south end of the lot conveyed by his deed to Barnes. Accordingly an opening was made

at the south end, necessarily at considerable expense, and he was supplied therefrom four years, until the spring of 1864, and until the differences arose which culminated in this suit. Until that opening was made in 1864 or 1865, there was none on the land except the one which had been made at the north end, before the contract between Barnes and Ripley was signed.

In the year 1854, while Barnes was still the owner of the land, a modification of the contract was agreed upon between him and Ripley, the particulars of which it is not now necessary to notice. The modification expired by its own limitation on the 1st of February, 1864, leaving the original agreement in full force. As we have seen, the complainants had, prior to that time, become the owners of the property, and had fulfilled, so far as it appears, the requirements of the modified contract. But very soon after its expiration, if not indeed before, differences arose between the owners of the land and Ripley, respecting their rights under the agreement, and on the 26th of April next following, Ripley, without giving any notice of his intended action, caused an entry to be made upon the entire property, as well the southern opening as the northern. The entry was made about three o'clock in the morning by Barnes, acting for Ripley, and a large number of men were set at work, to the exclusion of complainants. This bill was then filed, praying that the defendants, Barnes and Ripley, might be enjoined against further unlawful interference with or occupation of the then complainants' said property; that the contract might be decreed, rescinded and terminated; or if not, that various questions respecting its construction might be settled by the decree of the court, and that the defendant, Ripley, might be required to account for the money of the complainants in his hands. To this bill answers were put in by the defendants, and a cross-bill was filed by Ripley, praying that the Rutland Marble Company might be decreed to perform specifically the contract, by furnishing the marble as therein required, or deliver up the possession of the quarry and property to the said cross complainant, free and discharged from all claims, rights or title, which the said Company ever had or then had in and to the same; and that in the meantime they be restrained from operating or working the quarry, or selling any marble taken therefrom; that they be decreed to pay such damages as the complainants might have sustained in consequence of their not having supplied his mill with marble, as required by the contracts of 1850 and 1854, and pay the same by a specified day, and that the quarries be held as security therefor; and in default of such payment, the Company should be foreclosed of all equity of redemption or claim in and to said quarry and property.

In the circuit at the hearing, an injunction was granted in accordance with the prayer of the Rutland Marble Company; but the court refused to decree a rescission and cancellation of the contract of January 23, 1850. The court also, in effect, decreed a specific performance of the contract as prayed in the cross-bill, and made several decretal orders respecting the manner in which the contract should be performed, but the injunction asked

for in the cross-bill was denied. From this decree and these decretal orders, both parties have appealed.

The first question now presented for consideration is, whether the pleadings and proofs exhibited a proper case for an injunction upon the defendants, Ripley and Barnes, against disturbing the complainants in their right to take possession, occupy and use the property entered upon by the said defendants, and against continuing the occupation which they had commenced of the quarries and other property, real and personal, of the Company. The solution of this depends upon another question, which is, whether the entry made by Ripley, through his agent, Barnes, on the 26th day of April, 1864, was lawful under the circumstances in which it was made.

It is to be observed that the contract of January 23, 1850, between Ripley and Barnes, was, in a very practical sense, a contract of partnership, and that to Barnes' position under it the complainants have succeeded. By its terms each of the parties was bound to contribute to a common enterprise. Each had his own duties to perform. Barnes was to furnish the marble needed for the mill, and Ripley was to bestow his own labor and care in manufacturing it for the market and selling it. When this had been accomplished the net proceeds of sale were to be equally divided. Neither of the parties had a right to interfere with the specified duties of the other so long as that other discharged his obligations under the contract. But they had a common interest in the business carried on, quite as truly as if theirs had been an ordinary partnership. Any unauthorized attempt by one to oust the other from the position and rights assigned to him by the contract was, therefore, not only a breach of their agreement, but a fraud upon the relation they had assumed to each other. Such a wrong it is the province of a court of equity to prevent. A chancellor will interfere by injunction to restrain one partner from violating the rights of his copartner, even when a dissolution of the partnership is not necessarily contemplated. Story, Eq., sec. 669.

Prima facie, the entry of Ripley upon the quarry property and the consequent forfeiture of the complainants was an invasion of their rights as owners of the land, and as jointly interested with him in the marble business. The burden is upon him, therefore, to show that his entry was justifiable. Has he shown it? Under the reservation in Ripley's deed and under the contemporaneous agreement, his right to enter existed only in case Barnes, or his successors in the title, should fail or refuse to fulfill the conditions and stipulations of the contract; that is, should fail or refuse to deliver the marble as required by it. A right to enter for any other cause is not claimed. After a careful examination of the evidence, we do not find that there had been any such failure on the part of the complainants to deliver marble prior to April 26, 1864, as justified Ripley in entering upon their possession. They were not bound to keep in full supply the mill which he then had. The contract had reference to a supply of the mill as it was in 1850, when its capacity was less than one hundred and fifty thousand feet per annum. And when, afterwards, he en-

larged his mill so that he could saw three hundred thousand feet, nothing in the contract required Barnes, or his allies, to keep the enlarged mill supplied. The obligation was only to furnish one hundred and fifty thousand feet per annum, as it might be wanted to supply the old mill. Nor did the contract require that any defined portion of the whole quantity should be delivered at any specified season of the year. Undoubtedly, its spirit demanded that the deliveries should be reasonable. But it is in evidence that quarrying marble must be principally in moderate or warm weather, when there is no frost. It is, therefore, a reasonable construction that the parties intended the deliveries should be greatest in the summer and fall. Yet the evidence is (found in the testimony of Ripley himself, as well as in the cross-bill), that the complainants delivered at his mill, during the months of February, March and April of 1864, more than twenty-six thousand feet, besides other blocks which he refused to receive. In fact, a considerably greater quantity was delivered. All this was between February 1st (when the modification of the contract before mentioned expired) and the 3d of April. This was in excess of a ratable proportion of what the Company was bound to quarry and deliver. After the 2d of April there was an interruption of deliveries, caused by a general turn out of the workmen at the quarries, of which we shall have more to say hereafter. But what is most significant and convincing that there was no failure on the part of the Company is Ripley's answer to their bill. After stating herein that he had expressed the opinion, the Company should at once have refused all further employment of the laborers when they struck, and employ a new set of men, which he believed might have been done long before April 26 (the date of his entry), he proceeds to answer that the Company totally disregarded his said opinions, and wholly neglected, so far as he could learn, to make any arrangement to substitute new laborers or to renew the business of quarrying, and being reliably informed and believing that no arrangement would ever be made with the laborers for their return to work, and the use and possession of the quarries having been, to all appearance, entirely vacated from the time of the strike (which was April 5th or 6th) he entered. Thus it appears from his own sworn answer, that the reason for his entry was, not that there had been any failure or refusal to supply his mill with marble, so far as he had a right to claim it, but that the Marble Company disregarded his opinions, and he was apprehensive they would not be able to induce the laborers to return to work. It is plain that for such reasons neither the reservation in his deed nor the provisions of the contract gave him any right of entry. His intrusion upon the complainants' possession was, therefore, entirely unjustifiable, and a wrong the continuance of which a court of equity may well restrain.

We are also of opinion that his entry was not made in good faith, merely to supply himself with marble. Very soon after the modified contract came to an end he set up claims, some of which, at least, had no foundation in the contract. On the 15th of February he gave notice that he claimed a right to divide every lot

of blocks, at all times thereafter, when taken from the quarry referred to in his deed and in the contract, insisting upon a right to the first choice; and this, though he had elected forever to take all his marble from the south opening, which he had required to be made under the alternative provision of the contract. This was either claiming inconsistently with his demand for all his marble from that opening, or it was, in effect, requiring the Company to take therefrom twice as much as was necessary to supply the one hundred and fifty thousand feet for his mill. When the demand was resisted it was renewed, though without right. Differences of opinion also arose between the parties respecting Ripley's obligation to receive particular kinds of marble, respecting his right to demand payment for unloading it at his mill, and respecting his obligations to pay for quarrying and hauling. We do not enter now upon any consideration of the inquiry which of the parties was right. It is sufficient to notice that there were differences. It was while they existed, early in April, the strike of the laborers occurred. The evidence establishes, beyond any reasonable doubt, that Ripley advised the agents of the Company to hold out against the strike, and that when told the mill contracts made a difficulty, he said he would rather go without marble six months or a year, than that the Company should submit to the strikers. Yet at this time when giving this advice and making these professions, he was preparing secretly to make an entry on the property. He was having drills made at least a week or ten days before he made his entry at night, concealing the purpose for which they were made, and his design to enter. When told that he was aiding the strike, as the men understood he was intending to set them at work, he replied the men did not know but that he was going to quarry somewhere else. Meanwhile he was himself refusing, or at least neglecting, to pay what he was bound to pay, at the time, when it was due. It is impossible to read the evidence without being convinced that he intended to secure the possession of the property by surprising the complainants, and thereby force them to assent to his demands and his interpretation of the contract. Such being the conclusions to be drawn from the evidence, we cannot doubt that the injunction decreed by the circuit court was correctly awarded.

It was, however, too broad. It restrained the defendants, Ripley and Barnes, not only from the further occupation or possession of the premises and property described in the bill, and from any interference therewith, but it enjoined them against hindering or disturbing the complainants from taking possession of, occupying and using the same, until the further order of the court. The effect of this is to deny to Ripley the right of entry reserved in his deed, and forbid his exercising it, though the complainants should hereafter wholly refuse to deliver any marble, unless the court by a future order shall allow an entry. This is, probably, more than was intended. The decree should be modified so as only to enjoin against an entry for any cause heretofore existing, leaving Ripley to enjoy his reserved right hereafter entirely untrammelled.

We proceed next to inquire whether there is any sufficient reason for decreeing a cancella-

tion of the contract of January 23, 1850, as prayed for by the Marble Company. This is a call for an exercise of the highest chancery power, a power most frequently exerted in cases of fraud, accident or mistake. The grounds upon which the Company rest their claim that the contract may be decreed to be rescinded and canceled are, that Ripley has not performed the duties which it imposed upon him; that though it was, when made, intended to operate for the equal benefit of both parties, it has become, in the progress of time, oppressive and burdensome to the complainants, or, as they denominate it, unconscionable; that it makes them partners with Ripley, or his successors in title to the mill, whether they will or not; and that, if corporations cannot enter into partnership, they cannot purchase the lands subject to the obligation of becoming partners and, therefore, the contract restrains the alienability of the property.

Before proceeding to a consideration of these it is proper to remark that the agreement is inseparable from the deed for the land made by Ripley to Barnes. They were made at the same time, and they are parts of one arrangement. What is asked, therefore, is, not to rescind an entire contract, but to strike out of it a part which has become onerous to one of the parties. It is clear that the rights secured to Ripley by the agreement were a part of the consideration for his grant of the land, and so it was understood at the time his deed was made. If there was nothing else to show this, it is made apparent by the reservation in the deed of a right of entry to secure the fulfillment of the stipulations of the agreement. But the deed was an executed contract. It conveyed the title to the grantees. If, therefore, the agreement is rescinded by a decree of the court, the consideration of the grant is taken from the vendor after his conveyance has taken effect, and yet his grant is enforced. It is believed that such action by a court of equity is quite unprecedented. It has been ruled that when a party seeking to set aside a conveyance made by him has received part of the consideration, he must return it before a court of equity will cancel the conveyance. *Miller v. Cotton*, 5 Ga., 341; *Story, Eq.*, sec. 707.

That one party to an executory contract, partly executed, has violated his engagements, is generally no sufficient reason for a decree by a court of equity, at the suit of the other party, that the contract shall be annulled. Certainly it is not in the present case. If the contract has been broken by Ripley, the Marble Company has an adequate remedy at law. Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated. If it be, indeed, unequal now; if it has become unconscionable, that might possibly be a reason why a court should refuse to decree its specific performance; but it has nothing to do with the question whether it should be ordered to be canceled. It is not the province of a court of equity to undo a bargain because it is hard. Nor have the other reasons assigned in support of the complainants' prayer for cancellation any more weight in view of the circumstances of the case.

The Marble Company have, by their own

voluntary act, placed themselves in the position they occupy. With a full knowledge of the reservation in Ripley's deed to Barnes, and of the contract, the performance of which the reservation was intended to secure, they purchased the quarries. They purchased expressly subject to the rights guaranteed to Ripley, and they undertook with their grantors to perform the promises Barnes had made, so long as they held the land. At the time when they purchased, the contract had been in operation for years, and they knew its effect. It is fair to presume that the burden of the contract was considered in fixing the price they paid. They are, therefore, not in a condition to ask for its rescission, and the circuit court rightly refused to decree a cancellation.

The next question is, whether Ripley, the defendant, was entitled, upon his cross-bill, to a decree against the Marble Company for a specific performance of the contract. The court below substantially directed such performance, and from that decree the Marble Company have appealed, and they now urge that the contract, though supposed to be fair and equal when made, has, in the lapse of time, and by the operation of unforeseen causes, arising from changed circumstances, become exceedingly unfair, unreasonable and unconscionable, so that a decree for its specific performance would tend to their oppression and ruin. It may be doubted, however, whether the hardship of the contract is any greater than must have been contemplated when it was made. It is not unconscionable because Ripley obtains a larger profit from it than was at first expected, or because the other party obtains less. Those were contingencies, the possibility of which might have been foreseen. It could not have escaped the thought of the contracting parties that the expense of quarrying might possibly increase, and that the expense of sawing and preparing for market might either increase or diminish in the progress of time. Of that they took their chances. Besides, it is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances or changing events. Mr. Frye, in his work on Specific Performance, p. 116, asserts that "The question of the hardship of a contract is generally to be judged of at the time at which it is entered into; that if it be then fair and just, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, except when these subsequent events have been in some way due to the party who seeks the performance of the contract." *Vide* entire chapter 6. Judge Story, indeed (Story, Eq. Jur., 750, 776), states the rule somewhat differently, and there are some cases that support his statement; but the rule as stated by Mr. Frye must be applicable to contracts that do not look to completed performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually.

There are other objections, however, to a decree for a specific performance in this case which are more serious. Such a decree is not a matter of right. It rests in the sound dis-

cretion of the court and, generally, it will not be made in favor of a party who has himself been in default. In Story's Equitable Jurisprudence, sec. 736, it is said that "In cases of covenants and other contracts, where a specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For, if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them, courts of equity will not interfere." To the same effect are Smith's Principles of Equity, 220; *Thompson v. Tod*, Pet. (C. C.), 880; *Lewis v. Wood*, 4 How. (Miss.), 86, and many other cases. Applying these principles to the case in hand, it would appear that the conduct of the cross-complainant has not been such as to justify the court in decreeing a specific performance, at his suit, against the Marble Company. Without relying upon his alleged unfounded claims set up from time to time, or his alleged refusals or failures to make the payments due from him at the times required by the contract, or his alleged comfort given to the turn out of the workmen, and his advice that the Company should resist it, his unlawful and unwarranted entry and ouster of the Marble Company was such an invasion of the contract as leaves him no standing as a complainant asking for its performance in a court of equity.

Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor and cultivated judgment. It is, in effect, a personal contract, to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place—whether it was sound; whether it was of suitable size or shape or proportion. Meanwhile the parties may be constantly changing. The Marble Company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. *Ogden v. Fossick*, 9 Jur. (N. S.), 288. Many of the difficulties in the way of decreeing specific performance of a contract, requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in *Port Clinton R. R. Co. v. C. & T. R. Co.*, 13 Ohio St., 544.

Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the

suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Fry, Spec. Perf., sec. 286.

But what is a still more satisfactory reason for withholding a decree for specific performance is, that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed, and by the contract itself. In addition to his remedy by suit at law, he has a right of entry and the privilege of supplying himself with marble, as much as he may want, if the owners of the land do not fulfill the conditions and stipulations of the contract. He may take marble without making payment for it, and in case of such entry he may hold possession until the tenants of the fee are ready and willing to carry out the agreement, and until he has been compensated for all his expenditure. This is a remedy more adequate and full than any decree for specific performance could give him, and it renders such interference of a court of equity entirely unnecessary.

For these reasons, we are of opinion that the circuit court should not have decreed performance in specie of the contract, but should have left the cross-complainant to his action at law, or to the remedy reserved in his deed.

It is true that the Marble Company, on the 18th of June, 1864, gave notice to Ripley that they would claim that the facts set forth in their bill amounted to a permanent breach and violation on his part of the contract, authorizing them to treat it as rescinded, and that they, therefore, rescinded it, asserting that they had always performed it on their part until it was thus violated and broken by him. But this was after his wrongful entry, which certainly relieved them for a time from delivering marble, and the notice in no way interferes with any remedy he may have at law, or with any right he has to enter under the reservation in his deed.

The decree, so far as it orders specific performance, will, therefore, be reversed, as also all the decretal orders that direct the mode of performance.

We have thus disposed of all the questions raised by the appeal of the complainants, "The Rutland Marble Company," and of most of those raised by the appeal of the defendant, Ripley. Two or three questions remain to be considered. It is sufficient to say, in answer to the seventh specification of his appeal, that we do not perceive that he was required to pay the Company's share of the money received by him from the marble business any more rapidly than the contract, giving to it a reasonable construction, demanded.

In the sixth specification it is averred that the decree is erroneous, in that it omits to order and direct that The Rutland Marble Company, their agents, servants and assigns, be enjoined from selling or disposing of marble taken from said quarry of said Company. Though the ap-

peal is in these broad terms, it is presumed the appellant does not mean to be understood as claiming that the Marble Company should be enjoined against selling as much marble as the quantity furnished by them for the mill. If this is not so, then the construction he would have given to the contract is that the tenants of the fee must quarry every year three hundred thousand feet, and deliver one half thereof at the mill, leaving the remainder unsold and undisposed of. This is a construction so unreasonable and so at variance with the words of the contract, that it needs only mention to show its inadmissibility. Assuming it to be meant, then, that the court should have enjoined against a sale of marble from the land greater in quantity than that which was required by the contract to be delivered at the mill, we are of opinion the claim cannot be maintained. It has been argued in support of it, that the evidence shows the quarry to be exhaustible within a definite number of years; that the contract contemplated a perpetual supply for the mill, or a supply so long as the marble shall last, while the quarry shall be worked in the manner contemplated and prescribed by it; and hence, that taking out marble and disposing of it in greater quantities than the mill requires, with a right of choice of blocks in Ripley, is an invasion of his right.

The argument is faulty in several particulars. It assumes that the contract prescribed a mode of use of the quarries exclusive of any other. Such is not the agreement. It bears upon its face the evidence that supplies of marble to other consumers than Ripley's mill was contemplated. There, certainly, is no express restriction of the quantity which the owners of the land may take out, and restriction upon the absolute rights of ownership in fee is not to be raised by mere implication. When Ripley required, under the last provision of the agreement, all his marble to be furnished from the south opening on the lot, and when, in obedience to his demand, the opening was made by Barnes, it should require unambiguous language to satisfy a court that Barnes and his successors in the title were excluded from taking marble from any other opening for the purpose of sale.

The argument also misapprehends the nature of such a right as Ripley's, even though it be conceded that it was intended to provide for a perpetual enjoyment of a marble supply. Neither the contract nor the reservation in his deed gave him a corporeal interest in the marble *in situ*. It was not a grant to him of the marble, or a grant of a right to quarry and take it all. If his interest was real in any sense, which may be doubted, it was incorporeal. Of course, it was not exclusive of the right of the owners of the land to take marble on their own account *ad libitum*. In *Lord Mountjoy's* case, reported by Godbolt (Case 24), by Leonard (4 Leon., 147), in *Coke Littleton* (104), by Moore (p. 174), and more fully by Anderson (And., 307), a leading case, the words of the reservation were:

"Provided, always, and it is covenanted, granted, concluded and agreed between the said parties to this indenture, and the said John Brown and Charles (the grantees), and their heirs covenant and grant to and with the said Lord Mountjoy, his heirs and assigns, by these presents, in form following, that is to say, that

it shall be lawful for the said Lord Mountjoy, his heirs and assigns, at all times hereafter, to have, take and dig in and upon the heath ground of the premises, from time to time, sufficient ores, heath, turves and other necessities for the making of alum and copperas."

Here was a reservation from grantees and their heirs to the grantor, his heirs and assigns, quite as large as in the present case. Yet it was held an incorporeal hereditament, and not a grant of an exclusive right. It was likened to a grant of common "*sans nombre*," leaving the grantors a right to dig and take ore, though their so doing might exhaust it. *Chetham v. Williamson*, 4 East, 469, is another case equally decisive to the same effect. Other decisions asserting the same doctrine are at hand: *Caldwell v. Fullon*, 31 Pa., 482; *Johnston Iron Co. v. Cambria Iron Co.*, 32 Pa., 241; *Gloninger v. Coal Co.*, 55 Pa., 9. In all of them the covenants ran with the land. The grants were of undoubted real interests. They contemplated a perpetual supply to the grantees as plainly as it was contemplated in this case. The rights of the grantees were not limited, as here, to any defined quantity, and yet it was held they did not interfere with the right of the grantors to take ore, coal, etc., from the property out of which the incorporeal interests issued, and to take it without stint. The appeal of the cross-complainant cannot, therefore, be sustained.

Nor, under the circumstances of the case, can the Marble Company be decreed to account for failures to supply the marble required by the contract to be delivered at the mill, if there have been such failures. Holding as we do that there can be no decree for a specific performance and that Ripley is not entitled to an injunction against selling marble from the quarry, the substantial basis of the defendant's cross-bill fails, and having disturbed the plaintiffs' possession wrongfully, and thereby interfered with their power to perform the contract, he is not in a situation to invoke equitable aid. If he has any claim to damages for a breach of the contract, it must be asserted at law, and there his remedy is complete.

It remains only to add, what must now be apparent, that that part of the decree which directed Ripley to pay the taxable costs, except such as accrued from the portion of the complainants' bill which sought to annul the contract, was correct.

The decree of the circuit is reversed, and the cause ordered to be remitted, with directions to enter a decree in accordance with the opinion above given. And it is further ordered, that the costs of the appeals be divided, and that one half be paid by each of the parties.

Cited—1 McCrary, 556, 564; 18 Am. Rep., 153 (31 Mich., 57); 41 Am. Rep., 722 (47 Mich., 449); 43 Am. Rep., 239 (59 Cal., 28).

THE STEAM TUG R. S. MABEY, ETC.,
JOHN CAULDWELL, EXR., and RACHEL CORWIN, EXRX., etc., *Appls.*,

JOSHUA ATKINS and EDWIN ATKINS,
Owners of the Ship ISAAC F. CHAPMAN.

(See S. C., 10 Wall., 419, 420).

Further evidence in admiralty cases—amendments on appeal.

See 10 WALL.

On a motion to take further evidence to be used in this court in an admiralty case, some excuse, satisfactory to this court, should be shown for the failure to examine the witnesses in the courts below.

There can be no substantial amendment in this court; but if the pleadings or evidence are defective and the case appear to have merits, the court will reverse the decree and remand the cause, with directions to permit amendments and further proofs.

[No. 877.]

Argued Dec. 16, 1870. Decided Dec. 19, 1870.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

On motion for a commission to take testimony.

This case arose upon a libel in admiralty, in the United States District Court for the Eastern District of New York.

The history and facts of the case sufficiently appear in the opinion of the court.

Messrs. T. M. Wheeler and W. W. Goodrich, for appellants.

(No counsel appeared upon this motion for appellees.)

Mr. Justice Nelson delivered the opinion of the court:

This is a case of collision in admiralty. The decisions in the district and circuit court were in favor of the libelants, the appellees in the appeal. The appellants now move the court for a commission to take further evidence, to be read in this court on the hearing.

No excuse is shown in the papers on which the motion is founded, why the witnesses named and proposed to be examined, were not examined in some one of the courts below before the hearing there. The affidavit simply states that the testimony of these witnesses is material, as advised by counsel.

This is not in accordance with the practice of the court. Some excuse, satisfactory to this court, should be shown for the failure to examine them in the courts below, such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpoenaed and failed to appear, and could not be reached by attachments, and the like. *The Boston*, 1 Sumn., 328; *Goffin v. Jenkins*, 3 Story, 108; *The William*, 7 Irish Jur., 354; *Jarvis v. Chandler*, 1 Tur. & R., 819.

Many of the cases bearing on this subject are cases of amendment in the appellate court by adding new allegations and giving new proofs. *Pars. Ship.*, 2d vol., pp. 429, 430, 431, and *n.*; *Conk. Adm.*, p. 418; *Lamb v. Parkman*, U. S. C. C., per Curtis, J.; 21 Law Rep., 589. But they involve the practice applicable to motions simply to examine witnesses in the appellate court. There can be no substantial amendment in this court; but if the pleadings or evidence are so defective that no decree can be founded upon them, and the case appear to have merits, the court will reverse the decree and remand the cause to the court below with directions to permit amendments and further proofs. *The Caroline*, 7 Cranch, 496-500; *The Mary Anne*, 8 Wheat., 380.

It is quite apparent, if commissions were to be allowed by this court to issue as a matter of course, on a formal application under the twelfth Rule, without requiring any excuse for not

taking the evidence in the usual way before the courts below, the privilege would be open to great abuse, disturbing the orderly proceedings in courts of admiralty. Instead of taking proofs in the cause in the courts below, and there thoroughly trying it, much of the evidence could safely be omitted, relying on the new evidence in this court. There is no hardship upon the parties in guarding against this abuse with great care and strictness, as they have two opportunities to procure the attendance and examination of the witnesses before they come here on appeal; first, before the district court, and again before the circuit.

For the reasons stated, the motion must be denied.

Cited—91 U. S., 367; 97 U. S., 313.

JOHN KIMBALL, Administrator of JOSEPH A. GILMORE, Deceased, *Plff. in Err.*,

v.

JOHN Z. GOODRICH.

(See S. C., "*Kimball v. Collector*" 10 Wall., 436-454.)

Import duties, how estimated—appraisal of goods—invoice value.

Import duties are estimated in the first place, if they are *ad valorem*, on the invoice value without any appraisal.

Whenever, in the opinion of the collector, there was just ground to suspect that goods had been invoiced below their true value, he was authorized to direct that the goods should be appraised.

Neither the appraisers nor the collector can make any reduction in the invoice or entered value in the assessment of *ad valorem* duties.

[No. 11.]

Argued Dec. 8, 1870. Decided Dec. 19, 1870.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The plaintiff in error brought suit in the court below, upon an agreed statement of facts, to recover back certain duties on wool. Judgment having been rendered against him in that court, he sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. C. Cushing, W. E. Chandler and M. E. Ingalls, for plaintiff in error:

It was clearly the intention of Congress that, in determining whether wool was free or dutiable, the actual value of the same at the port and period of exportation should govern.

This is apparent from an examination of the various Acts of Congress in reference to this subject, of which there are three.

The first is that of 1832, found in 4 Stat. at L., 583, as follows:

"Wool, unmanufactured, the value whereof at the place of exportation shall not exceed eight cents per pound, shall be imported free of duty."

The second, that of 1857, under which this importation arose, provided that "Sheep's wool unmanufactured, of the value of twenty cents per pound or less at the port of exportation, should be exempt from duty; provided, nevertheless, that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value, any law of Congress to the contrary notwithstanding."

The third is that of 1861, found in 12 Stat.

at L., 196, as follows: "Wool, unmanufactured, the value whereof at the last port or place from whence exported to the United States, shall be eighteen cents or under per pound, shall be exempt."

The same intent is apparent in each of these Acts, viz.: that the value of the wool at the place of exportation should determine whether it was exempt from or liable to duty.

The Supreme Court of the United States in the case of *Sampson v. Peaslee*, in 30 How., 571 (61 U. S., XV., 1022), decide that the day of sailing is the date when the value is to be taken.

This Act of 1857, then, construed with reference to this decision and the facts of this case, is this:

If this wool was of the value of twenty cents or less at Cape Town, Apr. 25, 1861, it is not dutiable.

The facts in this case clearly show that the value of this wool, at the time and place mentioned, was less than twenty cents.

The practice of the department under this very Act was in harmony with this interpretation.

This is seen by the Treasury Circular which was issued Sep. 5, 1857, and is printed in the agreed statement: and also by the following circular, which was issued June 15, 1857.

"On a question submitted to the department, it is decided that the time at which the value of wool at the port of exportation is to be estimated with a view to its exemption from duty under schedule 'I' of the Tariff Act of Mar. 3, 1857, is the date of exportation from the foreign port for the United States, as provided by law in reference to the appraisement of imports for the assessment of duties."

There remains but one question to consider, viz.: is the intent of Congress as expressed in the Act of 1857, ch. 93, sec. 3, controlled by the proviso to the 2d section of ch. 101 of the Act of same year?

This involves two questions:

First. Is there a conflict between the two sections?

If so, which shall control?

The plaintiff submits: first, that there is no conflict; that each statute relates to a different subject-matter.

The first statute provides a way to determine whether an article is free or dutiable. If it is found to be free when tried by this test, then the last statute or proviso does not apply, for there is no duty to be assessed. If, on the other hand, the wool is found to be dutiable, when tested by the first statute, then the last statute applies and says upon what that duty shall be assessed.

If this construction is applied to this Act, and it seems the only proper and reasonable one, then there is no conflict between them. Each statute will be of force and consistent.

It is the rule in the construction of statutes, says Lord Mansfield, "That all which relates to the same subject must be taken to be one system and construed consistently."

The rule is to adopt such an interpretation, "*Ut res magis valeat, quam pereat.*" Dwar. Stat., 568.

If, on the other hand, the court shall hold that there is a conflict between the two statutes, then the question arises: which shall govern?

We submit, then, that the proviso to chapter 101, so far as it conflicts with the preceding statute, must yield for the following reasons:

First. If this invoice proviso, so called, does control the previous statute, then it practically defeats its operation, for no goods can come in free: for every importation by law has to be invoiced, and that invoice states a value; and if admitting it free is equivalent to assessing a duty upon a value, then every time an article comes in free you assess a duty upon a value less than that stated in the invoice.

Second. The intention of Congress in the Statute of 1857 is clear, as has been previously shown, that the value of the import shall govern, while the proviso of chapter 101 relates back to an entirely different class of cases, and it is not clear at all that Congress intended it to apply to this class of cases.

In fact, the presumption is that Congress did not intend it to so apply, for it would have nullified itself by so doing.

Third. By holding that this proviso controls the previous statute, you will hold out an inducement to merchants to impose upon the department by fraudulent sales and fictitious transfers, to avoid the effect of such a construction.

Every consideration of equity and justice is upon the side of the plaintiff, which should have great weight when the law is doubtful.

Messrs. Amos T. Akerman, Atty-Gen., and Hill, Asst. Atty-Gen., for defendant in error:

The Act in force, imposing a duty on wool at the date of this importation, was the Statute of 1857, chapter 78, sections 1, 3, 11 Stat. at L., 192, 194, which imposed an *ad valorem* duty of twenty-four per cent., but exempted from duties "Sheep's wool unmanufactured of the value of twenty cents per pound at the port of exportation."

The language of the Statute of 1857, *supra*, exempting certain wool from payment of duty, is almost identical with that of the Statute of 1832, 4 Stat. at L., 588, exempting from duty wool not exceeding in value eight cents per pound. Under the statutes at that time in force, goods imported from the country of their production were appraised, for the purpose of imposing duties at their value in that country at the time when purchased, and this continued to be so until the Statute of 1851, ch. 86, sec. 1, 9 Stat. at L., 629.

Greely v. Thompson, 10 How., 225; *Grinwoold v. Lawrence*, 1 Blatchf., 599; *Barnard v. Morison*, 1 Curt., 404.

By the Statute of 1842, ch. 270, sec. 16, 5 Stat. at L., 563, it was enacted, "That, in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, etc., imported into the United States, and in all cases where the duty imposed shall by law be regulated by or directed to be estimated or based upon the value of the square yard, or of any specified quantity or parcel of such goods, etc., it shall be the duty of the collector * * * to cause the actual market value or wholesale price thereof at the time when purchased in the principal markets of the country from which they shall have been imported, * * * to be appraised, estimated and ascertained, and this value, with certain other charges specified, is

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made the true value at the port where the same may be entered, upon which duties shall be assessed."

By the Statute of 1857, ch. 88, sec. 1, *supra*, it is enacted "That, in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, etc., imported into the United States, it shall be the duty of the collector * * * to cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same shall have been imported * * * to be appraised, etc." It will be perceived that the Statute of 1857 only applies to the first class of cases mentioned in the Statute of 1842, namely: those cases "Where there is, or shall be imposed any *ad valorem* rate of duty," and omits all reference to the other class of cases, namely: those where the duty imposed shall by law be regulated by, or directed to be regulated by or based upon the value of the goods. This omission is very significant, and would seem to show conclusively that, as to this latter class of cases, within which the present case falls, the value at the time when the goods were purchased is to be considered the true value at the port of importation, and not the value at the time when they were exported.

It is submitted, therefore, that in estimating the value of wool, to determine whether it is dutiable or not, the value at the time it was purchased is to be deemed the true value, and that the judgment below was correct.

But if this construction of the statute be erroneous, the invoice price in this case must be regarded as conclusive evidence of the value of the wool.

By the Statute of 1823, ch. 21, 8 Stat. at L., 727, *et seq.*, a true invoice, containing a just and faithful account of the cost of merchandise which has been purchased and supported by oath, is required when goods are imported.

By the Tariff Acts of 1842, 1846 and 1857, a penalty was imposed when the appraised value exceeded by ten per cent. the invoice value; provided, nevertheless, that under no circumstances shall the duty be assessed upon an amount less than the invoice value; any law of Congress to the contrary notwithstanding.

By our revenue laws, therefore, the invoice is regarded, not as a mere bill of parcels, but as a solemn statement of the importer, supported by oath.

In the present case, the merchandise was generally liable to an *ad valorem* duty, with an exception exempting it from duty if it did not exceed the value of twenty cents per pound. It was invoiced at more than twenty cents per pound, and was entered at more than that value. There is no authority for making one appraisement for the purpose of determining if merchandise be exempt from duty; and if it is found to be dutiable, then making another appraisement for the purpose of determining the value upon which *ad valorem* duties are to be assessed; and it would seem to follow, that the invoice must be as binding in the one case as in the other. Statutes *in pari materia* must be construed together.

Mr. Justice Clifford delivered the opinion of the court:

Import duties, illegally exacted, if paid under written protest "signed by the claimant," setting forth distinctly and specifically the grounds of objection to the payment, may be recovered back in an action of *assumpsit* against the collector. 5 Stat. at L., 727; *Assessor v. Osbornes* [ante, 749]; *Nichols v. U. S.* [ante, 127]; *Phila. v. Collector*, 5 Wall., 781 [72 U. S., XVIII., 616].

Recent enactments have annexed certain other conditions, of a very important character, to the right of action in such cases, but it is not necessary to enter into those details as none of the new provisions have any application in the case before the court. 18 Stat. at L., 214.

Four hundred and ninety-one bales of wool were imported in the month of June, 1861, into the Port of Boston by the plaintiff or his intestate, and the agreed statement shows that the wool was duly entered at that port for consumption. Duties were assessed upon the same to the amount of \$15,651.80, and the plaintiff or his intestate paid the same, having first complied with all the formal conditions to enable him to maintain the present action.

Wool unmanufactured, of the value of twenty cents per pound or less at the port of exportation, was at that time entitled to be admitted to entry free of duty, but wool unmanufactured, "imported from abroad," of greater value than twenty cents per pound at the port of exportation, was subject to an *ad valorem* duty of twenty-four per cent., as imposed by the Act reducing the duty on imports and for other purposes. 11 Stat. at L., 192, 194.

By the agreed statement it appears that the wool imported in this case was shipped in the barque *Vatella*, which sailed from Cape Town on the 25th of April, prior to the importation, but it also appears that the wool was purchased by the shippers at that place several months before the bark sailed. They purchased it at ten pence sterling per pound, as stated in the invoice, and the parties agree that the price given in the entry at the custom-house is the same as that given in the invoice, and that both correspond with the actual cost of the wool at the place of exportation.

American ships bringing goods from any foreign port into the United States are required to have on board a manifest signed by the master describing the goods and the vessel, and giving the name of the port where the goods were shipped, and the name of the port to which they were consigned. 1 Stat. at L., 644.

On arriving within four leagues of our coast the master of such ship is required, if the proper officer of the customs comes on board, to produce such manifest to such officer for his inspection, and he is also required, within twenty-four hours from the time the vessel arrives at a port of the United States where an officer of the customs resides, to report that fact to the collector or chief officer of the customs at that port. 1 Stat. at L., 649.

Goods imported from any foreign port or place are required to be landed in open day, and the Act of Congress provides that such goods shall not be landed or delivered from the ship without a permit from the collector and naval officer, if any, for such unloading and delivery. Authority to grant such a permit does not exist, if the goods are intended to be entered for

consumption, until the duties are paid or secured to be paid, and the duties are never paid nor are they ever secured to be paid in such a case before the importation is complete and the goods are entered at the custom-house. Such an entry, that is, an entry for consumption, must be in writing, and must be made by the owner, consignee or agent, to the collector of the district, within fifteen days from the time the master reports the arrival of the vessel, and the person making the entry must also produce to the collector the original invoice or invoices, or other documents received in lieu thereof, or concerning the same, in the same state in which they were received, with the bills of lading.

Examination of the entry, as presented by the owner, consignee or agent, is usually made by the entry clerk, and if found to be correct the collector proceeds to estimate the duties "on the invoice value and quantity," and if the estimated amount of the duties is paid or secured to be paid, as required by law, the collector is then authorized to grant a permit for the discharge and landing of the cargo. Until those acts are performed, no one has any authority to grant a permit or to remove the hatches, but the inspector remains in charge of the vessel.

Import duties, it will be observed, are estimated in the first place, if they are *ad valorem*, on the invoice value and quantity as shown in that document, unless additions are made to the same by the owner, consignee or agent, in the entry at the custom-house, and in that state of the case the duties are estimated on the invoice value and quantity together with those additions to the same, but in either event the duties are estimated at that stage of the proceedings without any appraisal.

Evidently it must be so, as the estimated duties are required to be paid or to be secured to be paid before the permit is granted to remove the hatches, and before the goods are landed from the vessel.

Such duties, so estimated, may be paid at the time, or, what is more usual, they may be secured to be paid by depositing the amount in gold with the collector, subject to an equitable adjustment when the duties are liquidated and the correct amount of the same is ascertained by such subsequent proceedings as are prescribed by law for that purpose.

Subsequent proceedings are essential to the ends of justice, as computations based solely on the invoice value and quantity will seldom prove to be correct, as the values expressed in the invoice may be less than the true market value of such imports in the principal markets of the country whence the importation was made, or articles imported may have been omitted in the invoice, or articles contained in the invoice may have been lost during the voyage, or the actual quantities as ascertained by the weighers, gaugers or measurers may differ from those given in the invoice and entry. Corrections of the kind are frequently necessary, but they are never made until the goods are landed and appraised.

Collectors are required by law to cause the dutiable value of imported goods subject to an *ad valorem* rate of duty to be appraised, estimated and ascertained, and the provision is that if the appraised value shall exceed by ten per centum the value so declared in the entry,

the goods are subject to a duty of twenty per cent. *ad valorem* on such appraised value in addition to the rate imposed where no such undervaluation is shown. 1 Stat. at L., 673.

Penalties of the kind, however, may be avoided if the undervaluation in the invoice is corrected in the entry at the custom-house, as the same section provides that it shall be lawful for the owner, consignee or agent of imports which have been actually purchased, or procured otherwise than by purchase, on entry of the same to make such addition in the entry to the cost or value in the invoice as in his opinion may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made.

Additions may be made to the cost or value of the goods as given in the invoice to raise the same to the true market value, but the additions, in order that they may have effect to avoid the additional duty of twenty per cent., must be made before or at the time of the entry, as no such corrections can be made afterwards; or, in other words, the additions, if any, must be made before the permit is granted and before the goods are landed, because if they are not made before those acts are performed the additions made to the cost or value given in the invoice would not become a part of the dutiable value in estimating the duties prior to the appraisal, and if the appraisers should report that the invoice value was correct the amount of the additions would escape taxation altogether. Nothing remains to be done subsequent to the granting of the permit and the landing of the goods except such acts as are required by law to correct any errors in the invoice and to liquidate the duties, as the express provision in the principal Collection Act is that all the duties on goods, wares and merchandise shall be paid or be secured to be paid before a permit shall be granted for landing the same. 11 Stat. at L., 199.

Before the permit is granted, it is the duty of the owner, consignee, or agent to present the invoice to the collector and make the entry in the form required by law, and thereupon the collector certifies the invoice and grants the permit in due form for the discharge and landing of the cargo, first designating the packages, at least one in ten, to be sent to the public store, and marks the same on the entry, invoice, and permit. *Waring v. Mayor* [ante, 342]; Gen. Reg. (1857), 145.

Packages intended for examination by the appraisers are usually sent to the public store for that purpose, but cumbrous articles may be examined on the wharf where they were landed, and samples may, in certain cases, be used for the same purpose instead of the packages, from which they were selected by the sampler.

Pursuant to the usual practice the goods in this case were entered for consumption according to the invoice value, to wit: at ten pence sterling per pound, expressed in decimals, which made the wool dutiable at the rate of twenty-four per cent. *ad valorem*.

Tested by the facts of the case as given in the agreed statement, it is clearly to be inferred that the preliminary proceedings were correct; that the invoice was seasonably presented to the collector; that the entry of the goods was

regularly made for consumption; that the duties were properly estimated on the invoice value and quantity; that the duties as thus estimated were duly paid, or secured to be paid, before the permit was granted; that the permit was subsequently granted in due form for the landing of the goods, and that one in ten of the packages was ordered to the public store for the examination of the local appraisers. Prior to that stage of the proceedings, the appraisers have no jurisdiction of the case, and they have no duty to perform in the premises.

Beyond doubt, the collector may direct that all packages shall be examined but he is required to designate on the invoice at least one package of the same, and one package at least of every ten packages of the importation, and the direction is that he shall order the same to the public stores to be opened, examined and appraised. All those requirements having been fulfilled, the appraisers are furnished with the original invoice which contains the marks of the collector designating the packages sent to the public stores for their examination.

Briefly stated, their duty is to appraise, estimate and ascertain the true market value of such imports in the principal markets of the country whence such importation was made, and to report their doings to the collector. They examined the packages sent to the public stores, and the agreed statement shows that they reported upon the invoice "value correct," in accordance with the prevailing custom to mark invoices in that manner in cases where the price given in the invoice was high enough to cover the market value.

Complaint is made that the custom does not allow the appraisers to reduce the invoice value when it is greater than the true market value, but the decisive answer to that complaint is, that the Act of Congress authorizing the appraisal of the importation, expressly provides "That, under no circumstances, shall the duty be assessed upon an amount less than the invoice or entered value" of the importation. Where the entered value is the same as the invoice value, the legal effect of the requirement is the same as it was in the prior Act, which did not contain the words "entered value," but in cases where the owner, consignee or agent makes additions to the value expressed in the invoice, to avoid the penalty of twenty per cent., the words "entered value," have a special application, and in those cases the duty cannot be assessed upon an amount less than the entered value, which includes the value expressed in the invoice and the additions made thereto by the owner, consignee or agent, before or at the time the goods were entered at the custom-house.

Ten pence sterling per pound was the actual cost of the wool at the time it was purchased, and the price actually paid for the wool is the value expressed in the invoice, and the same value is given in the entry made by the consignee, and the agreed statement shows that the appraisers reported that the invoice value was correct, and if the matter had stopped there the case would be too plain to admit of any controversy, as it would show that every requirement of law had been followed without the least departure, and that nothing had been done to which the plaintiff or his intestate ob-

jected at the time the act was performed, as he made the entry and gave therein the value expressed in the invoice as the true market value of the imports in the principal markets of the country whence the importation was made. 11 Stat. at L., 199.

"Value correct" was the report of the appraisers when they returned the invoice to the collector, and the duties were liquidated and assessed upon that amount as the true dutiable value of the goods, but before the duties were paid by the consignee as liquidated, the collector requested the appraisers to make a re-examination of the wool, and "a formal appraisement of its value," but they declined to make any appraisement of it at less than the invoice price, giving as a reason that they could not do so by law; evidently referring to the provision in the Appraisement Act that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value. At the collector's request, however, they made a statement to him in writing, which they expressly declared was not an official appraisement, in which they stated that the market value of the wool at the time it was exported, in the principal markets of the country where it was purchased, was eight pence and three farthings per pound, at which rate the wool would have been entitled to entry free of duty. Prices of wool had declined at that port subsequent to the purchase in this case, and before the bark sailed, so that the wool might have been purchased at the time it was exported at the reduced price named by the appraisers.

Ad valorem duties were always estimated, prior to the Act of the 20th of April, 1818, by adding a prescribed percentage, including charges and commissions, to the actual cost of the goods at the place where the same were purchased and exported, the actual cost being ascertained by the invoice. 1 Stat. at L., 41 and 678; 3 Stat. at L., 436.

Whenever, in the opinion of the collector, there was just ground to suspect that goods subject to an *ad valorem* duty, and imported into his district, had been invoiced below the true value of the goods in their actual state of manufacture at the place from which they were imported, the collector, by the Act last cited, was authorized to direct that the goods should be appraised in the manner prescribed in the 9th section of that Act, which was the first authority of the kind conferred in the Acts of Congress in cases where the entry was accompanied by the invoice, as required by law. Such duties were required to be estimated, by the Act of the 1st of March, 1823, by adding all charges except insurance, and a prescribed percentage to the actual cost of the goods, if the same were purchased, or by making the same additions to the actual value of the goods if they were procured otherwise than by purchase, or by making the same additions to the appraised value of the goods if the same were appraised, except in cases where the goods were subject to a certain penalty, and the express provision was that the rates of duties should be estimated on such aggregate amount. Goods imported from foreign countries could not be admitted to entry unless the invoice accompanied the entry, nor unless the invoice

was verified by oath, and neither the Act under consideration nor the first Collection Act gave the collector or the appraisers any authority to reduce the price or value of the goods as expressed in the invoice. 3 Stat. at L., 782.

Dutiable values of imported goods, subject to an *ad valorem* rate of duty, were required by the Act of the 30th of July, 1846, to be estimated and ascertained by appraisement, adding costs and charges as therein prescribed, but the provision was that under no circumstances "shall the duty be assessed upon an amount less than the invoice value." 9 Stat. at L., 43; *Shelton v. Austin*, 1 Cliff., 389.

Costs and charges, except insurance, were also required to be added to the appraised value by the Act of the 3d of March, 1851; but the Act vested no authority either in the collector or the appraisers to reduce the valuation of the goods below the invoice or entered value, and no such authority, applicable in this case, is found in any Act of Congress passed prior to the time when the entry before the court was made at the custom house. 9 Stat. at L., 630.

On the contrary, the Act of Congress under which the appraisers acted in this case expressly provides, as before explained, that under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value, the substance of which provision has been in force for a quarter of a century. 11 Stat. at L., 199.

Importers are required to make an entry of their importations, which should always be accompanied by the invoice, duly verified by oath, and when the entry is made and the permit granted the packages for appraisement are designated on the invoice by the collector who orders one in ten of them to the public store for the purpose of appraisal. Examination of the selected packages is then made by the appraisers, who report their doings to the collector, and if no appeal is taken from their appraisal, either to the general appraisers or to the Secretary of the Treasury, their decision in the premises is final and conclusive as to the dutiable value of the importation. *Belcher v. Linn*, 24 How., 531 [65 U. S., XVI., 757]; *Bartlett v. Kane*, 16 How., 272; *Rankin v. Hoyt*, 4 How., 327; *Stairs v. Peaslee*, 18 How., 524 [59 U. S., XV., 475].

Appraisers, it is said, are to appraise, estimate and ascertain the true market value of such imports, whether of greater or less value than that expressed in the invoice and entry; but the decisive answer to that suggestion is that their duties are regulated by the Act of Congress under which they act, and inasmuch as it is provided that the duties shall not, under any circumstances, be assessed upon an amount less than the invoice or entered value, it is clear that the appraisers have no authority to make any such appraisement as that which they were requested to make by the collector. Redress for such a grievance, if it be one, must be sought in Congress, as Congress, and not the courts, possesses the power to lay and collect taxes, duties, imposts, and excises, and to pass all laws which shall be necessary and proper to carry that power into execution.

Extended remarks respecting the case of *Rankin v. Hoyt*, 4 How., 327, need not be made, as the statement of the fact shows that the ap-

praisers in that case added to the value expressed in the invoice, and the decision was founded upon the Act of the 14th of July, 1832, which did not contain the provision that the duties should not under any circumstances be assessed upon an amount less than the invoice or entered value and, consequently, it is not an authority which controls the present case.

Comment upon the 5th section of the Tariff Act, under which the goods were imported in this case, may also be omitted for reasons of a like character, as the section must be construed in view of the proviso of the amendatory Act passed on the same day, which prohibits both the appraisers and the collector from making any reduction in the invoice or entered value in the assessment of *ad valorem* duties.

Judgment affirmed.

Cited—95 U. S., 182.

RICHARD C. GRAY, *Appt.*,

v.

THE CHICAGO, IOWA AND NEBRASKA
RAILROAD COMPANY ET AL.

(See S. C., "*The Clinton Bridge*," 10 Wall., 454-463.)

Mississippi bridge—Act to legalize—effect of.

By the Act of Feb. 27, 1865, it was the intention of Congress to legalize the bridge therein named as then constructed across the Mississippi River.

It was competent for Congress to interfere and legalize the bridge, under the power to regulate commerce.

The Act of Congress having passed, pending a suit to remove the bridge as a nuisance, it gave the rule of decision for the court, at the final hearing.

[No. 8.]

Argued Dec. 7, 1870. Decided Dec. 19, 1870.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The bill in this case was filed in the court below, to abate a bridge partially built over the Mississippi River, and perpetually to enjoin the erection of said bridge. The bill having been dismissed by that court, the complainant took an appeal to this court.

A full statement of the case is given in the opinion of the court.

Mr. T. D. Lincoln, for appellant:

Did the Act intend to abate the suit?

This is a question of construction merely, and must be decided with reference to well known rules of construing statutes.

It is not usual for Acts of the Legislature to interfere with pending litigation, or to make any new rules that shall dispose of the particular case then pending. And according to established rules, it should not be so construed, unless the Act is so clear that no other fair construction can be given to it. The 8d section of the Act would seem to indicate that it was only intended to apply to litigation thereafter arising; for without saying anything about litigation pending, it provides for litigation thereafter arising from alleged obstruction to the navigation. As this very section provides for litigation thereafter to arise in reference to the said bridge as an obstruction, how can it be claimed that this very Act disposed of that question?

Did the law intend to do more than to declare generally that a bridge at that point was

a lawful structure, for the purposes therein named? It declares that the bridge shall be a lawful structure, and shall be recognized as a post route. Now, this last clause is of such a character as would seem to indicate that it was lawful for the purposes of a post route.

1. The title of the Act comes in aid of this view of the law, for it is in these words: "An Act declaring Clinton bridge across the Mississippi River at Clinton, in the State of Iowa, a post route."

2. The declared object and purpose of the law was simply to provide that the Clinton bridge should be a post route, and to provide for the rate of carrying the mails; and the law must be construed in connection with the laws of Congress relating to post roads.

The Postoffice Department was temporarily established by the Act of Sep. 22, 1789, 1 Stat. at L., 10, Aug. 4, 1790, and by the Act of Mar. 8, 1791. It was permanently established Feb. 20, 1792, and May 8, 1794, 1 Stat. at L., 232, 354.

And this establishment has been improved from time to time by Congress, from that time to this. See, Act March 3, 1825, 4 Stat. at L., 102.

Numerous Acts have been passed from time to time establishing post routes, sometimes by Act embracing general classes of routes, covering nearly all travel routes by carriage or vessel in the country, but more generally by specific description of the route by name.

And the examination of the numerous laws passed by Congress on the subject of post routes will show that their object was simply to make it lawful for the Postmaster-General to establish postoffices and contracts for carrying the mail; and that they had no other purpose whatsoever. They were not intended to make all these various routes lawful for any other purpose. The Wheeling Bridge Act is declared to be "An Act making Appropriations for the Service of the Postoffice Department During the Fiscal Year Ending the Thirtieth June, One Thousand Eight Hundred and Fifty-three, and for other purposes."

The words, "and for other purposes," found in the title to this Act, cover the matters therein relating to the Wheeling Bridge; so that in this respect the Wheeling Bridge Act differs from the Act relating to the Clinton Bridge, now before the court.

Congress enacted, in the 6th section of the Act aforesaid, that the said bridges "are hereby declared to be lawful structures in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding."

This would seem to be quite conclusive of the intent of the Act; but the 7th section provided that the said bridges should be post routes for the passage of the mails, and then proceeded in these words:

"And that the Wheeling & Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation: and the officers and crews of all boats navigating the said river are required to regulate the use of said vessels and boats, and of any pipes and chimneys belonging

thereto, so as not to interfere with elevation and construction of said bridges."

This language leaves no room for argument or doubt that the Act was intended to reach the very question decided by the court.

The case of *Pa. v. Bridge Co.*, 18 How., 460 (59 U. S., XV., 449), cannot be regarded as disposing of the question now before the court. That case is, undoubtedly, authority of importance upon the constitutionality of the Act in question. It is not of much value upon the question of the construction of the Clinton Bridge Act.

If it is claimed that this is an enactment finding the bridge to be a lawful structure in such a way as to put an end to this suit, it is the exercise of a legal function which belongs to the courts, and not to Congress. Sec. 1, art. 3, of Const.

The principal question to be heard was, whether the bridge was so built or not. This was a legal question, purely and simply such.

It is the exercise of a judicial function, which is placed by the Constitution in the courts of the United States. Such it was in effect, and the court below, in obedience to that view of the Act, ordered the bill dismissed upon the force of the statute, refusing to inquire into the merits.

The court is referred to the following cases bearing upon this point:

De Chastelluz v. Fairchild, 15 Pa., 20; *State v. Fleming*, 7 Humph., 153; *Lewis v. Webb*, 8 Me., 888; *Lamier v. Gallatas*, 18 La. Ann., 176; *Holden v. James*, 11 Mass., 896; *Merrill v. Sherrburne*, 1 N. H., 203; *Parmales v. Thompson*, 7 Hill, 80; *Sanborn v. Com. of Rice Co.*, 9 Minn., 279.

The Clinton Bridge Law is not a law regulating commerce among the States, and is invalid.

Ch. J. Marshall gives this definition of the power of Congress to regulate commerce: "It is the power to regulate, that is, prescribe, the rule by which commerce is to be carried on." *Gibbons v. Ogden*, 9 Wheat., 196.

Here is no rule provided for carrying on commerce, or any rule intended to affect it. Nor is the bridge, in any fair sense, an instrument of commerce. Except so far as it creates the bridge a post route, it is not, as has been said before, in the nature of a law, but a finding or a decree.

This bridge is a piece of a railroad, one half of which is in Iowa and the other half in Illinois; and it does not, in this regard, differ from any other piece of railroad in these States.

If, then, Congress has power to regulate or legalize this bridge, it has power to regulate or legalize any and every road or canal in the country.

Messrs. T. O. Howe, James H. Howe and Enoch Totten, for appellee.

(The court declined hearing any argument upon this side.)

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of Iowa.

The bill was filed by the plaintiff to enjoin the defendants from building a railroad bridge across the Mississippi River, at the Town of

Clinton, situate on its banks on the Iowa side, and extending to a point opposite on the Illinois side. After setting out the interest the plaintiff had in the free and unobstructed navigation of the river, and the serious danger and obstruction to the navigation by the erection of the bridge, the bill concluded with a prayer for a temporary injunction against the defendants, enjoining them from building the bridge until the final hearing of the cause, and for a perpetual injunction in the final hearing. Answers were put in by the several defendants and also replications, and a large amount of proofs were taken by both parties. When the cause came on for a final hearing, the counsel for the defendants objected to the proof of the plaintiff being read, on the ground that since the erection of the bridge Congress had passed an Act declaring it a lawful structure, which objection was sustained by the court, and a dismissal of the bill decreed accordingly.

The Act of Congress was passed 27th February, 1865.

The 1st section of the Act of Congress provides, "That the bridge across the Mississippi River, erected by the Albany Bridge Company and the Chicago, Iowa and Nebraska Railroad Company, under the authority of the States of Iowa and Illinois, etc., shall be a lawful structure, and shall be recognized and known as a post route."

The 2d section: "That the draw of said bridge shall be opened promptly, upon reasonable signal, for the passage of boats, etc., except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw."

The 3d section: "That in case any litigation hereafter arising from any alleged obstruction to the free navigation of said river, the cause may be tried before the Circuit Court of the United States of any State in which any portion of said obstruction or bridge touches."

The 4th section reserves the right to alter or amend the Act, so as to prevent or remove all material obstructions to the navigation of the river by the bridge.

It appears that the bridge was completed before the passage of this Act.

We cannot doubt, upon a perusal of the section, but that it was the intention of Congress to legalize the bridge as then constructed across the river, and that the words used carry out fully this intent. It is declared "a lawful structure;" that is, the bridge as built, with its abutments, piers, superstructures, draw and height, should have the sanction of law, and be maintained and used in that state and condition until the law was altered by the reserved power in the last section.

The Act of Congress in the case of *The Wheeling Bridge* was more explicit, but not more comprehensive than the present one. It was there declared "That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane Island in said river, are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding." In that case the court had rendered a decree, directing the obstruction to be

removed by elevating the bridge, or if not, by abatement. No doubt the existence of this decree, which was in the process of execution, led to the very specific terms of the Act. But, with all its particularity, it is not more comprehensive or decisive in legalizing the bridges than the one before us.

The questions, whether or not it was competent for Congress to interfere and legalize the bridge under the power to regulate commerce, and whether or not the Act put an end to the pending suit, were questions examined and settled in the affirmative in the case already referred to. *Pa. v. Wheeling Bridge*, 18 How., 429 [59 U. S., XV., 436]. The reasons for the conclusions arrived at will be there found, and need not be repeated.

The only difference between the case of *The Wheeling Bridge* and the present one is, that in the former a decree had been rendered by the court against the bridge; in the latter, the cause was pending undecided. It was, in the former case, insisted on behalf of the complainant, that the Act of Congress could not invalidate the decree of the court. But it was answered that the decree of abatement of the obstruction was executory, and a continuing decree, which required not only the removal of the bridge, but enjoined the defendants against any reconstruction. And that whether or not it would be a future existing obstruction depended upon the question whether it interfered with the right of free navigation, and that if, in the mean time, this right had been modified by competent authority, so that the bridge was no longer an unlawful obstruction, the decree of the court could not be enforced. There was no longer any interference with the enjoyment of the public right inconsistent with law no more than there would be if the complainant himself had given his consent after the decree.

In the present case the Act of Congress having passed pending the suit, it gave the rule of decision for the court at the final hearing upon the same principle that the Act in *The Wheeling Bridge* case staid the execution of the decree directing its abatement. The court say in that case (p. 431) that if the remedy had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress. And if, in the present case, the action had been at common law for damages alleged to have been done to the property of the plaintiff before the passage of the Act of Congress, very different considerations would have arisen as to the effect of the Act upon this private right of action from that upon a simple proceeding to enjoin the building of the bridge; or, if built, to abate it as a nuisance.

We think the ruling of the court below was right, and the judgment should be affirmed.

Cited—20 Wall., 332; 98 U. S., 13; 105 U. S., 475; 91 Ill., 517.

THE STATE OF TEXAS, Complt.,

vs.
GEORGE W. WHITE, JOHN CHILES,
JOHN A. HARDENBERG, SAMUEL
WOLF, GEORGE W. STEWART ET AL.

(See S. C., "*Texas v. Chiles*" 10 Wall., 127, 128.)

Additional relief, when denied.

See 10 WALL.

A motion on the foot of the decree, for additional relief not within the scope or tenor of the decree, will be denied.

[No. 4. Orig.]

Argued Dec. 19, 1870. Decided Jan. 3, 1871.

BILL in equity.

On motion.

The case is fully stated by the court.

Mr. T. J. Durant, for complainant.

Mr. James Hughes, for respondents.

Mr. Justice Nelson delivered the opinion of the court:

The bill was filed in this case by the complainant against White, Chiles and others, to recover the possession of some one hundred and thirty-five bonds, of \$1,000 each, denominated "United States Texas indemnity bonds," charged to have been illegally obtained by the defendants. Such proceedings were had in the suit that a decree was rendered in favor of the complainant, as will be seen by the report of the case [*ante*, 889].

A motion is now made on the foot of that decree by the complainant against Chiles, one of the defendants, for a rule to show cause why he should not deliver to the clerk of this court twelve of these bonds, which it is charged he has in his possession and has not accounted for. The only proofs furnished, upon which a rule is prayed for, is the answer for White, a co-defendant, the deposition of McKinley, all in the original case, and the affidavit of George Taylor, produced on this motion. The answer of White, not being competent evidence against a co-defendant, needs no further notice. The deposition of McKinley shows that sometime in the summer of 1867, he thinks he delivered to Chiles ten bonds that had been deposited with him as a banker, about a year previous, for a third person on certain conditions, which had not been complied with. According to the affidavit of Taylor, Chiles admitted to him that he had received of E. K. Thompson, cashier of the Branch Bank of Kentucky, two bonds, after the service of the injunction in the case, and which he said he held subject to the order of the court.

The answer of Chiles to the bill was put in, on or about the 25th May, 1867, in which he accounts specially for some fifty-one of the bonds in litigation.

The court, after decreeing that the complainant was entitled to recover the possession of the bonds of White and Chiles and of all persons claiming under them with notice, proceeds to determine on the pleadings and proofs, for which and how many bonds the said defendants, respectively, were accountable to the complainant to make restitution thereof, or make good the proceeds.

No decree was entered against Chiles for bonds or proceeds, although the same evidence was then before this court, as it respects ten of the bonds in question, as is presented in support of this motion. It would seem, therefore, that in the judgment of the court, the pleadings and proofs furnished no ground, legal or equitable, for charging him personally in respect to either the bonds or proceeds.

We may add that the twelve bonds, sought to be brought before the court under the rule to show cause, founded upon the suggestion at

the foot of the decree, were received by Chiles after the filing of the bill in February, 1867. The decree, in terms, limits the accounting of the defendants to bonds in their possession at the several times of the service of the process in this suit. The case, therefore, presented, is not within the scope or tenor of the decree.

Motion denied.

Cited—39 Am. Rep., 239 (78 Ky., 332).

ARTHUR C. DUCAT, *Plff. in Err.*,
v.
THE CITY OF CHICAGO.

(See S. C., 10 Wall., 410-415.)

State may require insurance companies of other States to take out licenses and pay fees and percentages.

The case of *Paul v. Virginia*, ante, 357, followed, to the effect that a State may require agents of foreign insurance companies to take out a license before doing business in the State, and to pay certain fees and percentages.

A State has power to discriminate between its own domestic corporations and those of other States, desirous of transacting business within its jurisdiction.

As to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.

[No. 48.]

Submitted Dec. 21, 1870. Decided Jan. 9, 1871.

IN ERROR to the Supreme Court of the State of Illinois.

Suit was brought by the defendant in error, in the Superior Court of Chicago, to recover license fees for carrying on the business of insurance. Judgment having been given in that court for the plaintiff, the defendant took an appeal to the Supreme Court of the State, by which the said judgment was affirmed. Whereupon the defendant sued out this writ of error.

The case is sufficiently stated in the opinion of the court.

Mr. Samuel W. Fuller, for plaintiff in error:

No State can lawfully impose heavier taxes upon property within its limits, belonging to the citizens of other States, than are laid upon the property of its own citizens. The leading cases on this subject are *Brown v. Md.*, 12 Wheat., 445; *Woodruff v. Purham* (ante, 332); and *Hinson v. Lott* (ante, 387).

The Insurance Companies complied with every requirement of law, and received licenses to do business throughout the State, and when they had thus become, as it were, legally domiciled within the State, and acquired property within its limits liable to taxation, the State attempted to authorize the City of Chicago, and also other cities in which the licensed agencies were established, to levy taxes upon that property, which were not imposed upon the property of the citizens of Illinois, merely because it belonged to corporations created in other States.

Neither in form, substance, nor effect, is the tax in question a license for the privilege of doing business. It was first enacted in 1845 (see Rev. L. of 1845, ch. 64, secs. 22, 23; 13 Ill., 554),

NOTE.—Power of Congress to regulate commerce. State licenses. Power of State to tax commerce. See note to *Gibbons v. Ogden*, 22 U. S. (9 Wheat.), 1; and note to *Brown v. Maryland*, 25 U. S. (12 Wheat.), 419.

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and was changed in 1852, by an Act giving to an incorporated charitable institution the proceeds of the tax (21 Ill., 511); but in 1855 and 1857, the general laws were enacted, and in 1868, the charter of the City of Chicago was revised, and this tax was included in the revenue chapter of the charter, and required to be paid into the city treasury and appropriated to municipal purposes.

The laws of 1855-7 have been all this time in full force, and obedience to their requirements is strictly required, and thus we have a license system, and one of taxation, independent of each other, wholly applicable to foreign insurance companies.

This court has decided in *Paul's* case that the former is valid; it has also decided that unequal taxation, discriminating against the citizens of other States, is invalid; and as this is a tax and not a license fee or price paid for a license, it cannot be supported, either as a license or a tax.

Mr. M. F. Tuley, for defendant in error:

The same questions are here which were presented to this court in the case of *Paul v. Virginia* (ante, 357).

The point involved in each case is: whether or not a State Legislature has the power to make a discrimination between foreign and domestic insurance companies, as to the conditions and terms upon which they may respectively do business within the State.

If these corporations are merely creations of the local law which created them; if they are not citizens; if they have no privileges nor immunities which other States are bound to recognize; and if the other States may prohibit them doing business—their very existence—within the limits of such other States respectively—all of which has been decided in *Paul's* case—then it necessarily follows, that Illinois has the right to provide, as in the Acts of 1855, 1857 and 1868, that any foreign corporations, as a condition to its doing business in the City of Chicago, shall not only take out a state license, but shall also pay \$2 out of every \$100 of their premiums received from business transacted in the City, to the City Treasurer.

The Supreme Court of the State of Illinois has, not only in this case, but twice before, in passing upon this law, decided that "It is not a tax upon property, but that it is a burden imposed upon the agent, for the right of exercising a franchise or privilege, and which the Legislature would have the right to withhold or inhibit altogether; and the amount of premiums charged is merely a mode of computing the amount to be paid for the exercise of the privilege."

People v. Thurber, 18 Ill., 554; *Benefit Ass'n v. Lounsbury*, 21 Ill., 511.

The decision of a state court, as to the conformity of a local law to the State Constitution, will be followed by the United States Courts.

Nemith v. Sheldon, 4 McLean, 375; *Dubois v. McLean*, 4 McLean, 488; *Gelpcke v. Dubuque*, 1 Wall., 175 (68 U. S., XVII., 520); *Bk. v. Dudley*, 2 Pet., 492.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Illinois.

The case is this: Ducat, the defendant below,

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was an agent, residing in the City of Chicago, of several insurance companies chartered in the State of New York, and took out licenses under the laws of Illinois, authorizing him to carry on the business of insurance as agent of said companies.

These laws required the agent to take out a license from the Auditor of the State; and before obtaining it, to furnish him with a statement under the oath of the President or Secretary of the Company, showing its name and locality, the amount of its capital stock, the portion paid in, the assets of the Company, etc. The license was granted from year to year.

An Act was also passed by the Legislature of the State, providing that all foreign insurance companies engaged in effecting insurances in the City of Chicago, should pay to the State Treasurer the sum of \$2 upon \$100, and at that rate upon the amount of all premiums which shall have been received, designating the time and mode of payment. The law also, in case of default of payment, provided that it should be unlawful for the Company to transact any business of insurance in the City until the payment was made, and that the rates might be recovered of the company or of its agent, in the name and for the use of the City. The present suit was brought to recover rates which the defendant had refused to pay over.

This case was pending here when that of *Paul v. Virginia* [ante, 357] was argued and decided; the decision in which, as is admitted by the learned counsel for the plaintiff in error, has already disposed of all the principal questions involved.

Paul, the agent of the insurance companies in that case, refused to comply with some of the conditions annexed by the law of Virginia to the granting of the license, on the grounds: 1, that the corporations he represented were entitled to all the privileges and immunities of citizens of the several States, and that the law imposing discriminating conditions against foreign corporations was void, as repugnant to this clause of the Constitution; and 2, that it was void as against the commercial power. Both these grounds of defense were overruled for the reasons assigned in the opinion of the court, which need not be repeated, and the agent held liable to the penalty imposed for a violation of the Act. The principle of that case must govern the one before us. The only difference between the Statute of Virginia and that of Illinois is, that the latter is more onerous to the companies than the former. The difference is in degree, not in principle.

The power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Bk. of Augusta v. Earle*, 18 Pet., 519. As to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. We find no such limitations in this case.

Judgment affirmed.

Cited—80 Wall., 457, 458; 94 U. S., 539, 540; 3 Sawy., 221; 6 Biss., 464; 3 Biss., 422; 11 Bank. Reg., 172; 15 Kan., 636; 30 Am. Rep., 364, 356 (57 Pa. St., 122, 123).
ee 10 WALL, U. S., BOOK 19.

ABNER C. CAMPBELL ET AL., *Piffs. in Err.*,

WILLIAM H WILCOX.

(See S. C., 10 Wall., 421-423.)

Omission to stamp note, effect of—averment in declaration—waiver of demurrer—ten per cent. damages.

A fraudulent omission to stamp a promissory note, if available at all to the maker of the note, can only be set up by special plea or urged on the trial. It cannot be taken advantage of on demurrer.

An averment in the declaration that the defendants made their promissory notes, would imply that the instruments were at the time in the form and condition required by law.

The filing of a plea to the merits after a demurrer was overruled, operates as a waiver of the demurrer.

Where the writ of error is prosecuted merely for delay, the judgment will be affirmed, with ten per cent. damages.

[No. 88.]

Submitted Dec. 16, 1870. Decided Jan. 9, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

Suit was brought in the court below, by the defendant in error, upon certain promissory notes. Judgment having been given for the plaintiff in that court the defendants sued out this writ of error.

The case is further stated by the court.

Messrs. H. Stanbery, Durbin Ward and E. P. Norton, for plaintiff in error:

The only question arising in this case is upon the demurrer to the declaration, which counts upon certain promissory notes, bearing date in 1866, but contains no averment that they were stamped at their date nor at any subsequent time.

The English precedents of declaration upon instruments subject to stamp duties contain no such averment; but they are not in point, for the want of a stamp does not in England invalidate the instrument, but only excludes it from being used in evidence until stamped. Our statutes declare the unstamped instrument invalid, until a stamp is affixed by an application to an internal revenue officer.

The statutory provisions on the subject of stamps may be found in Bump's Internal Revenue Laws, p. 806; and the decisions of the state courts are cited on pp. 815, 816, 817, 818 of same book.

If the stamp is necessary to give validity to the instrument, it would seem that the declaration should aver that the note was stamped.

Mr. W. Cornell, for defendant in error:

14 Stat. at L., 142, provides that notes and other instruments of writing may be stamped at any time after their issue; and that unstamped instruments of writing are not to be deemed invalid, unless issued with intent to evade the provisions of the Act.

The averments in the declaration, that the defendants executed and delivered to plaintiff their certain promissory notes, implies that they were such as are contemplated by the laws of the land; and if they were not stamped at the time the declaration was filed, they could have been stamped at any time thereafter, provided the stamps were not omitted for the purpose of defrauding the government.

A demurrer, therefore, will not reach the defect, even if it exists.

It would require a plea with an averment

that the stamps were fraudulently omitted from the notes.

Trull v. Moulton, 12 Allen, 896; *Hallock v. Jaudin*, 84 Cal., 167; *Bump's Int. Rev. Laws*, 815, 816.

Mr. Justice Field delivered the opinion of the court:

The only question in this case arises upon the demurrer to the declaration. The action is upon four promissory notes of the defendants, and the declaration contains the usual averments according to the established precedents in such cases, but does not aver that the notes were stamped as required by the Act of Congress, either at their date or at any subsequent time. The demurrer is general, that the declaration does not set forth facts sufficient in law to constitute a good cause of action; but the omission of an averment, in the particular mentioned, constitutes the special ground of objection presented in the brief of counsel.

To the objection there are several answers. In the first place, the Act of Congress which requires promissory notes and other instruments to be stamped, only declares that they "shall be deemed invalid and of no effect" when the stamp is omitted "with intent to evade the provisions" of the Act—that is, with intent to defraud the government of the stamp duty. It is a fraudulent and not an accidental omission at which the penalty of the statute is levied. Such fraudulent omission, if available at all to the maker of the note, can only be set up by special plea or urged on the trial. It cannot be taken advantage of on demurrer. See Act of July 18, 1866, amending Internal Revenue Act of 1864, sec. 158; 14 Stat. at L., 142.

In the second place, if a stamp were essential to the validity of paper of this kind, the averment in the declaration that the defendants had made and delivered to the plaintiff their promissory notes, would imply that the instruments were at the time in the form and condition required by law. It has been held that in a declaration upon a contract, some memorandum of which, under the Statute of Frauds, must be in writing, a compliance with the requisition of the statute is implied in the averment that the contract was made, and that such compliance need not be specifically stated, although it must be proved if denied by the defendant. So in this case; the existence of a stamp upon the notes, as in the case stated, the existence of a writing, is a matter of evidence and not of pleading. 1 Chit. Pl., 804.

In the third place, the filing of a plea to the merits after the demurrer was overruled, operated as a waiver of the demurrer. The pleading was thus abandoned, and ceased thenceforth to be a part of the record. *Clearwater v. Meredith*, 1 Wall., 42 [68 U. S., XVII., 609]; *Aurora v. West* [ante, 42]; *Young v. Martin* [ante, 418]; *Brown v. R. R. Co.*, 18 N. Y., 495.

The defense is without merit, and the writ of error appears to us to have been prosecuted merely for delay.

The judgment will, therefore, be affirmed with ten per cent. damages.

Cited—14 Wall., 374; 7 Sawy., 226, 331; 17 Minn., 322; 30 Ohio, 522; 7 Am. Rep., 736 (45 Miss., 499); 7 Am. Rep., 499 (105 Mass., 51).

LEWIS TAPPAN, *Piff. in Err.*,

v.

JOHN BEARDSLEY ET AL.

(See S. C., 10 Wall., 427-436.)

Record, not evidence as against one not a party—only against parties and privies.

The record of a suit is not evidence in another suit against one who is not a party to it.

Depositions in chancery can only be read in evidence in another action when the bill shows that the cause was against the same parties, or those claiming in privity with them.

[No. 84.]

Argued Dec. 16, 1870. Decided Jan. 9, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

Suit for libel was brought in the court below, by the defendants in error. Judgment having been given in their favor, the defendant in that court sued out this writ of error.

A sufficient statement of the case appears in the opinion of the court.

Messrs. Charles O'Connor and Wm. Allen Butler, for plaintiff in error:

The record of the second suit for divorce, in the case of *Mary Beardsley* against *John Beardsley*, was improperly received in evidence.

1. If this record, to which the defendant was neither a party nor privy, was admissible for any purpose against him, it was only so much thereof as showed the nature of the suit and the time of its commencement.

2. But it was wholly irrelevant and inadmissible because, as appeared on its face, the suit mentioned therein was not commenced until Mar. 20, 1849—long after the publication of the alleged libels, on which the present action is founded.

3. The answer of *John Beardsley*, as appears on the face of the record, was not filed until May 8, 1849, which was after the commencement of the present action.

4. The said answer contains various scandalous allegations against the defendant, wholly irrelevant to the suit in which it was filed, and the reading thereof against the defendant on the trial of the present action, was in the highest degree unjust.

Messrs. T. W. Bartley, F. P. Stanton, Jos. Casey and P. Phillips, for defendants in error:

The record and proceedings in the divorce case were evidence to show that the application for divorce by the wife of *John Beardsley* was without cause, and resulted from the unfortunate disposition and partial insanity of the lady, and not from any fault in his conduct or character as a man.

In an action for libel or slander, the plaintiff, in order to establish the malicious intention, may prove the falsity of the defamatory statement, and the means which the defendant had of knowing its falsity.

2 Stark. Ev., 869; *Rogers v. Clifton*, 3 Bos. & P., 587; 3 Eng. C. L. R., 353.

Where the defendant attempts to justify the

slander by an effort to prove the truth of the words, and fails, the plaintiff on the same principle may, in rebutting, show the utter falsity of the words, and the defendant's knowledge of their falsity.

So, also, where the defendant attempts, under the general issue, to prove that the charge was a matter of common or general report in the neighborhood, the plaintiff, in rebutting, has a wide field open to him to prove the falsity and utter groundlessness of such reports, and that the defendant had the means of knowing that they were false and groundless.

Mr. Justice Miller delivered the opinion of the court:

The defendants in error, who were plaintiffs below, recovered a verdict against the present plaintiff for the sum of \$10,000, in an action for libel in the Circuit Court for the Southern District of New York. Tappan, the defendant below, was the proprietor of what is now generally known as the Mercantile Agency, the purpose of which is to collect information of the standing, character and credit of merchants all over the country, and to communicate such information for reward to the business houses in New York, who may need it in their dealings with the former. And it was a communication made by Tappan to one of his customers concerning Beardsley & Brother that constitutes the alleged libel.

The substance of that communication was, that Beardsley & Co. had been sued; that J. Beardsley's wife was about to sue him for a divorce and alimony, in consequence of which he had put his property out of his hands; and that their store would probably be closed at once if the suit were brought.

The declaration set this out as the foundation of the action. The defendant pleaded the general issue, and gave notice under the practice in New York, of special matters to be offered in evidence. This special matter presented two defenses: 1. An attempt to bring the publication of the libelous words within the rule which protects privileged communications; and 2. An assertion of the truth of the words published.

The questions presented to us for review arise from a bill of exceptions taken on the trial, and relate to the objections taken by the defendant to the admission of certain evidence, and to the ruling of the court in instructing the jury.

In the admission of evidence we are of opinion that the court committed an error that must have contributed very largely to swell the amount of the verdict which, without such testimony, was perhaps unusually and unjustifiably large, and might possibly have been for the defendant.

The error referred to was in the introduction of the record of a suit for divorce, brought in the name of John Beardsley's wife against him in the County of Huron, State of Ohio.

The bill of exceptions states that when this record was offered in evidence on the part of the plaintiff, the counsel of defendant objected on several grounds, which were overruled; and that when plaintiff's counsel proposed to read the whole record, the counsel of defendant objected, and insisted that only so much thereof

as showed the nature of the suit and the time of the commencement thereof could be read, and especially that the answer of John Beardsley, the defendant therein, could not be read against defendant in this action; which objections were overruled, and the whole of said record was read to the jury, to which defendant's counsel excepted.

The record thus read to the jury consisted of the petition of the wife of Beardsley for divorce, the answer of Beardsley, the depositions of several witnesses taken by Beardsley in that suit, and the order of the court dismissing the bill. The influence of this record on the verdict of the jury will be at once understood by a slight reference to its contents. It seems that the suit was commenced some four or five months after the alleged publication of the libelous matter for which this suit was brought, and some time after its commencement. Beardsley, in his answer, alleged that the suit was not instituted by his wife or for her benefit, but by Tappan, and by counsel employed by him, for the sole purpose of making good the slander which he had published against Beardsley on that subject.

The testimony of S. F. Taylor, who was the attorney that brought the divorce suit, is also a part of the record so read, and having been taken by Beardsley is as artfully contrived as it could possibly be made, to confirm the truth of Beardsley's answer, that the suit was brought at Tappan's request without the authority of the nominal plaintiff; and all this is confirmed by his final appearance and dismissal of the suit, for want of prosecution.

In short, no one can read that record and believe it without being convinced that Tappan, having slandered Beardsley, and being called into account for it, entered into a still more disgraceful conspiracy to establish the truth of what he had said by using the name of Beardsley's wife in a suit against him for divorce without her authority, and without any shadow of justice.

The effect of this in aggravating the damages to be recovered is too plain to require comment. And yet Tappan was no party to that suit; had no right to control or influence the making of that record; could not cross examine the witnesses, all of whom were Beardsley's, nor take any exceptions to or contradict Beardsley's answer. It is difficult to conceive upon what principle the record of that suit was admissible for any purpose whatever in the trial of this one. If the defendant had introduced any evidence to show that a suit for divorce had actually been brought, in support of his statement that there was a rumor that it would be done, then it might have been competent for the plaintiff to show when it was instituted, as some evidence that no such rumor existed when Tappan so reported. But it does not appear that Tappan attempted to show in this suit that the divorce suit had ever been instituted. All that comes from the plaintiff; and it is difficult to see what relevancy it had to any issue before the court. If, however, a state of case could possibly have existed to justify the introduction by the defendant of that record for that purpose, it could be used for no other, and the answer of Beardsley and the depositions of the witnesses were not only irrelevant to the

issue then being tried, but they were forbidden by other well established rules of evidence.

1. Beardsley's answer was not sworn to, and was made with a probable view to its use against Tappan in this suit, and was made when Tappan could neither contradict his statements nor cross examine him.

2. As to Taylor's deposition, the fact that he was a competent witness in the present suit and could have been used by the plaintiff as such, is sufficient to exclude his deposition taken in another suit, even if Tappan had been a party to that suit. Still more forcible is the objection when the deposition was taken in a suit to which Tappan was no party, and on an occasion of which he had no notice, and when he had no right to cross-examine him or to controvert the truth of what he said. *Rutherford v. Geddes*, 4 Wall., 220 [71 U. S., XVIII., 343].

Two inconsistent reasons are given in support of the ruling of the court on this point.

It is said first that the depositions do not constitute a part of the record of the divorce suit, and were, therefore, not read in the present suit. And it is true that such depositions not read on the trial of the divorce suit could in no just sense constitute a part of the record. But it is clear to us from examining the bill of exceptions of the present case that the depositions were read to the jury as a part of the record of the divorce suit, and were so read against the objection of the defendant.

It is said, on the other hand, that they should have been read because they were a part of the record, and that when one part of a record of a suit is read, all must be read.

When one party introduces and reads from such a record that which suits his purpose, the other party may read for his own benefit all that relates to that subject, or require the party introducing the record to do so. But we know of no rule which, because a party may use a record or part of it to establish a fact that can only be established by record, authorizes the same party to use everything else which may be found in the record, however irrelevant to the issue on trial, or however it may violate other well established principles of the law of evidence.

It is possible that the plaintiff had a right to show that the divorce suit against him was brought long after the publication of the slander and after Tappan had been sued for it; and that for this purpose the record was admissible. But this by no means establishes his right to bring before the jury the entire merits of the divorce suit, the depositions taken in that suit which bear hardly upon Tappan, who was no party to it, and the answer of Beardsley making charges against Tappan, when the latter could make no reply to them.

Upon this question the case of *The Ins. Co. v. Hodgson*, 6 Cranch, 206; *Rutherford v. Geddes* [supra] and *Laybourn v. Crisp*, 4 Mees. & W., 820, are directly in point; and the authorities cited by Mr. Taylor in his work on evidence, section 1413, fully sustain the proposition laid down by him, that depositions in chancery can only be read when the bill shows that the cause was against the same parties, or those claiming in privity with them.

For this error the judgment of the Circuit Court is reversed, and a new trial awarded.

V. P. CORBETT, *Plff. in Err.*,

v.

WILLIAM D. NUTT, TRUSTEE, ETC.

(See S. C., 10 Wall., 464-481.)

Construction of statutes authorizing redemption from tax sales—decree—redemption of land—Act to suppress insurrection.

Courts should give to statutes authorizing redemption from tax sales, a construction favorable to owners.

The Supreme Court of the District of Columbia could not, by the mere force of its decree, transfer the title to land lying without its jurisdiction, from the party in whom it was vested.

A person having charge of the estate of the owners, who were laboring under disability by reason of their coverture, may make the redemption of their lands under the Act of June 7, 1862.

The additional oath imposed by the Act of 1865 is required only of owners seeking in person to redeem.

Under the Act of July 17, 1862, entitled "An Act to Suppress Insurrection," it is only as against the United States that the sales, transfers and conveyances of property liable to seizure are null and void.

They were null or void as against the belligerent or sovereign right of the United States to appropriate and use the property for the purpose designated, but in no other respect and not as against any other party.

Under the Act of March 3, 1865, the validity of the redemption from taxes does not depend upon repayment to the purchaser.

[No. 41.]

Argued Dec. 21, 1870. Decided Jan. 9, 1871.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

The defendant in error brought suit in the Circuit Court of Alexandria Co., Va., to recover certain lands. Judgment having been given in said court for the plaintiff, the defendant sued out a writ of error to the Supreme Court of Appeals of Va., by which the said judgment was affirmed; whereupon the defendant sued out a writ of error to this court.

The case is further stated by the court.

Messrs. Geo. Wm. Brent and C. W. Wattles, for plaintiff in error:

The redemption by J. D. McPherson was illegal. He was a stranger to the land and had no right to interfere. Nutt, the defendant in error, was also a stranger to the redemption and can claim no advantage from it.

McPherson had no interest in the land. The decree of the court of the District of Columbia, removing Nutt and substituting McPherson in his stead, could not deprive Nutt of his title and vest it in McPherson. It could not operate on lands in another jurisdiction.

1 Rob., N. P., 386, 343; Story, Const., 344, 345; *Watkins v. Holman*, 16 Pet., 25.

Two oaths were required of the person redeeming. These oaths were not taken by McPherson. He alone took the oath to support the Constitution.

Emily Featherstonough and Marion Young made oath that they had not taken part in the rebellion, but took no oath to support the Constitution. The oath of these ladies cannot help McPherson; and if, as supposed by the court below, these ladies could redeem in their own person, the oath of McPherson cannot supply the defect in their oaths.

When the late civil war was flagrant, Mrs. Hunter and Nutt were residents of Alexandria

County; Nutt had been the holder of an office of trust under the United States. They abandoned their homes in the fall of 1861, and Nutt accepted an office under the Confederate Government.

The devise is inoperative under the provisions of the Act of Congress of July 17, 1862.

Stat. at L. for 1861-2, p. 589.

The 5th section of this Act provides that, "To insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, etc.," of certain persons thereafter named.

The fourth clause of the section describes one class as follows: "If any person having held an office of honor, trust or profit in the United States, shall hereafter hold an office in the so called Confederate States of America, etc., * * * All sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

The 6th section of said Act is as follows: "That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this Act, being engaged in armed rebellion against the United States, or aiding or abetting such rebellion, shall not within sixty days after public warning and Proclamation duly given and made by the President of the United States, cease to aid, countenance and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof. And all sales, transfers or conveyances of any such property after the expiration of the said sixty days from the date of such warning and Proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property or any of it, to allege and prove that he is one of the persons described in this section."

The sections annul all conveyances and transfers by persons enumerated in the Act. It is said, however, that no one except the United States can object. This is a mistake. The 5th and 6th sections provide that objection may be taken in any suit by the persons embraced or enumerated in the said sections. Sections 5 and 6 prevented Mrs. Hunter from conveying any estate, and Nutt from accepting the same.

This point we think settled in *McKee v. U. S.* (ante, 329).

Messrs. S. F. Beach, J. M. Carlisle, J. D. McPherson and D. L. Smoot, for defendant in error:

It is provided by the Act of Mar. 8, 1865, sec. 7, that the owner shall prove his loyalty, to the satisfaction of the Tax Commissioners. 12 Stat. at L., 502.

The commissioners being the officers charged with the execution of the law, it is presumed that their acts are valid until the contrary be shown.

1 Phil. Ev., 450; C. & H. Notes, 296; *Chapin* See 10 WALL.

v. Curtienius, 15 Ill., 427; *Patterson v. Brindle*, 9 Watts, 100; *Gault's Appeal*, 83 Pa., 98.

The Act of Congress does not say that the trustee entitled to redeem shall be the trustee of the whole estate of the owner, or trustee of the particular property sold. It is sufficient if he be trustee of any estate or any funds of the owner which he can justly apply to that purpose.

Dubois v. Hepburn, 10 Pet., 22.

Any person in the capacity of next friend of a married woman, might redeem her land under the Act; a married woman might own real estate, and yet have no trustees; it might be held adversely and no one have charge of it for her. It could not have been intended by Congress to cut off such an owner from all rights of redemption.

But McPherson was the trustee of their estate, appointed by decree of the Supreme Court of the District of Columbia, and the owners were proved, to the satisfaction of the commissioners, to be loyal persons and under a legal disability.

The 6th section of the Act referred to declares, that if any person, being engaged in armed rebellion, or in aiding such rebellion, shall not within sixty days after Proclamation return to his allegiance, the estate of such person shall be subject to seizure; and it renders all transfers of any such property after said sixty days, null and void.

If, then, the transfer of this property was void under this section, it must have been because Mrs. Hunter was aiding and abetting the rebellion, and did not return to her allegiance after the Proclamation. Whether Nutt was aiding the rebellion, has nothing to do with the case. It was not his property that was transferred.

Now, the case made in the instruction does not bring the case of Mrs. Hunter within the Act. It instructs the jury, that if they should find that Mrs. Hunter went voluntarily within the Confederate lines, and was there when she died, then she could not transfer her property by her will; in other words, it asks the court to say that merely going into the Confederate lines and remaining there, is equivalent in law to aiding and abetting the rebellion, and not returning to allegiance after the Proclamation.

This proposition is utterly untenable.

Moreover, the prohibition to transfers applies only in respect to land in the predicament described by the statute and not in respect to any general incapacity of the person. *Bigelow v. Forrest* (ante, 696).

It is land which the President has caused to be seized under the Act, with a view to its confiscation. As to such land and such only, all transfers are void.

Mr. Justice Field delivered the opinion of the court:

Several questions were raised and elaborately examined in this case in the courts of Virginia, both in the lower courts and in the Court of Appeals of the State, which are not open for consideration here. The only questions which we can consider, under the 25th section of the Judiciary Act, arise upon the ruling of the court admitting the certificate of redemption issued to McPherson, and the refusal to give certain instructions prayed by the defendant.

The action was brought to recover a tract of land consisting of sixty acres, situated in the County of Alexandria, in the State of Virginia. The plaintiff claimed title under one Louisa Hunter, who died seised in fee of the land in April, 1863, leaving a last will and testament, by which she devised the premises to the plaintiff, in trust for Marion Young, her adopted daughter, and Emily Featherstonaugh, her niece, both of whom were then and still are married women.

Prior to the late civil war, Mrs. Hunter resided in the County of Alexandria, in Virginia; but after the occupation of Alexandria by the forces of the United States, she went within the Confederate lines, and there remained until her death.

Immediately preceding the commencement of the war, the plaintiff, Nutt, held an office under the Government of the United States. This he resigned in February, 1861, and in September following, went within the Confederate lines and took office under the Confederate Government, which he held at the time of Mrs. Hunter's death.

On the 29th of February, 1864, the land in controversy was sold for taxes due the United States, under the Act of Congress of June 7th, 1862, providing for the collection of direct taxes in insurrectionary districts within the United States; and at the sale the defendant became the purchaser, received the commissioner's certificate of sale, and took possession of the premises under the title thus acquired.

In July, 1865, the *cestuis que trust*, under the will of Mrs. Hunter, filed a bill in the Supreme Court of the District of Columbia, to obtain the appointment of a new trustee in place of the one named in the will, setting forth that the testatrix had left a large and valuable estate, the greater part of which lay within the district; that the settlement of the estate was impossible, by the terms of the will, without the intervention of the trustee named therein, or another in his stead, invested with his powers and duties; and that they were informed that the trustee named declined to qualify, or to accept the trusts reposed in him.

Nutt appeared to the suit and answered the bill, admitting that he was the person named in the will, and that he had declined to accept the trusts thereunder. The court thereupon, at the hearing, adjudged that the complainants, the *cestuis que trust*, were entitled to the relief prayed, and by its decree appointed John D. McPherson trustee, in the place and with the powers and duties of the trustee named in the will, first requiring of him the execution of a bond in the penal sum of \$10,000, conditioned for the faithful performance of his trust.

On the 10th of February, 1866, McPherson, as trustee, appeared before the Tax Commissioners and paid to them the several sums required for the purpose of effecting a redemption of the property from the tax sale, and received from them a certificate of redemption, stating the payments made by him, and that he had taken an oath to support the Constitution of the United States; and that Marion Young and Emily Featherstonaugh, owners of the property, and married women at the time of the sale and still under the same disability, had sworn that they had not taken part with the insurgents

in the rebellion, or in any way given them aid or comfort, and had satisfied the commissioners that the oath was true.

This certificate was admitted in evidence against the objection of the defendant that the redemption was illegal, and did not sustain the claim of the plaintiff. The point of the objection was, that McPherson was a stranger to the title, and in consequence had no right to interfere for the redemption of the land.

The 7th section of the Act of June 7th, 1862, for the collection of direct taxes in insurrectionary districts, after directing the advertisement and sale of lands, upon which taxes due the United States remained unpaid, after a designated period, contains two clauses relating to the redemption of the land from such sale. 12 Stat. at L., 423, 424. The first clause provides that the owner of the land, or any loyal person of the United States having any valid lien upon or interest in the land, may at any time, within sixty days after the sale, appear before the Board of tax commissioners, in proper person, and redeem the land from sale upon paying the amount of the tax and penalty, with the interest and expenses prescribed, and taking an oath, if a citizen, to support the Constitution of the United States. The second clause provides that if the owner of the land sold be a minor, a non-resident alien, a loyal citizen beyond the seas, a person of unsound mind, or under a legal disability, the guardian, trustee or other person having charge of the person or estate of such owner, may, in the same manner, and with like effect, redeem the land at any time within two years after the sale.

By these provisions persons entitled to make redemption are divided into two classes. The first class embraces persons who are residents in the country, and are not laboring under any legal disability. They may well be supposed to have had personal knowledge of the assessment of the taxes and of the sale made, and for this reason, it may be inferred, their privilege of redemption was limited by Congress within the narrow period prescribed.

The second class embraces loyal citizens beyond the seas, non-resident aliens and persons laboring under some legal disability, to whom the reason for the limitation prescribed to the first class was not applicable. To those absent from the country, personal knowledge, either of the assessment or sale, could not be justly imputed; and these under disability, if possessed of the knowledge, might reasonably expect that the matter would receive the attention of the parties intrusted with the charge of the property. Congress, therefore, gave to the persons of this class a much more extended period within which to exercise the privilege of redemption, and allowed the redemption to be made by "the guardian, trustee or other person having charge of the person or estate" of the owner. The position of the persons composing this class, absent from the country or under legal disability, was such that their property would, in the ordinary course of things, be in the "charge" of others; but, lest the latter might, from any cause, neglect the interests of the owners, the period of redemption was prolonged to two years. It was for the benefit of the owners of the property, that they might not suffer from the remissness or

faithlessness of their guardians, trustees or agents, that the privilege was thus extended, and to secure that benefit the Act should be liberally construed. It is the general rule of courts to give to statutes authorizing redemption from tax sales a construction favorable to owners, when they provide, as in the present case, full indemnity to the purchaser, and impose a penalty upon the delinquent; *Dubois v. Hepburn*, 10 Pet., 22.

In this case it appears to be conceded that the Supreme Court of the District of Columbia exceeded its authority in appointing McPherson trustee, in place of Nutt, of the land in Virginia. That court could not, by the mere force of its decree, transfer the title to land lying without its jurisdiction from the party in whom it was vested by the will of Mrs. Hunter. A court of equity acting upon the person of a defendant may control the disposition of real property belonging to him situated in another jurisdiction, and even in a foreign country. It may decree a conveyance and enforce its execution by process against the defendant, but neither its decree nor any conveyance under it, except by the party in whom the title is vested, is of any efficacy beyond the jurisdiction of the court. This is familiar law, and was declared by this court in *Walkins v. Holman*, 16 Pet., 57, the court observing that "no principle was better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the State where the land is situated."

McPherson was not, therefore, legally trustee of the property in Virginia, and if his right to interpose for the redemption depended upon the possession of the legal title, his action might be treated as that of a stranger to the land. But the absolute possession of such title by him was not essential under the circumstances. He regarded himself as trustee of the property. The *cestuis que trust* so regarded him. He professedly acted in their behalf and for their interests. He was apparently, from the decree of the Supreme Court of the District, clothed with the legal title. The commissioners treated him as a person entitled to make the redemption. They were not obliged to inquire into the validity of the decree. They were not expected to enter upon investigations of title any further than was necessary to prevent the impertinent intermeddling of strangers. It was sufficient for the commissioners to allow the redemption, when they found that the party offering to redeem furnished *prima facie* evidence of possessing the character which entitled him under the statute to make the redemption.

The trustee named in the will not having accepted the trust reposed in him when the decree of the Supreme Court of the District was made, it is reasonable to suppose, from the subsequent conduct of McPherson, that he immediately took actual charge of the estate for the *cestuis que trust*, and was in such charge when the redemption was made. If such were the case, and we think there is little doubt of it, McPherson was, by the very words of the statute, authorized, without regard to the validity of the decree, as a person "having charge" of the estate of the owners, who were laboring under disability by reason of their coverture, to make the redemption; although from the ineffectual parol dis-

claimer of his trust by Nutt, the legal title may have remained in the latter which required the present action for the recovery of the property to be brought in his name.

It is further objected that, assuming that McPherson was entitled to redeem, the redemption was ineffectual because he did not take the oath required by the 7th section of the amendatory Act of March 3d, 1865, which declares "That no owner shall be entitled to redeem unless, in addition to the oath prescribed by existing laws, he shall swear that he has not taken part with the insurgents in the present rebellion, or any way given them aid or comfort, and shall satisfy the Board of commissioners that the said oath is true." 12 Stat. at L., 602.

But the objection is untenable. McPherson did not redeem as owner, but as trustee of the owners, or as a person "having charge" of their property. The Act of 1862 distinguishes between owners appearing in their proper persons and redeeming, and owners beyond the seas or laboring under some legal disability and redeeming through trustees, guardians, or persons having charge of the property. 12 Stat. at L., 423, 424. It requires—both of the owners redeeming in person, and of the trustees, guardians and agents redeeming for others—an oath to support the Constitution of the United States. It specifies the taking of the oath as one of the terms on which the redemption can be made by owners and loyal persons having a lien upon or interest in the property sold, when appearing in person before the commissioners. And it subsequently authorizes a redemption by trustees, guardians, and parties acting for others, "in the manner above provided;" that is, by making the like payments and taking a similar oath. But the additional oath imposed by the Act of 1865 is, in our judgment, required only of owners seeking in person to redeem. It declares that "no owner shall be entitled to redeem" unless he take the additional oath. If the requirement extended also to owners beyond the seas or laboring under legal disability, it could not in many cases be complied with, and the beneficial object of the Act, which was to secure to them the right of redemption, would be defeated.

We have not overlooked the fact that, in the present case, the certificate of redemption states that the additional oath was taken by the owners. This circumstance is not entitled to weight, because the owners do not themselves make the redemption; and if they could be themselves considered as redemptioners, they failed to take the oath to support the Constitution required by the Act of 1862.

We proceed to consider the prayers for instructions presented by the defendant and refused by the court. The first of these prayers was as follows:

"If the jury shall believe from the evidence that Wm. D. Nutt, the plaintiff, who sues as trustee, held a position under the Government of the United States, and resigned said office and went voluntarily within the lines of the Confederate States, and accepted office under the Confederate Government, and held said office at the time of the death of the testatrix; and that the said Louisa Hunter was a resident of the County of Alexandria at the time of the breaking out of the civil war, and after its

breaking out went voluntarily into the Confederate lines and resided therein up to the time of her death; and that the premises in the summons described were at all times in the military lines and under the jurisdiction of the United States; then, that said devise to the plaintiff was inoperative to pass or transfer any title to him, and he cannot, therefore, recover in this action."

The court was thus requested to declare, in effect, that the voluntary residence of the testatrix within the Confederate lines incapacitated her from making a last will and testament; and the resignation by the plaintiff of an office under the United States, and acceptance of an office under the Confederate Government incapacitated him from acting as trustee under her will, and taking the devise in that capacity.

The object of the instruction prayed, says the defendant in his petition to the Court of Appeals of Virginia, was to raise the question as to the effect and meaning of the 6th section of the Act of Congress, passed on the 17th of July, 1862, entitled "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for other purposes."

The previous section of the Act provides that, "To insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects of the persons" thereafter named, "and to apply and use the same, and the proceeds thereof, for the support of the army of the United States." 12 Stat. at L., 590.

The section then enumerates six classes of persons whose property is thus made subject to seizure. The fourth class embraces persons "who, having held an office of honor, trust or profit under the United States, shall thereafter hold office in the so called Confederate States." The section concludes by declaring that "All sales, transfers or conveyances of any such property shall be null and void."

The 6th section provides that if any person within any State or Territory of the United States, other than those named in the previous section, "being engaged in armed rebellion against the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and Proclamation duly given and made by the President of the United States, cease to aid, countenance and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof.

And all sales, transfers or conveyances of any such property, after the expiration of the said sixty days from the date of such warning and Proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

The 7th section of the Act directs the proceedings to be instituted for the condemnation and sale of the property seized.

If the devise of Mrs. Hunter can be brought

within the language of this last section, it must be because a devise is embraced within the terms "sales, transfers and conveyances;" and because her "aiding and abetting" the rebellion, and her refusal to return to her allegiance to the United States, are legitimate and necessary inferences from her voluntary and continued residence within the Confederate lines, for there is no direct evidence on either of these latter points, nor any evidence tending to establish either of them except such voluntary residence. Assuming, however, that a devise is within the "sales, transfers and conveyances" invalidated by the Act, and that Mrs. Hunter is within the category of persons for whom the warning and Proclamation of the President were intended, we are of the opinion that the invalidity declared is limited and not absolute; that it is only as against the United States that the "sales, transfers and conveyances" of property liable to seizure are null and void; and that they are not void as between private persons, or against any other party than the United States.

The object of the provisions cited is manifest. It is declared, in express terms, to insure the speedy termination of the existing rebellion. The confiscation of the property of persons engaged in the rebellion, and the appropriation of it, or its proceeds, to the support of the army of the United States, were supposed to have a tendency to advance that object. The seizure of the property of particularly designated classes, and of others engaged in the rebellion, or aiding and abetting it, who should not heed the public warning and Proclamation of the President was therefore directed, as also the institution of proceedings required in the courts of the United States for its condemnation and sale.

It was to prevent these provisions from being evaded by the parties whose property was liable to seizure that "sales, transfers and conveyances" of the property were declared invalid. They were null and void as against the belligerent or sovereign right of the United States to appropriate and use the property for the purpose designated, but in no other respect and not as against any other party. Neither the object sought nor the language of the Act requires any greater extension of the terms used. The United States were the only party who could institute the proceedings for condemnation; the offense for which such condemnation was decreed was against the United States, and the property condemned, or its proceeds, went to their sole use. They alone could, therefore, be affected by the sales.

Any other construction would impute to the United States a severity in their legislation entirely foreign to their history. No people can exist without exchanging commodities. There must be buying and selling and exchanging in every community, or the greater part of its inhabitants would have neither food nor raiment. And yet the argument of the defendant, if good for anything, goes to this extent, that by the Act of Congress "all sales, transfers and conveyances" of property of the vast numbers engaged in the late rebellion against the United States, constituting the great majority of many towns and cities and even of several States, were utterly null and void; that even the commonest transactions of exchange in the daily

life of these people were tainted with invalidity. It is difficult to conceive the misery which would follow from a legislative decree of this wide-sweeping character in any community, where its execution was conceived to be possible, or confidence was reposed in its validity.

We do not notice that part of the instruction prayed which relates to the *status* of the plaintiff as an office holder under the United States just previous to the commencement of the war, and subsequently taking office under the Confederate Government, as it was not his property, the sale of which is assailed. If he was incapable of taking the devise, it was not from his participation in the rebellion, but because the testatrix was incapable of passing her property by will under the Act of Congress, a position which we have already shown to be untenable.

The second, and the only other prayer for instruction presented by the defendant, and refused by the court, which we can take notice of, is this: "That to enable the plaintiff to recover he must show that the certificate of redemption was forwarded to the Secretary of the Treasury, and the defendant repaid his purchase money by a draft drawn on the Treasury of the United States." This prayer was based upon a misapprehension of the 7th section of the Act of Congress of March 3d, 1865 (18 Stat. at L., 503), which provides that when a redemption is made, the Board of Tax Commissioners shall certify the fact to the Secretary of the Treasury, and the Secretary shall repay the purchaser, by draft on the Treasury, the principal and interest of the purchase money; and that the purchaser shall deliver possession to the owner redeeming. These provisions only prescribe the duty both of the Secretary and purchaser when the redemption is made, but they do not make the performance of the duty of the purchaser dependent upon the previous performance of the duty resting on the Secretary. The Act was intended for the benefit of the purchaser, to enable him to obtain the repayment of the purchase money and interest thereon; but the validity of the redemption does not depend upon such repayment. That is a matter between the purchaser and the Secretary, with which the owner or redemptioner has no concern.

We find no error in the record, and the judgment of the Supreme Court of Appeals of Virginia must be, therefore, affirmed.

And it is so ordered.

Cited—95 U. S., 723; 96 U. S., 288, 308; 102 U. S., 657; 1 Flipp., 477.

JAMES CODDINGTON, *Plff. in Err.*

v.

LYMAN RICHARDSON.

(See S. C., 10 Wall., 516-518.)

Where no error appears, judgment affirmed.

Where no exceptions are taken on the trial, nor any special statement of facts is found by the court, and there is no question of law arising upon the pleadings or the trial, the judgment will be affirmed.

[No. 29.]

Argued Dec. 13, 1870. Decided Jan. 9, 1871.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

See 10 WALL.

Suit in trover, in the court below, was brought by the defendant in error, to recover for certain horses and mules. Judgment having been given in favor of the plaintiff by that court, the defendant sued out this writ of error. The case is sufficiently stated by the court.

Messrs. Ward H. Lamon, J. M. Pulmer and T. Lyle Dickey, for plaintiff in error.

Mr. Lyman Trumbull, for defendant in error:

On such a record, one is at a loss to know what there is for this court to consider. The declaration is in the usual form; all the proceedings appear to be regular, and the finding of the facts by the circuit court, like the verdict of the jury, is conclusive here; and whether the fact was rightly decided or not, according to the evidence, is not open to inquiry in this court.

18 Stat. at L., 501; *Bond v. Brown*, 12 How., 254; *Kimbrow v. Bullitt*, 22 How., 288 (63 U. S., XVI., 317); *Guild v. Frontin*, 18 How., 135 (59 U. S., XV., 290).

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the Southern District of Illinois.

The action was trover, for the recovery of the value of a number of horses and mules. A trial by jury was waived by stipulation under the statute, and such proceedings were had before the court, that a judgment was rendered for the plaintiff for \$5,000.

No exceptions were taken to the admission or rejection of evidence on the trial, nor any special statement of facts found by the court. The only statement after closing the evidence is, "and the court thereupon found the issue for the plaintiff, and assessed his damages at the sum of \$5,000."

There is no question of law arising upon the pleadings or the trial. Those attempted to be raised refer to the evidence, as embodied in the record, but which, in a trial of the facts before the court, a jury being waived, we do not look into. We look into them only when found by the court. *Flanders v. Tweed* [*ante*, 678].

Judgment affirmed.

Cited—18 Wall., 248, 250; 21 Wall., 161; 91 U. S., 133; 98 U. S., 443; 3 Dill., 108.

EX PARTE IN THE MATTER OF JAMES GRAHAM AND L. MADISON DAY, *Petitioners*.

(See S. C., 10 Wall., 541-548.)

Proceeding in confiscation—libel of review—writ of prohibition in admiralty cases.

A proceeding in confiscation under the Act of July 17th, 1862, was not a proceeding in admiralty. A libel of review of a decree in confiscation is an elongation of the original case, and necessarily of the same nature and jurisdictional character.

This court is authorized to issue writs of prohibition to the district courts, only when proceeding as courts of admiralty and, consequently, cannot issue such a writ in such a proceeding.

[No. 9. Orig.]

Argued Dec. 20, 1870. Decided Jan. 9, 1871.

PETITION for prohibition.

The history and facts of the case are sufficiently stated by the court.

Messrs. Thos. J. Durant and L. Madison Day, for petitioner:

The jurisdiction of the Supreme Court.

Act of Sep. 24, 1789, sec. 13, 1 Stat. at L., 81; same, sec. 14, pp. 81, 82; *U. S. v. Peters, District Judge*, 3 Dall., 121; *Ex parte Christy*, 3 How., 292; *Bronson v. R. R. Co.*, 1 Wall., 405 (68 U. S., XVII., 616); *Ex parte Gordon*, 1 Black, 504 (68 U. S., XVII., 184); *U. S. v. Hoffman*, 4 Wall., 158 (71 U. S., XVIII., 354); *Bains v. The James & Catherine*, Bald., 563; 3 Bl. Com., 112; Bac. Abr., tit. Prohibition; 1 Kent, Com., 300.

Mr. C. Cushing, opposing:

1. In no case is the Supreme Court authorized to issue a writ of prohibition to a district court, except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789; that is to say, where the district courts are proceeding as courts of admiralty and maritime jurisdiction.

Ex parte Gordon, 1 Black, 503 (66 U. S., XVII., 134); *Ex parte Christy*, 3 How., 322.

Compare also the following cases, namely:

U. S. v. Peters, 3 Dall., 121 (the only case reported in which prohibition has ever issued from this court); *Bronson v. R. R. Co.*, 1 Wall., 405 (68 U. S., XVII., 616); *U. S. v. Hoffman*, 4 Wall., 158 (71 U. S., XVIII., 354).

2. The proceedings, in and by which the sixteen lots of land had been condemned and sold, could not take place in the admiralty court.

Ins. Co. v. U. S., 6 Wall., 759 (73 U. S., XVIII., 879); *Armstrong's Foundry*, 6 Wall., 766 (73 U. S., XVIII., 882); *U. S. v. St. Louis Street Foundry*, 6 Wall., 770 (73 U. S., XVIII., 884); *U. S. v. Hart*, 6 Wall., 773 (73 U. S., XVIII., 914).

Mr. Justice Swayne delivered the opinion of the court:

A rule was granted by this court that the district judge show cause why a writ of prohibition should not issue agreeably to the prayer of the petitioners.

The petition upon which the rule was founded discloses, so far as it is necessary to state them, the following facts:

The United States instituted in the District Court of the United States for the Eastern District of Louisiana, under the Act of Congress approved July 17th, 1862, 12 Stat. at L., 589, entitled "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for other purposes," proceedings in confiscation against sixteen lots of ground, the property of Duncan Kenner. The lots were condemned as forfeited to the United States and ordered to be sold by the Marshal. This was accordingly done. Graham and Day became the purchasers of certain portions of the property. They complied with the conditions of the sale and received deeds from the Marshal. The court ordered the proceeds of the sale, less the costs, to be paid over to the United States. Subsequently, on the 9th of February, 1869, Kenner, as is alleged for the purpose of clouding the

title of the purchasers, and of annoying and harassing them, filed in said court what purports to be a libel of review, wherein he prayed that the decree in confiscation condemning the property and ordering it to be sold, should be reviewed and reversed for errors of law apparent on the face of the record.

On the 29th November, 1869, for the same purposes as is alleged, he filed, by leave of the court, an amendment to his original libel of review, whereby and by process duly served upon them, Graham and Day were made parties to the proceeding.

In addition to the prayer of the original libel, the amendment prays that they should render an account of the rents and profits of the property while in their possession, and that they should be required respectively to pay to Kenner such sums as should be found due to him.

The district judge, it is alleged, holds that the proceeding in confiscation was a proceeding in admiralty and that it was, therefore, competent for him to entertain the libel of review and to exercise the jurisdiction which it invoked.

This jurisdiction is denied by the petitioners and a remedy is prayed for by a writ of prohibition.

The district judge has filed an answer to the rule, but the view which we take of the case renders its consideration unnecessary.

Our jurisdiction is specific and limited. It is defined by the Constitution and laws of the United States. We can exercise none but what is conferred by one or the other.

The 13th section of the Judiciary Act of 1789 (1 Stat. at L., 81), authorizes this court "to issue writs of prohibition to the district courts when proceeding as courts of admiralty."

The question whether the district court, in entertaining the libel of review, is proceeding as a court of admiralty, meets us, therefore, at the threshold of the case before us. It is only in such cases that it is competent for this court to issue the writ. *U. S. v. Peters*, 3 Dall., 121; *Ex parte Christy*, 3 How., 292. The 7th section of the Act of 1862 (12 Stat. at L., 589), under which the decree sought to be reviewed was made, provides that proceedings against the property seized shall be *in rem*, and "shall conform as nearly as may be to proceedings in admiralty or in revenue cases." It is too clear to admit of doubt that the original case was not one in admiralty, and it is equally clear that the proceeding sought to be prohibited is not within that category. *The Union Ins. Co. v. U. S.*, 6 Wall., 759 [73 U. S., XVIII., 879]; *U. S. v. Armstrong's Foundry*, 6 Wall., 766 [73 U. S., XVIII., 882]; *U. S. v. Hart*, 6 Wall., 770 [73 U. S., XVIII., 914]; *The Sarah*, 8 Wheat., 891.

The supplemental case is an elongation of the original case, and necessarily of the same nature and jurisdictional character.

These conclusions are fatal to the case of the petitioners. If the district court shall err in the proceedings upon the libel of review, the remedy of the petitioners will be by a writ of error from the circuit to the district court, and, if need be, finally, by a like writ from this court to the circuit court.

The rule is discharged, and the motion denied.

THE STEAMER COTTON PLANT AND
CARGO, DAVID O. LAWS AND MICH-
AEL McMAHON, Claimants, *Appts.*,

UNITED STATES.

(See S. C., "*The Cotton Plant*," 10 Wall., 577-582.)

Inland capture, what is—not maritime prize.

A capture of a steamer and her cargo of cotton, within the State of North Carolina on the Roanoke River, and about one hundred thirty miles above its mouth, made by a naval force detached from two steamers, is an inland capture, though made upon a river which empties into an arm of the sea. Under the 7th section of the Act of July 2, 1864, the property thus captured and condemned cannot be regarded as maritime prize and subject to condemnation as such.

[No. 40.]

Argued Dec. 20, 1870. Decided Jan. 9, 1871.

APPEAL from the District Court of the United States for the Eastern District of Pennsylvania.

The libel in this case was filed in the court below, for the condemnation of the steamer Cotton Plant as prize of war. A decree of condemnation having been entered in that court, the claimants of the steamer took an appeal to this court.

The case is sufficiently stated by the court.

Messrs. Wm. L. Hirst, W. H. Lamon and T. R. Elcock, for appellants:

The Act of July 2, 1864 (2 Bright., 288, p. 47), provides that "No property seized or taken upon any of the inland waters of the United States, by the naval forces thereof, shall be regarded as maritime prize; but all property so taken or seized shall be promptly delivered to the proper officers of the court, or as provided in this Act and in the said Act approved March 12, 1863."

Webster defines "inland" to be "remote from the sea."

The court below had no jurisdiction. The property seized in this case should have been promptly handed over to the agent of the Secretary of the Treasury.

The place of capture and the State of North Carolina were occupied and controlled by national troops. The armies of Lee and Johnson had surrendered and dispersed. Generals Grant and Sherman had complete and permanent control of the State, and it was so proclaimed. General Schofield, in command of the department, from Raleigh, Apr. 29, announces that "Hostilities within this State have definitely ceased;" that "All are invited to resume their industrial pursuits;" and that "Between the Government of the United States and the people of North Carolina there is peace."

The President, Apr. 29, proclaims that "All restrictions upon internal, domestic and coast-wise commercial intercourse be discontinued in such parts of the States of North Carolina, Virginia, etc., as shall be embraced in the lines of the military occupation," etc.

The claimant acted upon these Proclamations; they were protectors and guaranties, not snares to decoy property into prize courts or into prize money.

Messrs. Amos T. Akerman, Atty-Gen., C. M. Hill, Asst. Atty-Gen., and T. Hubley Ashton, for appellees.

See 10 WALL.

Mr. Justice Strong delivered the opinion of the court:

Whether the steamer Cotton Plant and her cargo of cotton were subject to lawful capture when seized, is a question that need not now be considered; for if it be conceded that they were, we are still of opinion that they were not liable to condemnation as maritime prize. The capture was made within the State of North Carolina, on the Roanoke River, and about one hundred and thirty miles above its mouth. It was made by a naval force detached from two steamers that had proceeded up the river from Albemarle Sound, one about eighty, and the other about one hundred miles, where they stopped, in consequence of the crookedness of the stream and apprehensions of low water. A picket launch, with a crew of six men, and two other boats' crews, were then sent forward, and they effected the capture. It was, therefore, an inland capture, though made upon a river which empties into an arm of the sea, and it was at a point where ordinary vessels of war could not safely go. There was nothing in the situation of the property that required peculiarly a naval force or maritime service to effect its capture. The seizure might as well have been made by a detachment from the army as by one from the navy. It appears to us, therefore, that in view of the legislation of Congress, the property cannot be regarded as a maritime prize. By the 7th section of the Act of July 2d, 1864 (13 Stat. at L., 377), it was enacted "That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof, shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts (or) as provided in this Act, and in the said Act approved March twelve, eighteen hundred and sixty-three." The language of this section is very comprehensive. It embraces all property seized or taken by the naval forces upon any of the inland waters of the United States. It would be difficult to give any reason for holding that the part of the Roanoke River upon which The Cotton Plant was seized is not described by the phrase "any of the inland waters of the United States," as understood by Congress. The river is wholly inland. It is true that it discharges its waters into Albemarle Sound, and that it is accessible directly from the ocean. But, in speaking of inland waters, Congress must have intended waters within land, indeed, yet waters where a naval force can go, and where naval captures could be made. And it is obvious that other waters than those of the great lakes were contemplated and designed to be included. The Act was passed during the war of the rebellion, and it was part of a system devised for securing captured and abandoned property in States and districts declared to be in insurrection by the President's Proclamation of July 1, 1862. There was no war upon the lakes, and they were not within insurrectionary districts. If, therefore, the Act does not apply to rivers, and to rivers accessible from the sea, upon which naval captures could be made, it could never have had any practical effect. But if it applies to captures upon rivers, what reason can there be for confining its operation to seizures by the naval forces upon

rivers that run directly into the sea? The Act speaks of captures upon any of the inland waters of the United States. It makes no distinction between rivers that run directly into the sea and those that flow into others that discharge into the sea. If any distinction exists, it is purely arbitrary and judicial rather than legislative. Both classes of rivers are inland waters; equally such. Maritime service can be no more meritorious or efficient upon one than upon the other. In the absence of express legislative enactment to that effect, no satisfactory reason can be given why a vessel captured on the Red River, five miles above its junction with the Mississippi, should be turned over to the courts to be treated as captured and abandoned property under the Statutes of 1863 and 1864, which does not apply to a capture made on the Mississippi itself five hundred miles farther from the Gulf of Mexico. Congress probably anticipated, especially in view of the state of the war when the Act was passed, that most of the captures on the rivers would be made by the army, and thought it unwise to continue two modes for the disposition of the property taken.

Such being our opinion of the meaning of the 7th section of the Act of July 2d, 1864, we must hold that the property captured and condemned in this case ought not to have been regarded as maritime prize and subject to condemnation as such.

The decree of the District Court is, therefore, reversed, and the case is remanded, in accordance with the rule stated in U. S. v. Weed, 5 Wall., 62 [72 U. S., XVIII., 531], for further proceedings if the Government shall see fit to institute them.

Cited—106 U. S., 612.

RYNIER V. YATES, *Appt.*,

v.

THE CITY OF MILWAUKEE AND ALEXANDER MILLER.

(See S. C., 10 Wall., 497-507).

Riparian proprietor, rights of—nuisance—city cannot take away riparian rights.

A riparian proprietor, whose land is bounded by a navigable river, has the right of access to the navigable part of the river and the right to make a landing, wharf or pier for his own use or for the use of the public.

This riparian right is property, and is valuable, and the owner can be deprived of it only if necessary that it be taken for the public good, upon due compensation.

A municipal corporation cannot, by its mere declaration that a structure is a nuisance, subject it to removal by any persons supposed to be aggrieved, or even by the city itself.

A city cannot, by creating a mere artificial and imaginary dock line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel, by building wharves and docks to it.

[No. 51.]

Argued Dec. 21, 1870. Decided Jan. 16, 1871.

APPEAL from the Circuit Court of the United States for the District of Wisconsin.

The bill in this case was filed in the court below, by the appellant, to restrain interference by the respondents with a certain wharf. That

court having entered a decree dismissing the bill, the complainant took an appeal to this court.

The case is fully stated by the court.

Mr. Matt. H. Carpenter, for appellant:

This wharf does not obstruct the navigation of the river and, therefore, is not a nuisance. The wharf is not within one hundred and fifty feet of the navigable waters of the river in a natural state, and navigation to the wharf was only rendered possible by the excavation made by Peter Yates on his own land for that purpose.

The doctrine laid down by the Supreme Court of Wisconsin, in *Walker v. Shepherdson*, 4 Wis., 486, on the faith of which this wharf was completed was, that the lot owners on the river "May construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage, nor prevented from the use of all parts of the stream which are navigable." And this is the settled rule in the state courts of Wisconsin. This court, in *R. R. Co. v. Schermeier* [*ante*, 74] a case which involved the construction of a grant of land by Congress, held that, under the laws of Congress, the title of purchasers of land bordering upon navigable rivers was limited by the stream, while the title to lands bordering on a non-navigable stream extended to the center of the stream.

Dutton v. Strong, 1 Black, 23 (66 U. S., XVII., 29); *Ang. Tide Wat.*, 196; *Bainbridge v. Sherlock*, 29 Ind., 384; *Rice v. Ruddiman*, 10 Mich., 125; *Lorman v. Benson*, 8 Mich., 18; *Ang. High.*, sec. 58; *Cates v. Wadlington*, 1 McCord, 580; *Wadsworth v. Smith*, 11 Me., 278.

The Legislature cannot deprive the riparian owner of any of his rights, without making compensation.

Walker v. Board Pub. Works, 16 Ohio, 540; *Moor v. Veazie*, 82 Me., 843; *Bell v. Gough*, 3 Zab., 624; *Binney's case*, 2 Bland, 158; *Walker v. Shepherdson*, 4 Wis., 486.

By the common law, a nuisance can only be abated by one who suffers some special injury, not common to other persons.

Broome, Com., 250.

In regard to the abating of a public nuisance, it is laid down that if a new gate, which is a common nuisance, be erected across the public highway, any of the King's subjects passing that way may cut it down and destroy it. The cases below referred to (*Dimes v. Pelley*, 69 Eng. C. L., 276; *Bridge v. Grand Junc. R. Co.*, 8 M. & W., 244; *Davies v. Mann*, 10 M. & W., 546; *Bateman v. Bluck*, 21 L. J. Q. B., 406), however, show that to justify a private individual in abating on his own authority such a nuisance, it must appear that it does him a special injury; and he can only interfere with it as far as may be necessary to exercise his right of passing along the highway with reasonable convenience, and not because the obstruction happens to be there.

Phear, Wat., 107, republished in 27 Law Lib., sixth series, 70; *Harrouer v. Ratoon*, 87 Barb., 301; see, also, *Bridge Co. v. Smith*, 80 N. Y., 44; *Rogers v. Barker*, 81 Barb., 447; *Clark v. Syracuse*, 18 Barb., 82.

In *Dimes v. Pelley*, 15 A. & Eil. (N. S.), 276, that was an action for damage to plaintiff's wharf by defendant's vessel; the plea was, "That the wharf had been made and continued

by the plaintiff, and projected into the navigable river below low water mark, and unlawfully obstructed the navigation of part of the river, and the liege subjects could not use that part, unless the wharf were broken, as in the declaration mentioned; that the defendant had occasion to pass with the vessel over that part of the river, and in so passing did the damage, and that he managed his vessel with all skill necessary to navigate the river. The court held the plea bad, because it contained no averment that it was necessary to pass over this part of the river, or even that defendant could not conveniently navigate the river without coming in contact with the nuisance.

The Act relied upon provides, section 2:

The Common Council shall have power, by ordinance, to establish dock and wharf lines upon the banks of the Milwaukee and Menomonee Rivers, restrain and prevent encroachments upon said rivers and obstructions thereto.

They cannot, by ordinance, employ a contractor to demolish a dwelling-house supposed to encroach upon the highway; nor, under this Act, can they order the destruction of the plaintiff's property. The Legislature itself does not possess, nor can it delegate such a power. The Legislature may pass a law to provide for the punishment of any man who shall obstruct a highway; but it cannot pass a law declaring that the house of A does obstruct a highway, for that would be an exercise of judicial power.

But it is understood that the respondents will rely upon *Yates v. Judd*, 18 Wis., 118, to overthrow all the doctrine which has been considered as settled in regard to riparian ownership, both in England and in this country, for several centuries.

The answer alleged, but no proof was given under it at the trial, that defendant was in occupation of a lot on the opposite side of Point Street, and that the wharf of plaintiff made access to defendant's premises more difficult. But the answer did not allege that defendant could not, with reasonable care, go to and from his premises without interfering with this wharf. No proof whatever was offered by the defendant upon this subject, as the bill of exceptions shows.

On the trial, the plaintiff proved that the defendant took the earth from the north half of Point Street, and from the plaintiff's wharf, and deposited it upon the defendant's lot to fill it up, and that the plaintiff's wharf was, thereby, injured.

The court, there speaking of the parties who were owners of adjacent lots, says: "Neither of them can so use his land as to impair the right of the other."

The decision in that case is not an estoppel upon us.

To have this effect, two elements must exist; the subject-matter and the parties must be identical.

"When the decisions of the state court are not consistent, we do not feel bound to follow the last if it is contrary to our own convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrine, subversive of former safe precedent."

See 10 WALL.

Pease v. Peck, 18 How., 599 (59 U. S., XV., 520).

This court had first decided the very question. *Dutton v. Strong*, 1 Black, 23 (66 U. S., XVII., 29); *Georgetown v. Can. Co.*, 12 Pet., 91, and *Railroad v. Ward*, 2 Black, 485 (67 U. S., XVII., 811).

The decisions of the state court are not consistent.

Judd v. Yates is an erroneous decision, and ought not to be followed.

Such is not the law of that court.

Walker v. Shepherdson, 2 Wis., 384; S. C., 4 Wis., 486; *Barnes v. Racine*, 4 Wis., 454; *Carpenter v. Mann*, 17 Wis., 155.

It is not the law of this court.

Georgetown v. Can. Co., 12 Pet., 91; *Railroad v. Ward* (*supra*).

It is not law at all.

Broome, Com., 250; *Bridge Co. v. Smith*, 80 N. Y., 44; *Rogers v. Baker*, 31 Barb., 447; *Clark v. Syracuse*, 31 Barb., 82; *Dimes v. Petley*, 15 A. & E. (N. S.), 276; *Bridge v. R. R. Co.*, 3 Mees. & W., 244; *Davies v. Mann*, 10 Mees. & W., 546; *Mayor of Colchester v. Brooke*, 7 Q. B., 839.

The decision in the *Judd* case is not applicable to this, because the facts shown here are wholly different from the case shown in the record, upon which that court made its decision.

Messrs. E. G. Ryan and H. L. Palmer, for appellees:

Conflicting rules of decision, by different courts, affecting rights within the same jurisdiction, are an evil of great magnitude, and when applied to the tenure of land, would be an intolerable plague.

McKeen v. Delaney, 5 Cranch, 32; *Polk v. Wendall*, 9 Cranch, 98; *Elmendorf v. Taylor*, 10 Wheat., 159; *McDowell v. Peyton*, 10 Wheat., 461; *McCutchen v. Marshall*, 8 Pet., 240.

I know of no decision of this court to the contrary, relating to the title of the land. The exceptions to the general rule applying to all state statutes, stated by the court in *Pease v. Peck*, 18 How., 598 (59 U. S., XV., 520), have no application in this case. I refer generally to *Thatcher v. Powell*, 6 Wheat., 127; *Thompson v. Selden*, 20 How., 194 (61 U. S., XV., 1001); *Russell v. Ely*, 2 Black, 577 (67 U. S., XVII., 259); *Leffingwell v. Warren*, 2 Black, 608 (67 U. S., XVII., 262); *Evans v. Patterson*, 4 Wall., 230 (71 U. S., XVIII., 394); *League v. Atchison*, 6 Wall., 115 (73 U. S., XVIII., 764); *Walker v. Villavaso*, 6 Wall., 124 (78 U. S., XVIII., 853).

The rule if here applied, is conclusive of this case.

The grantor of the complainant asserted the same right to the same premises, in an action in the State Courts of Wisconsin. The decision of that case, by the Supreme Court of the State, is found in *Yates v. Judd*, 18 Wis., 118. It is conclusive on this court, under its own rule of decision.

The defense in this case fully sustained upon the doctrine of dedication; that "the premises for the injury to which the plaintiff complains, were devoted by the original proprietors to the public use as a highway by water and, consequently, that the grading, filling and other works of the plaintiff within the line of such highway, by which it is blocked up and destroyed, were a public nuisance."

It is not inconsistent with the principle of dedication on which *Yates v. Judd* rests, that the riparian owner takes to the center of the river, and that the public cannot, without compensation, establish a dock line to intrude upon his possession.

The plaintiff in that case was the grantor of the complainant in this, and the defendant in that case rested upon the public right to the water highway. This gives to the case almost the effect of *res judicata*, conclusive on the complainant here.

Argument was made in the court below, that the City had no power to remove the obstruction. The City, by its charter, has charge of all the public highways within its corporate limits, and has a special duty to keep the river dredged to a sufficient depth. It is, therefore, difficult to see the force of the argument. This point also is settled by *Yates v. Judd*. If a private person had a right to remove this obstruction, certainly the City had.

Mr. Justice Miller delivered the opinion of the court:

In the year 1856, Clark Shepherdson, who was the owner of a lot in Milwaukee, fronting on the Menomonee and Milwaukee Rivers in said City, and who had commenced to build a wharf at the junction of those rivers, conveyed the interest that he had in said wharf and in the front of the lot to the center of the Milwaukee River, to Peter Yates, with the right and privilege of docking, dredging out and making a water front on the Milwaukee River. Between the margin of the water (which for the purposes of this case may be assumed to be the eastern boundary of Shepardson's lot) and the navigable channel of the Milwaukee River, a space intervened, which was covered with water more or less, but which was of no use for purposes of navigation. The title of this was supposed by Shepardson and Yates to be conveyed by the deed from the former to the latter, and over it Yates built a wharf the width of the lot and extending one hundred and ninety feet, in order to reach the navigable part of the river.

In April, 1864, the City of Milwaukee, by an ordinance, declared this wharf an obstruction to navigation and a nuisance, and ordered it to be abated. On the refusal of Yates to abate it himself, the City entered into a contract with Miller, the other defendant in this suit, to remove it, and thereupon R. V. Yates, the appellant, who had purchased of Peter Yates, commenced this suit to restrain them from doing so.

There is no evidence in the record to show that the wharf was an actual obstruction to navigation, or was, in any other sense, a nuisance.

The defendants, in support of their right to remove the wharf, seem to rely: 1, upon the want of title in the plaintiff to the *locus in quo*; and 2, upon the absolute power of the City of Milwaukee, as the repository of the public authority on the subject of wharves, piers, and other matters affecting the navigation of the river within the city limits, to determine the character and location of such structures.

As to the first of these propositions, it does not seem to be necessary to decide whether the title of the lot extends to the thread of the chan-

nel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of *R. R. Co. v. Schurmeier* (*ante*, 74), would limit the title to the margin of the stream.

But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of *Dutton v. Strong*, 1 Black, 23 [66 U. S., XVII. 29], and *R. R. Co. v. Schurmeier*, just cited. The Supreme Court of Wisconsin has gone further, and asserts the doctrine that the title of the owner of such a lot extends to the center of the stream, subject to the easement of the public in its use for navigation, and that he "may construct docks or landing places for goods or passengers, taking care that vessels employed in navigating the stream are not impeded in their passage, nor prevented from the use of all parts of the stream which are navigable." *Walker v. Shepardson*, 4 Wis., 486.

This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

The Act of the Wisconsin Legislature, approved March 31, 1854, confers upon the City of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee Rivers, and restrain and prevent encroachments upon said rivers and obstructions thereto, and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the City Council of Milwaukee, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the City or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the City itself. This would place every house, every business, and all the property of the City, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the City, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public.

It is true that it is said in argument that the

City Council has established a wharf and dock line under the authority of the statute we have cited, and that Yates' dock projects beyond that line.

No such defense is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it cannot be taken into account here, though there is some testimony on the subject as to two different dock lines, one made before and the other after Yates' wharf was built. But however this may be, we are of opinion that the City of Milwaukee cannot, by creating a mere artificial and imaginary dock line, hundreds of feet away from the navigated part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose.

The case of *Yates v. Judd*, 18 Wis., 118, is much relied on as conclusive of the one before us. Not as a technical estoppel, though one of the parties is grantor of the lot in question to the present plaintiff, and the suit embraced some of the points mooted here. But it is said that, as a case establishing the law of the State of Wisconsin on the questions necessarily involved in the present suit, we are bound to follow it in this court.

We do not see in that case any legal proposition decided in conflict with what we have said in the previous part of this opinion. The court held that from the plat made by the original owners, who had laid out the lots, they would infer a dedication of the space covered with water, in front of the dry land of the lots, to public use, and that Yates' wharf was an invasion of that public right. This question of dedication, on which the whole of that case turned, was one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common law principles to their acts. This does not depend upon state statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions except, perhaps, in a class of cases where state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the State.

This is not such a case. In every instance where the question of a dedication might arise it would be decided on the special facts of each case even in the Wisconsin courts, and the case of *Yates v. Judd* lays down no principle of law which would govern all such cases. The Supreme Court inferred from the facts as presented in that case, a dedication of the land between the lot, as ascertained by its given dimensions, and the navigable channel of the river. That question does not arise here, because, as we have already seen, the case of *R. R. Co. v. Schurmeier*, decided that if the lot, as thus described, came to the margin of the stream, no title to the precise locality supposed to be dedicated ever passed from the United States.

Much, however, as we respect that court, we feel at liberty to hold, as we do, that there is no valid dedication as the case is presented to us.

On the whole we are of opinion that Shepard-
See 10 WALL.

son, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and that Yates, the appellant, whether he be regarded as purchaser or as licensee, has the same right; and that if the authorities of the City of Milwaukee deem its removal necessary in the prosecution of any general scheme of widening the channel and improving the navigation of the Milwaukee River, they must first make him compensation for his property so taken for the public use.

The decree of the Circuit Court is, therefore, reversed, with instructions to enter a decree enjoining the defendants below from interfering with plaintiff's wharf, reserving, however, the right of the City to remove or change it so far as may be necessary in the actual improvement of the navigability of the river, and upon due compensation made.

Cited—18 Wall., 64; 21 Wall., 392; 107 U. S., 699; 109 U. S., 882; 3 Blss., 253; 2 Dill., 485; 8 McCrary, 265; 23 Minn., 180, 181; 42 Wis., 211; 26 Mich., 517; 105 Mass., 361; 61 Mo., 351; 12 Am. Rep., 168 (51 N. H., 504); 13 Am. Rep., 308 (41 Ind., 42); 14 Am. Rep., 657 (10 R. I., 35); 23 Am. Rep., 608 (45 Tex., 312); 84 Am. Rep., 664 (12 R. I., 348); 37 Am. Rep., 401 (26 Minn., 226); 38 Am. Rep., 96 (98 Ill., 316); 41 Am. Rep., 296 (28 Minn., 373); 44 Am. Rep., 394 (32 N. Y., 473).

GEORGE M. BARNARD, *Plff. in Err.*,

v.

E. N. KELLOGG, A. DUNHAM, ET AL.

(See S. C., 10 WALL., 883-895.)

Rule of caveat emptor, in sales of personal property—sale by sample—custom cannot imply warranty—contract not varied by usage.

In sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud and is neither the manufacturer nor grower of the articles he sells, the maxim of *caveat emptor* applies.

This rule does not apply in the case of a sale by sample, because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent.

Where the common law does not, on the admitted facts, imply a warranty of the good quality of wool, no custom in the sale of this article can be admitted to imply one.

A clear, certain and distinct contract is not subject to modification by proof of usage.

[No. 54.]

Argued Nov. 17, 1870. Decided Feb. 23, 1871.

IN ERROR to the Circuit Court of the United States for the District of Connecticut.

Suit was brought in the Superior Court in Hartford County, Connecticut, by the defendants in error, to recover damages upon the sale of a certain quantity of wool upon the petition of the defendants, the case was removed to the court below, in which court the cause was tried and judgment given for the plaintiffs, whereupon the defendant sued out this writ of error.

The case is fully stated by the court.

Mr. Charles E. Perkins, for plaintiff in error:

By the custom of dealers in wool in New York and Boston, there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed. The wool in ques-

NOTE.—Custom and usage, admissibility in construction of contracts. See note to *Adams v. Otterback*, 56 U. S. (15 How.), 539.

tion was falsely packed; but this was not known to Mr. Barnard, he supposing it was fairly packed.

We claim that it is fully settled by the authorities in New York and Massachusetts, as well as elsewhere, that such a custom is illegal and void, as being opposed to a plain and well established general principle of law.

In sales of personal property, no warranty of quality or condition is implied.

Salisbury v. Stainer, 19 Wend., 158; *Ormrod v. Huth*, 14 Mees. & W., 651.

Innumerable other authorities might be cited to the same point.

It is now quite as well settled, that a usage in opposition to a settled rule of law is void.

Edie v. E. I. Co., 2 Burr., 1216.

On the circuit, Lord Mansfield admitted evidence of a custom of merchants by which a draft negotiable under the general law, was made non-negotiable. But in the opinion of the full court given by him, he says: "I am very clearly of opinion that I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this I say I am now satisfied, for the law is already settled."

Brown v. Jackson, 2 Wash. (C. C.), 24; *Frith v. Barker*, 2 Johns., 327; *Woodruff v. Bk.*, 25 Wend., 673; S. C., 6 Hill, 174; *Homer v. Dorr*, 10 Mass., 26; *U. S. v. Buchanan*, 8 How., 88; *Thompson v. Riggs*, 5 Wall., 668 (73 U. S., XVIII., 704); *Thompson v. Ashton*, 14 Johns., 316; *Rankin v. Ins. Co.*, 1 Hall, 619; *Hinton v. Locke*, 5 Hill, 437; *Beirne v. Dord*, 5 N. Y., 95; *Bowen v. Newell*, 8 N. Y., 194; *Wheeler v. Newbould*, 16 N. Y., 395; *Hone v. Ins. Co.*, 1 Sandf., 187; *R. R. Co. v. Morgan*, 52 Barb., 217; *Coze v. Heisley*, 19 Pa., 243; *Wetherill v. Neilson*, 20 Pa., 448; *Boon v. The Belfast*, 40 Ala., 184; *Dickinson v. Gay*, 7 Allen, 29; *Dodd v. Farlow*, 11 Allen, 426; *Sturges v. Buckley*, 32 Conn., 21; *Eaves v. Bk.*, 27 Conn., 229; *Leech v. Beardlee*, 22 Conn., 404.

It is also expressly held by the above cases, that a custom by which a warranty is implied against false packing or any other defect, contrary to the rule of *caveat emptor*, is void.

There are some cases in New York in Cowen and Wendell which, it has been claimed, adopt a contrary view; but all of these were sales by sample.

But, even if the court should be of the opinion that this custom is a legal and valid one, it cannot be allowed to contradict nor alter the express terms of sale.

"Though usage is admissible to explain what is doubtful, it is not admissible to contradict what is plain."

1 Greenl. Ev., sec. 292, pp. 233, 234; *Thompson v. Riggs*, 5 Wall., 663 (73 U. S., XVIII., 704); *Oelricks v. Ford*, 28 How., 49 (64 U. S., XVI., 584); *The Reeside*, 2 Sumn., 567; *Ware v. Rubber Co.*, 3 Allen, 84; *Leech v. Beardlee*, 22 Conn., 404; *Eaves v. Bk.*, 27 Conn., 229.

Mr. Barnard made it an express condition of sale, that the purchaser should come to Boston and examine the wool. By law, a broker is the agent of both parties.

Story, Ag., 28, sec. 28, and n. 2.

So far as he was the agent of Mr. Barnard, he could not go beyond his instructions. If Kellogg & Co. did not fully understand the terms of sale nor the powers of the broker, they

should have inquired. There was certainly sufficient to put them on inquiry as to the meaning of the terms used, and the authority of the broker.

Messrs. N. Shipman and R. D. Hubbard, for defendant in error.

"It is no objection to a custom, that it is not conformable with the common law of the land; for it is of the very essence of a custom that it should vary from it."

By Lord Kenyon, in *Horton v. Backman*, 6 T. R., 764; *The Paragon*, 1 Ware, 323; *Chubb v. 7,600 Bushels of Oats*, 16 Law Rep. (N. S.), 492; *Wilcox v. Wood*, 9 Wend., 349; *Willocks v. Phillips*, 1 Wall., Jr., 68; *Gibson v. Oulser*, 17 Wend., 805; *Clark v. Baker*, 11 Met., 186; *Cookendorfer v. Preston*, 4 How., 317; *Kilgers v. Bulkley*, 14 Conn., 363; *Halsey v. Brown*, 3 Day, 346.

"Every sale of packed cotton must be considered in the nature of a sale by sample, which amounts to a warranty that the whole bulk shall compare with the specimen exhibited."

Mfg. Co. v. Lawrence, 4 Cow., 444; *Beets v. Robert*, 19 Wend., 413; *Boorman v. Jenkins*, 12 Wend., 566; *Gallagher v. Waring*, 9 Wend., 20.

The custom of any particular trade may establish an implied warranty between parties transacting business therein, it being presumed that the dealings of the parties were regulated by the custom, in the absence of evidence to the contrary.

Chit. Cont., 454; *Jones v. Bowden*, 4 Taunt., 853; *Mfg. Co. v. Dixon*, 3 Cush., 407.

For examples of the customs sanctioned by courts which vary or modify the rule of *caveat emptor*, we refer to *Sewell v. Gibbs*, 1 Hall, 602; *Sumner v. Tyson*, 20 N. H., 884.

The customs, contravening the rule of *caveat emptor*, which have been disregarded by the courts, are of a very different nature from the one now under consideration.

The former were customs whereby the seller impliedly warranted his wares to be merchantable, and were thus directly at variance with the common law. This custom is not a warranty in regard to character or quality, but is in effect a warranty against fraud; that material, foreign to and not properly belonging to or with the article sold, has not been secretly placed within the bale.

When an express or implied warranty exists, an examination of the article sold is not a waiver of the contract.

Willings v. Consequa, Pet. (C. C.), 301.

Especially is this true when the articles are so prepared and present such an appearance as to deceive purchasers.

Henshaw v. Robbins, 9 Met., 83; *Tye v. Fyrmore*, 3 Camp., 462; *Shepherd v. Kane*, 5 B. & Ald., 240; *Osgood v. Lewis*, 2 Harr. & G., 493.

A principal is liable for the acts of a general agent, in all matters within the customary and usual scope of the business upon which the agent is employed, although the agent exceeds private instructions, not communicated to the party acting with such agent.

Story, Ag., 147; and n.; *Howard v. Sheppard*, 2 L. R. (C. P.), 148.

Mr. Justice Davis delivered the opinion of the court:

This suit grows out of an alleged breach of

contract concerning a lot of foreign wool, and it is necessary to state the main facts of the case, to show how the single question of law which the record presents arises. In the summer of 1864, Barnard, a commission merchant residing in Boston, Massachusetts, placed a lot of foreign wool, received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of Bond & Co., wool brokers in Boston, to sell, with instructions not to sell unless the purchaser came to Boston and examined the wool for himself. These brokers sent to E. N. Kellogg & Co., merchants and dealers in wool in Hartford, Connecticut, at their request, samples of the different lots of wool, and communicated the prices at which each lot could be obtained. Kellogg & Co., in reply, offered to take the wool, all around, at fifty cents a pound, if equal to the samples furnished, and Bond & Co., for their principal, on Saturday, the 8th day of August, by letter and telegram accepted this offer, provided Kellogg & Co. examined the wool on the succeeding Monday and reported on that day whether or not they would take it. Kellogg & Co. acceded to this condition, and the senior member of the firm repaired to Boston on the day named, and examined four bales in the brokers' office as fully as he desired, and was offered an opportunity to examine all the bales and have them opened for his inspection. This he declined to do, and concluded the purchase on the joint account of all the plaintiffs. Some months after this, on opening the bales, it was ascertained that a portion of them were falsely and deceitfully packed, by placing in the interior rotten and damaged wool and tags, which were concealed by an outer covering of fleeces in their ordinary state. This condition of things was communicated to Barnard, and he was asked to indemnify the purchaser against the loss he sustained in consequence of it. The refusal of this request resulted in the bringing of this suit. The learned circuit court trying this cause without the intervention of a jury, found that there was no express warranty that the bales not examined should correspond to those exhibited at the brokers' store, and that the law under the circumstances could not imply any. But the court found, as a matter of fact, that by the custom of merchants and dealers in foreign wool in bales in Boston and New York, the principal markets of this country where such wool is sold, there is an implied warranty of the seller to the purchaser that the same is not falsely nor deceitfully packed, and held as a matter of law that the custom was valid and binding on the parties to this contract, and gave judgment for the plaintiffs below.

This writ of error is brought here to test the correctness of this ruling.

No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted

to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample, is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it.

Applying this acknowledged rule of law to this case, it is easy to settle the rights of the parties, and to interpret the contract which they made. That the wool was not sold by sample clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg intended to rely on the samples as a basis of purchase, why did he go to Boston and inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample. If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know or have reason to believe that the wool was falsely packed. The sale on his part was intended to be upon the usual examination of the article, and the proceeding by Kellogg shows that he so understood it, and it is hard to see what ground of complaint even he has against Barnard. It will not do to say that it was inconvenient to examine all the bales because, if inconvenient, it was still practicable and that is all, as we have seen, that the law requires. The case of *Salisbury v. Stainer*, 19 Wend., 168, is similar in its facts to this case, and the court applied to it the rule of *caveat emptor*. There bales of hemp were sold which turned out to be falsely packed. The purchaser wished to treat the sale as a sale by sample; but the court said to him, "You were told to examine for yourself, and having opened one bale, and at liberty to open all; and omitting to do it, you cannot be permitted to allege that the sale was a sale by sample, nor to recover damages as on an implied warranty." It is, therefore, clear by the general principles of law, adopted in the interests of trade and commerce, that the seller in this instance was not answerable over for any latent defects in the bales of wool.

But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed, and having held Bernard bound by it, the inquiry arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

It is to be regretted that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle, as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. See *notes to Wrighleworth v. Dallison*, 1 Smith's L. Cas., 670 (Doug., 200); 2 Pars., Cont., sec. 9, p. 585; Taylor, Ev., p. 943, and following. "Usage," says Lord Lyndhurst, "may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." *Brackett v. Royal Eech. Ass. Co.*, 2 Crompt. & J., 249. And it is well settled that usage cannot be allowed to subvert the settled rules of law. See *note to Smith's L. Cases, supra*. Whatever tends to unsettle the law and make it different in the different communities into which the State is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court, in *Thompson v. Ashton*, 14 Johns., 317, "would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In *Dickinson v. Gay*, 7 Allen, 29, which was a sale of cases of satinetts made by samples, there were in both the samples and the goods a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was con-

tended that, by custom, there was in such a case a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject and, therefore, void. If anything, the case of *Dodd v. Farlow*, 11 Allen, 426, is more conclusive on the point. There forty bales of goat skins were sold by a broker, who put into the memorandum of sale, without authority, the words "to be of merchantable quality and in good order."

It was contended that by custom, in all sales of such skins, there was an implied warranty that they were of merchantable quality and, therefore, the broker was authorized to insert the words, but the court held the custom itself invalid. They say: "It contravenes the principle, which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject." It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

In New York there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in *Frisk v. Barker*, 2 Johns., 327, was, whether a custom was valid that freight must be paid on goods lost by peril of the sea, and *Chief Justice Kent*, in deciding that the custom was invalid, says: "Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law." In *Woodruff v. Bank*, 25 Wend., 673, a usage in the City of New York, that days of grace were not allowed on a certain description of commercial paper, was held to be illegal. *Nelson, Chief Justice*, on giving the opinion of that court, says: "The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the City of New York;" and adds: "If the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." And in *Beirne v. Dord*, 5 N. Y., 95, the evidence of a custom that in the sale of blankets in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels. But the latest authority in that State on the subject is the case of *Simmons v. Law*, 3 Keyes, 219. That was an action to recover the value of a quantity of gold dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, say: "A

clear, certain and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined."

In Pennsylvania this subject has been much discussed, and not always with the same result. At an early day the Supreme Court of the State allowed evidence of usage, that in the City of Philadelphia the seller of cotton warranted against latent defects, though there were neither fraud on his part nor actual warranty. *Snowden v. Warder*, 3 Rawle, 101. Chief Justice Gibson, at the time, dissented from the doctrine, and the same court, in later cases, has disapproved of it, and *Coze v. Heistley*, 19 Pa., 243; *Witherill v. Neilson*, 20 Pa., 488, now hold that a usage, to be admissible, "must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American note to *Wrigglesworth v. Dallison* [*supra*] where the cases are collected and distinctions noticed.

The necessity for discussing this rule of evidence has often occurred in the highest courts of England on account of the great extent and variety of local usages which prevail in that country, but it would serve no useful purpose to review the cases. They are collected in the very accurate English note to *Wrigglesworth v. Dallison* [*supra*] and are not different in principle from the general current of the American cases. If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable.

"These rules," says Chief Justice Wilde, in *Spartali v. Benecke*, 10 C. B., 223, "are well settled, and the difficulty that has arisen respecting them has been in their application to the varied circumstances of the numerous cases in which the discussion of them have been involved." But this difficulty does not exist in applying these rules to the circumstances of this case. It is apparent, that the usage in question was inconsistent with the contract which the parties chose to make for themselves and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty, which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do, and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade, in the manner proposed by the custom of dealers of wool in Boston, it is easy to see it can be

See 10 WALL.

changed in other particulars, and in this way the whole doctrine frittered away.

It is proper to add, in concluding this opinion, that the conduct of the parties shows clearly that they did not know of this custom, and could not, therefore, have dealt with reference to it.

The judgment of the Circuit Court reversed, and the cause remanded, with directions to award a venire de novo.

Dissenting, Mr. Justice Strong and Mr. Justice Bradley.

Cited—10 Wall., 667; 13 Wall., 365; 14 Wall., 603; 100 U. S., 692; 109 U. S., 293; 110 U. S., 112; 5 Sawy., 434; 2 McArthur, 359; 75 N. Y., 77; 10 Am. Rep., 415 (49 N. Y., 464); 14 Am. Rep., 228 (55 N. Y., 206); 30 Am. Rep., 640 (126 Mass., 10); 43 Am. Rep., 656 (91 N. Y., 32).

LOUIS HANNAUER, *Plff.*,

v.

ALDEN M. WOODRUFF.

(See S. C., 10 Wall., 482, 483.)

Division of opinion, practice on.

Where this court is equally divided in opinion, the case will be remitted to the court below for the purpose of enabling that court to take such action therein as it may be advised.

[No. 35.]

Submitted Nov. 3, 1870. Decided Jan. 23, 1871.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Eastern District of Arkansas.

This action was brought in the court below. The history and facts of the case sufficiently appear in the opinion of the court.

Mr. A. H. Garland, for plaintiff.

(No counsel appeared in this court for defendant.)

Mr. Justice Nelson delivered the opinion of the court:

The suit was brought by Hannauer against Woodruff, to recover the sum of \$3,099 and interest, upon a promissory note. The defense set up was, that it was given upon an illegal consideration, which was certain bonds issued by the State of Arkansas after her Secession Ordinance. The judges below differed in opinion, and certified two questions to this court:

1. Was the consideration of the notes void on the ground of public policy, so that no action could be sustained in the Federal Court?

2. If the bonds were a sufficient consideration to sustain the action, what was the measure of damages? This court being equally divided in opinion upon the question, the case will be remitted to the court below, for the purpose of enabling that court to take such action therein as it may be advised. This direction is in conformity with the opinion of this court in *Silliman v. Bridge Co.*, 1 Black, 582 [66 U. S., XVII., 81].

Enter an order accordingly.

S. C.—15 Wall., 439.

Cited—14 Wall., 665; 19 Wall., 556; 109 Mass., 382.

NOTE.—Cases certified on division of circuit court; jurisdiction of Supreme Court in; on what division should be. See note to *Webster v. Cooper*, 51 U. S. (10 How.), 54.

THE STATE OF TEXAS, Complainant,

v.

JOHN W. WHITE ET AL.;

AND

THE STATE OF TEXAS, Complainant,

v.

GEO. P. RUSSELL, Exr. of GEO. PEABODY,
Deceased, ET AL.(See S. C., "*In re Paschal*," 10 Wall., 483-497.)*Attorney's lien—on funds in his hands—change
of attorney.*

*1. The attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the cause, and any suit or proceedings brought to recover other moneys covered by the same retainer.

2. A motion to pay into court the moneys collected will not be granted, but the parties will be left to their action, if the attorney is guilty of no bad faith or improper conduct, and has a fair set-off against his client, which the latter refuses to allow.

3. A party has a general right to change his attorney, and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands, as security for his fees and disbursements.

[Nos. 4, 6, Orig.]

Argued Dec. 16 & 19, 1870. Decided Jan. 23, 1871.

1. MOTION for a rule on Geo. W. Paschal to pay over certain moneys, etc., and

2. Motion to strike from the docket the appearance of Geo. W. Paschal as counsel for complainant.

The history and facts of this case are fully stated by the court.

Mr. Thomas J. Durant, for complainant:

Rule on George W. Paschal to pay into court certain money collected by him as counsel.

1. The court will exercise a summary jurisdiction in a case such as the rule presents.

Atkin's case, 4 Barn. & Ald., 49.

2. The practice of the Court of King's Bench and of Chancery in England, afford outlines for the practice of this court.

Rule of court, No. 3.

3. A counsel can have no action for his fees.

3 Bl. Com., 39, and notes in Sharwood's ed.;

*Head Notes by Mr. Justice BRADLEY.

NOTE.—Attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage. Purchase of interest in the suit or subject of litigation by attorney. See note to *McMicken v. Perin*, 56 U. S., XV., 604.

Lien of an attorney for compensation.

An attorney at law, employed to prosecute a demand, has a lien for his fees or compensation upon any judgment or recovery obtained through his services, which will be protected against any unfair dealings of the client. *Walker v. Sargeant*, 14 Vt., 247; *Bradt v. Coon*, 4 Cow., 416; *McKenzie v. Wardwell*, 61 Me., 136; *Pindar v. Morris*, 3 Calves, 185; *Carter v. Davis*, 8 Fla., 183; *Andrews v. Morse*, 12 Conn., 444; 8 C. 31; 1 Am. Dec. 732; *Boyer v. Clark*, 3 Neb., 161; *Howland v. Taylor*, 6 Hun, 237; *contra*, *Forsyth v. Beveridge*, 52 Ill., 238; 8 C., 4 Am. Rep., 612.

This lien does not arise till judgment. *Foot v. Tewksbury*, 2 Vt., 97; *Getchell v. Clark*, 5 Mass., 309; *Simmons v. Almy*, 108 Mass., 33; *Potter v. Mayo*, 3 Me., 34; *Hooper v. Welch*, 48 Vt., 169; 8 C., 5 Am. Rep., 237; *Shank v. Shoemaker*, 18 N. Y., 489; *Hobson v. Watson*, 34 Me., 20; *Honeyhe v. City of Chicago*, 41 Ill., 26; *Sweet v. Bartlett*, 4 Sandf., 661; *Coughlin v. N. Y. C. R. R. Co.*, 71 N. Y., 443; *Ex parte Kyle*, 1 Cal., 331.

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Kenedy v. Brown, 13 J. Scott (N. S.), 678; *Mostyn v. Mostyn*, L. R. 5 Ch. App., 457; Act of Feb. 26, 1853, 10 Stat. at L., 161, sec. 1.

4. If counsel can sue for fees, he has no lien on money or other property in his hands, and must deposit in court.

2 Edw. N. Y. Ch., 108; *Walton v. Dickerson*, 7 Pa., 376.

5. This court is without jurisdiction to pass upon a claim set up by a citizen against the State of Texas.

Act of Sep. 24, 1789, 1 Stat. at L., p. 80, sec. 13.

6. The legislative power of the State of Texas gives the Governor authority to employ such means as he may deem proper to recover the indemnity bonds, and to employ such assistance as may be necessary.

Acts of Texas of 1866, p. 69.

7. Those who contract with the Governor, contract with the State, and must rely on the discretion and good faith of the legislative body. *Chisholm v. Georgia*, 2 Dall., 446.

8. It is a presumption of law, *juris, et de jure*, that the sovereign power will do justice.

Gibbons v. U. S. (ante, 454).

Rule to strike the name of G. W. Paschal as counsel from the docket.

1. The Governor of Texas is, by law of that State, invested with full authority and power in the recovery of the indemnity bonds.

See, Act of Texas Legislature of 1866, p. 69.

2. The Governor has discharged Mr. Paschal, and has the legal right to do so.

Cholmondeley v. Lord Clinton, 19 Ves., 272, 274; *Beer v. Ward*, Jacob, 77; *Bricheno v. Thorp*, Jacob, 800; *Johnson v. Marriott*, 2 Crompt. & M., 183; sec. 35, Act of Sep. 24, 1789, 1 Stat. at L., 92.

3. Even in cases of contracts for personal service for a fixed period, the employer may discharge the servant.

2 Pars. Cont., 32 et seq.; *Orphan Asylum v. Ins. Co.*, 8 La., 181.

Messrs. A. G. Riddle and J. Hughes, for White & Chiles, respondents.

Messrs. A. G. Riddle and G. W. Paschal, for Paschal, respondent:

The rule to pay money into court must be discharged.

I. Because there is a total absence of all mis-

This lien attaches to the fruits of the skill and labor of an attorney, whether it is in a judgment or decree or award or in any other form obtained through his services, also to the money payable to the client thereunder. *Mitchell v. Oldfield*, 4 Term, 123; *Read v. Duffer*, 6 Term, 261; *Tabram v. Horn*, M. & R., 228; *Ex parte Price*, 2 Ves., Sr., 407; *Omerod v. Tate*, 1 East, 464; *Turwin v. Gibson*, 3 Ark., 730; *Skinner v. Sweet*, 3 Madd., 417; *Irving v. Vland*, 2 You. & J., 70; *Barnesly v. Powell*, Amb., 102; *Wylie v. Co.*, 56 U. S., 15 How., 415; *Benjamin*, 10 Conn., 110; *Walker v. Sargeant*, 14 Vt., 247; *Hutchinson v. Howard*, 15 Vt., 544; *Sexton v. Pike*, 6 Eng., 193; *Newbert v. Cunningham*, 50 Me., 231; *Cooley v. Patterson*, 52 Me., 472; *Stratton v. Hussey*, 62 Me., 238; *Pelroe v. Bent*, 66 Me., 381; *Carter v. Davis*, 8 Fla., 183.

An attorney has also a general lien on his client's papers in his possession obtained in the course of his professional employment. *Hughes v. Mayre*, 3 Term, 275; *Howell v. Harding*, 8 East, 322; *Ex parte Russell*, 1 How. Fr., 149; *St. John v. Dieffendorf*, 12 Wend., 361; *contra*, *Walton v. Dickerson*, 7 Pa. St., 376; *Hollis v. Claridge*, 4 Taunt., 367; *Ex parte Nesbitt*, 2 Sch. & Lef., 270; *Gist v. Hanley*, 3 Ark., 233. This lien extends to a general balance for professional services and is not confined to

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conduct in office, without which the rule cannot be sustained.

The respondent has shown that he retains the fund in good faith, and for a meritorious purpose, as he might well do.

Pitman's case, 1 Curt., 186.

So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact, by any other evidence. *U. S. v. Dodge*, 2 Gall, 313.

If the party can clear himself upon oath, he is discharged.

4 Bl. Com., 285.

But, if perjured, may be prosecuted for the perjury. 4 Bl. Com., 287; *U. S. v. Dodge*, 2 Gall, 315; *Balsbaugh v. Frazer*, 19 Pa., 95.

II. The law of Texas is the law of the contract between the parties and, under that, the respondent is entitled to retain this fund until his claim is adjusted.

1. When there is a special contract for compensation, the attorney is entitled to his fee, even though his client compromised the suit.

Alcorn v. Butler, 9 Tex., 56; *Hill v. Cunningham*, 25 Tex., 81; see, also, *Ratcliff v. Baird*, 14 Tex., 44; *Smith v. Lipscomb*, 13 Tex., 536.

When wrongfully dismissed he is entitled to his full fee.

Myers v. Crockett, 14 Tex., 258; see, also, 14 Tex., 46.

When an attorney accepts an order to pay over a judgment when collected, it means the amount less his fees.

Kinsey v. Stewart, 14 Tex., 458; *Casey v. March*, 30 Tex., 180; *Able v. Lee*, 6 Tex., 431.

2. This accords with the general current of the American authorities on this point. In the United States, the distinction between attorneys and counselors is lost, and both are entitled to the rights of attorneys and solicitors in England and have the same rights of lien.

Story, Ag., sec. 383; 2 Kent, Com., 641; *Ex parte Plitt*, 2 Wall., Jr., 453; *McDonald v. Napier*, 14 Ga., 99.

By the English rule thus recognized, attorneys and solicitors have liens, not only for their taxable costs as between the parties to the case, but for their just charges as between themselves and clients.

The English rule is enforced in *Ex parte Stirling*, 16 Ves., 258; *Stevenson v. Blakelock*, 1 M. & S., 636; *Barker v. St. Quintin*, 12 Mees. & W., 440; *White v. Pearce*, 7 Hare, 278, and innumerable cases.

Among American cases, that recognize and apply it generally for the protection of lawyers, may be cited *Pender v. Morris*, 3 Cal., 165; *Martin v. Hawks*, 15 Johns., 405; *St. John v. Deisen-dorf*, 12 Wend., 261; *Bradt v. Koon*, 4 Cow., 416; *Hutchinson v. Howard*, 15 Vt., 544; *Hutchinson v. Pettes*, 18 Vt., 614; *Gammon v. Chandler*, 80 Me., 152; *Frost v. Belmont*, 6 Allen, 152. See, also, Bl. & H., 401, 440; *Sprague*, 11, 85, 126.

III. For all his services the respondent had a contingent fee, and hence acquired a specific lien upon the subject-matter covered by his retainer, which the court will protect.

Patten v. Wilson, 84 Pa., 292; *Ex parte Plitt*, 2 Wall., Jr., 453; *Wylie v. Coz*, 15 How., 415.

On removal as counsel.

The respondent has a specific lien upon the subject-matter of said suits, which the court is bound to protect.

Wylie v. Coze (supra); *Ex parte Plitt* (supra); *Patten v. Wilson*, 84 Pa., 292.

The respondent is specially authorized to prosecute said suit, coupled with an interest, and his authority is not revocable, except for good cause.

Hunt v. Rousmanier, 8 Wheat., 174.

The respondent cannot be discharged except on payment of his fees.

Sloo v. Lav, 4 Blatch., 268.

In England, so important are the rights of attorneys, that a rule has been promulgated forbidding their dismissal pending a suit, except upon an order of the court, which is usually upon the payment of their fees.

Stokes, Att'ys, 47.

Mr. Justice Bradley delivered the opinion of the court:

In the first of these cases, motion is made for an order on George W. Paschal, lately counsel for the complainant, to pay to the clerk of this court for the benefit of complainant the sum of \$47,825 in gold, alleged to have been received by him under the decree in the case. In the other case, motion is made that the name of said Paschal be stricken from the docket as

a litigation terminating in a judgment. *In re H.*, an Attorney, 87 N.Y., 521; *Hooper v. Welch*, 43 Vt., 171; *Ex parte Nesbit*, 2 Sch. & Lef., 279; *Worrall v. Johnson*, 2 Jac. & W., 218; *Ex parte Sterling*, 16 Ves., 258; *Ex parte Pemberton*, 18 Ves., 282.

He has a lien upon a note deposited with him for collection (*Dennett v. Cutts*, 11 N. H., 163; *Howard v. Osceola*, 22 Wis., 453; *Stewart v. Flowers*, 44 Miss., 513); or upon a mortgage deposited with him for foreclosure. *Bowling Green Savings Bk. v. Todd*, 52 N. Y., 489.

He has no lien upon papers of his client coming into his hands otherwise than in the course of his professional employment, nor has a member of a firm of attorneys a lien upon papers received by his firm for his individual demand. *Bowling Green Savings Bk. v. Todd*, 54 Barb., 146; S. C., 52 N. Y., 489; *Henry v. Fowler*, 3 Daly, 199; *Montague on Lien*, 59.

In New York it is held that an attorney's lien extends not only to the taxable costs, but also to an agreed sum fixed as compensation between him and his client. *Fox v. Fox*, 24 How. Pr., 408; *Ackerman v. Ackerman*, 14 Abb. Pr., 229; *Hall v. Ayer*, 19 How. Pr., 91; 9 Abb. Pr., 220; *Marshall v. Meech*, 51 N. Y., 140; S. C., 10 Am. Rep., 572.

In some States the lien is regulated by statute. N. Y. Code of Civil Procedure, sec. 66; *Baker v.*

Cook, 11 Mass., 236; *Porter v. Mayo*, 3 Me., 34; *Wood v. Anders*, 5 Bush., 601.

It has been held in some decisions that an attorney's lien should be limited to the costs and disbursements allowed by statute. *Forsyth v. Beveridge*, 52 Ill., 268; *Humphrey v. Browning*, 46 Ill., 476; *Cozzens v. Whitney*, 3 R. I., 79; *Dodd v. Brott*, 1 Minn., 270; *Currier v. R. R.*, 37 N. H., 233; *Wells v. Hatch*, 43 N. H., 246; *Ex parte Kyle*, 1 Cal., 331; *Mansfield v. Dorland*, 2 Cal., 517; *Russell v. Conway*, 11 Cal., 103. Hence, some of the cases last cited in States where there are no taxed costs, hold that an attorney has no lien on a judgment rendered in his client's favor.

Where the judgment is for cost it is notice of the lien. *Leshar v. Roegner*, 3 Hun, 217; S. C., 5 N. Y., S. C. (T. & C.), 674.

Where it is for damages and costs it is not notice of the lien even for the taxed costs; notice of the lien is then necessary to the judgment debtor. *Marshall v. Meech*, 51 N. Y., 140; S. C., 10 Am. Rep., 572; *Pleasants v. Kortrecht*, 5 Helsk., 694; *Neal v. Staten*, 7 Helsk., 230.

Retaining an attorney to prosecute an action and its commencement, gives him no lien upon what may be recovered therein. *Fulver v. Harris*, 52 N. Y., 73; *Casey v. March*, 30 Tex., 180.

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counsel for the complainant, and that he be forbidden to interfere with the case. Rules to show cause having been granted, with leave to either party to file affidavits, the respondent, Paschal, at the return of the rules, filed a statement under oath by way of cause why the motions should not be granted.

The application for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to compel him to pay the money, in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or *assumpsit*, but is a *quasi* criminal proceeding, in which the question is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly in not paying it over. If no dishonesty appears the party will be left to his action. The attorney may have cross demands against his client, or there may be disputes between them on the subject proper for a jury or a court of law or equity to settle. If such appear to be the case, and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction. And as the proceeding is in the nature of an attachment for a contempt, the respondent ought to be per-

mitted to purge himself by his oath. "If he clear himself by his answer," says Justice Blackstone, "the complaint is totally dismissed." 4 Com., 288.

The answer of the respondent in this case sets forth the history of the litigation instituted for the recovery of the Texas indemnity bonds, and the part taken by him therein, both in the two cases in which these motions are made, and in other cases and in proceedings. A portion of this history is published in the report of *Texas v. White* [*ante*, 227].

The answer admits that the respondent has received the sum alleged, viz.: \$47,325 in gold, paid under the decrees of this court, but alleges that his disbursements have been \$13,355.98 (of which he gives an account by items), and that his charges for services is \$20,000 in the case of *Texas v. White* [*supra*] alone, the reasonableness of which charge is corroborated by affidavits of highly respectable counsel; and the balance and much more he claims to be due to him from the State of Texas, for his services in relation to others of this same lot of indemnity bonds, for the recovery of which he was originally retained by the Governor of Texas, as well as for other matters specified in the answer, into the merits of which it is not necessary for us to go, inasmuch as neither party has asked this court to settle or liquidate the accounts between them. All that we are concerned to ascertain and decide on this motion is, whether the respondent retains the money in his hands in bad faith and is, therefore, guilty of any such misconduct as will justify this court in interposing its authority in a summary way.

It appears by the answer that, at the breaking out of the rebellion, there was in the Treasury of Texas seven hundred bonds of the United States of \$1,000 each, belonging to the school fund of the State, and known as the Texas indemnity bonds, being part of the \$5,000,000 of bonds delivered to the State at the time of its admission into the Union. These bonds had not been indorsed by any Governor of the State, as was required of them to make them negotiable, but the Military Board, nevertheless, disposed of them, for the purpose of aiding in carrying on the war. One hundred and thirty-six of these bonds came into the hands of White, Chiles and others; about one hundred and fifty came into

An assignment by an attorney of his claim extinguishes his lien, and re-assignment will not revive it. *Chappell v. Dann*, 21 Barb., 17.

Acceptance of any security, as a note, for the claim, suspends the lien. *Cowell v. Simpson*, 18 Ves., 275; *Lambert v. Buckmaster*, 2 Barn. & C., 616; *Balch v. Symes*, 1 Turn. & R., 62.

If the note is dishonored and property of client remains in hands of attorney, lien is revived. *Davies v. Lowndes*, 3 C. B., 808; *Stevenson v. Blakelock*, 1 M. & S., 535.

Attorney has a lien for compensation upon money received for his client in the course of his employment, and the court will, upon application to compel him to pay it over, fix the amount due him. *In re Knapp*, 85 N. Y., 224; but see *Lawrence v. Townsend*, 88 N. Y., 24.

Counsel has no lien. *Brown v. Mayor, etc.*, 9 Hun, 587.

The lien of an attorney is lost by parting with the possession of the deeds or papers to which it attaches; but not if they are taken away from him improperly. *Nichols v. Pool*, 89 Ill., 491; *Clark v. Gilbert*, 3 Bing., N. C., 353; *Dicas v. Stockley*, 7 Car. & P., 587.

Attorney's lien is governed by the law of the State where the judgment was recovered, not by the law of the State where it is sought to be en-

forced. *Citizens' Natl. Bk. v. Culver*, 64 N. H., 37; S. C., 20 Am. Rep., 134.

An attorney's lien on a judgment does not authorize him to bring a suit thereon in his client's name without authority. *Horton v. Champlin*, 12 K. L., 550; S. C., 24 Am. Rep., 722.

The Statute in New York is as follows: "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report decision or judgment in his client's favor, and the proceeds thereof, in whose hands they may come, and cannot be affected by any settlement between the parties before or after judgment." Code of Civil Procedure, sec. 66.

The following cases were either decided under the above section or seem applicable to it. *In re H.*, an Attorney, 87 N. Y., 521; *Jenkins v. Adams*, 22 Hun, 600; *McBratney v. R. W. & O. R. R. Co.*, 5 N. Y., 467; *Affg.*, 17 Hun, 385; *Eberhardt v. Schuster*, 10 Abb., N. C., 374; *Ennis v. Curry*, 22 Hun, 584; S. C., 61 How. Pr., 1; *Wilber v. Baker*, 24 Hun, 24; *Tullis v. Runkle*, 13 Week. Dig., 456; *In re Kuhne*, 23 Hun, 232; *Flint v. Van Dusen*, 26 Hun, 606; *Parker v. Spear*, 62 How. Pr., 394.

the hands of Peabody & Co.; and various others into the hands of other persons. It was claimed by these parties that, having received the bonds in good faith, they were entitled to be paid their full amount by the Government of the United States, and many of them were so paid. But it is claimed by the answer that by the indefatigable exertions of the respondent, payment was stopped on a large number of the bonds, and suits were instituted against the parties who had received them or had received the money secured by them. The respondent was employed by A. J. Hamilton, the provisional Governor of Texas in 1866, to carry on these prosecutions. He first commenced a suit against White, Chiles *et al.*, in Texas; but not being able to serve them with process, he moved his operations to Washington, and there commenced the suit, now No. 4 on the original docket, on which the money in question was recovered. He also took the proper steps and presented elaborate arguments in the Treasury Department, to prevent a redemption of the bonds and to render the prosecution effectual, being partially successful in this object, as before mentioned. No stipulation was made with Governor Hamilton for any certain fee for these services, but it was understood between them that the respondent should charge such fees as the responsibility, expense, time, skill and services should render proper. On the faith of this understanding, the respondent left his home in Texas, where his practice was lucrative, and came to the North to attend to this business. For a time, on a change of local administration in Texas, other counsel were employed in the cases; but never, as it appears to the entire displacement of the respondent; and in December, 1867, he received the following special engagement from E. M. Pease, then Governor of Texas:

"EXECUTIVE OF TEXAS,
AUSTIN, Dec. 3, 1867. }
George W. Paschal, Esq.,
DEAR SIR:

Your two letters of the 9th and 14th November came together a day or two since. I had intended to write you before this, and ask you to make a thorough examination of the suit at Washington in behalf of the State against Chiles and others, for certain United States bonds belonging to the school fund of Texas; but a great press of business has prevented me from doing it. I now wish you to make such an examination, and make a full report thereon to this office as early as possible. In the meantime you are fully authorized to take charge of and represent the interest of the State in said suit. Your compensation will be dependent upon the action of a future Legislature, unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received. Yours, with respect.

(Signed) E. M. PEASE."

The power of the Governor to make such an arrangement is not disputed. The Legislature in October previous had passed an Act expressly authorizing the Governor to take such steps as he might deem proper to recover possession of these bonds, and to compromise with the parties holding them, or through whose hands they had passed. The respondent accepted these terms and continued to manage and conduct the litigation, both in this case of White, Chiles

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and others, and other cases. In addition to the above letter, Governor Pease, on the 18th of November, 1868, executed to the respondent a power of attorney, constituting him his agent and attorney in fact, to represent the State of Texas in any suits then pending, or thereafter to be instituted, in any courts in the District of Columbia, in relation to said bonds, with power to settle and compromise with any of the parties. Under these various engagements and retainers, the respondent gave his attention for several years to the recovery of the bonds, and finally succeeded in recovering the amount before mentioned, from the defendants in the case of White, Chiles and others, and made considerable progress in negotiating a settlement of those which had come to the hands of Peabody & Co. In June, 1869, Governor Pease visited Washington, and on being made acquainted with the respondent's proceedings, approved the same, and entered into a further arrangement with him in relation to three hundred of the said bonds which had been carried to Europe by one Swisher, of which the Peabody bonds were a part, by which he agreed that the respondent should be paid, for carrying the litigation through, twenty-five per cent. on the one hundred and forty-nine bonds received by Peabody & Co., and twenty per cent. on the remainder; being one hundred and fifty-one bonds in the hands of Droege & Co. Under this arrangement, the respondent continued his negotiations with these parties, and was, as he believes, near effecting a satisfactory arrangement and settlement with them, when on or about the 27th of January, 1870, he received a telegram from Edward J. Davis, who had been appointed provisional Governor of Texas in place of Governor Pease, that his appointment, as agent of the State of Texas, was revoked. A letter from the Governor was received shortly after, containing a formal revocation of the respondent's authority as such agent, and of the power to represent the Governor of Texas, given him by Governor Pease. The respondent alleges that this interference on the part of Governor Davis put an end to the negotiations for a settlement with Droege & Co., and Dabney, Morgan & Co., who had received the money on the Peabody bonds, and was entirely unauthorized by the Governor, and entitles the respondent to receive the contingent fees of twenty-five and twenty per cent. as before mentioned, and to continue as attorney and counsel in the case until his demand is settled.

The respondent also claims that the State of Texas is indebted to him in a balance of \$17,577 for publishing, binding and delivering to the Secretary of State of Texas 400 copies each, of five volumes of reports of the decisions of the Supreme Court of Texas, which he reported under the laws of the State. He also claims that the State owes him \$1,000 for bringing two suits in the District Court of Travis County, Texas, and prosecuting appeals therein, to the Supreme Court of the State.

On the part of the State of Texas it is shown, not only that the Governor has revoked Mr. Paschal's authority, but that he has appointed Mr. Durant, as attorney and agent for the State, in his stead, with authority to receive all moneys due to the State; and that Mr. Durant has made the demand of Mr. Paschal for the money in

his hands, and has required him not to intermeddle further in the suit of *Texas v. Peabody et al.*

Upon a consideration of the facts disclosed by the answer and affidavits, the result to which the court has come, in relation to the money retained by the respondent, is, that he has not been guilty of any misconduct which call for the exercise of summary jurisdiction. We see no reason to suppose that he is not acting in good faith; and whether his claim to the entire amount be valid or not (a point which we are not called upon to decide), it is clear that the claim is honestly made. The case is one in which the parties should be left to the usual remedy at law, where the questions of law and fact which are mooted between them can be more satisfactorily settled than they can be in a summary proceeding.

A good deal has been said in the argument on the question, whether the respondent has or has not a lien on the moneys in his hands. We do not think that the decision of this motion depends alone on that question. For, even if he has not a lien co-extensive with the sum received, yet if he has a fair and honest set-off, which ought in equity to be allowed by the complainant, that fact has a material bearing on the implied charge of misconduct which underlies the motion for an order to pay over the money. And when, as in this case, there exists a technical barrier to prevent the respondent from instituting an action against his client (for it is admitted that he cannot sue the State of Texas for any demand which he may have against it), it would seem to be against all equity to compel him to pay over the fund in his hands, and thus strip him of all means of bringing his claims to an issue. Whilst, on the other hand, no difficulty exists in the State instituting an action against him for money had and received, and thus bringing the legality of his demands to a final determination.

But in the judgment of the court the respondent has a lien upon the fund in his hands for at least the amount of his fees and disbursements in relation to these indemnity bonds. His original retainer by Governor Hamilton related to all the bonds indiscriminately, and much of the service rendered by him has been rendered indiscriminately in relation to them all. With regard to the White and Chiles bonds, the agreement of Governor Pease was express, that in case of recovery the respondent might retain his compensation out of the amount received. In England and in several of the States, it is held that an attorney or solicitor's lien on papers or money of his client in possession extends to the whole balance of his account for professional services. But whether that be or be not the better rule, it can hardly be contended that in this case it does not extend to all the fees and disbursements incurred in relation to all of these indemnity bonds. And, in this country, the distinction between attorney or solicitor and counsel is practically abolished in nearly all the States. The lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot be well distinguished. And, as a general rule, counsel fees, as well as those of attorney or solicitor, constitute a legal demand for which an action

will lie. And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client, a different rule obtains. The claim of the attorney or solicitor in the latter case, even in England, extends to all proper disbursements made in the litigation, and to the customary and usual fees for the services rendered.

The fee bill adopted by Congress in 1853 recognizes this general rule and, in fact, adopts it. By the 1st section of that Act it is expressly declared, that nothing therein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

The change in the rule relative to fees and costs has been gradually going on for a long period. In Pennsylvania, counsel fees could not be recovered in an action so late as 1819, when the case of *Mooney v. Lloyd*, 5 Serg. & Rawle, 412, was decided. But in the subsequent case of *Postor v. Jack*, decided in 1835, 4 Watts, 384, the contrary was held in a very able opinion delivered by Chief Justice Gibson. And in *Balsbaugh v. Frazer*, 19 Pa. St., 95, Chief Justice Black delivered the opinion of the court in a series of propositions which strongly commend themselves for their good sense and just discrimination. The court there held that in Pennsylvania an attorney or counselor may recover whatever his services are reasonably worth; that such claim, like any other which arises out of a contract, express or implied, may be defalked against an adverse demand; that an attorney who has money in his hands, which he has recovered for his client, may deduct his fees from the amount; that if he retain the money with a fraudulent intent the court will inflict summary punishment upon him; but if his answer to a rule against him convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial.

In New York, counsel fees have always been recoverable on a *quantum meruit*. In *Stevens v. Adams*, 28 Wend., 57; *S. C.*, 36 Wend., 451. Stevens recovered \$300 for counsel fees and \$50 for maps made to be used in a cause. It was held by the court that the fee bill, which declares it unlawful to demand or charge more than therein limited, has reference only to the question of costs as between party and party, and not as between counsel and client. The arguments of Chancellor Walworth and Senators Lee and Verplanck, in the Court of Errors, on the general subject, were exceedingly lucid and able, going to show that in this country the counselor is regarded as entitled to a fair remuneration for his services, and to recover the same in an action either upon an express or implied contract. The Code has since abolished the fee bill, and left attorneys and solicitors to make their own bargains with their clients. But the courts have held that this change has not affected the attorney's lien, even on the judgment recovered, for the amount which it

has been agreed he shall receive. In one case he was to receive one half the amount to be recovered. Judgment was obtained for \$1,179, and the court held that the attorney had a lien on this judgment for his half of it, and that the defendant could not safely settle with the plaintiff without paying him. *Rooney v. R. R. Co.*, 18 N. Y., 368.

In Texas the law has been held substantially the same. In the case of *Casey v. March*, 80 Texas, 180, it was decided that an attorney has a lien on the papers and documents received from his client, and on money collected by him in the course of his profession, for the fees and disbursements on account of such claims, and for his compensation for his services in the collection of the money. If, as the respondent contends, this case is to be governed by the law of Texas, it is decidedly in favor of his lien, at least to the extent of his services and disbursements in relation to the indemnity bonds. See cases of *Kinsey v. Stewart*, 14 Tex., 457; *Myers v. Crockett*, 14 Tex., 257; *Ratcliff v. Baird*, 14 Tex., 43; *Hill v. Cunningham*, 25 Tex., 25. As the original retainer was made in Texas, we are inclined to the opinion that the rights of the parties are to be regulated by the laws of that State. But if this be not the case, this court would be guided by what it deems to be the prevailing rule in this country; and, according to this rule we are of opinion that the respondent has a lien on the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds; and that in retaining the said fund for the purpose of procuring a settlement of his claim he has done nothing to call for the summary interposition of this court.

The motion for an order in case No. 4, to compel the respondent, George W. Paschal, to pay to the clerk of this court the money received by him is, therefore, denied.

The other motion we think should be granted. The respondent, as appears from his answer, was employed by Governor Pease to proceed with and carry through the litigation relating to the three hundred bonds in the hands of Peabody & Co. and Droege & Co., with a stipulation to receive twenty-five per cent. of the amount that might be recovered on one hundred and forty-nine of the bonds, and twenty per cent of the amount to be recovered on the remainder. Granting it to be true that this contract was definitely concluded (although there seems to have been some uncertainty as to one part of it), it cannot be seriously claimed that the complainant is so fixed and tied up by the arrangement that it cannot change its attorney and employ such other counsel as it may see fit, always being responsible, of course, for the consequences of breaking its contract with the respondent. Whether in discharging him the State has made itself liable for the whole contingent fee agreed upon, or only for so much as the respondent's actual disbursements and services were worth up to the time of his discharge, or for nothing whatever, it is not necessary for us to decide. That question can be more properly determined in some other proceeding instituted for the purpose. The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must necessarily suffer.

See 10 WALL.

Whether in any case, in virtue of an agreement made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire. In this case one of the States of this Union is the litigant, and moves to change its attorney for reasons which are deemed sufficient by its responsible officers. It is abundantly able, and it must be presumed will be willing to compensate the respondent for any loss he may sustain in not being continued in the management of the cause. The court cannot hesitate in permitting the State to appear and conduct its causes by such counsel as it shall choose to represent it, leaving the respondent to such remedies for the redress of any injury he may sustain as may be within his power. Under the decision which we have just made in relation to the money in his hands, he will be able to retain that fund and any papers and documents belonging to his client until his claims shall be adjudicated in such action as the State may see fit to institute therefor.

An order to discharge the respondent, George W. Paschal, as solicitor and counsel for the complainant in the second case, No. 6, will be granted.

No costs will be allowed to either party on these motions.

Cited—96 U. S., 417; 105 U. S., 533; 93 N. Y., 384; 34 Am. Rep., 729 (12 R. I., 550).

THE MISSISSIPPI AND MISSOURI R. R. COMPANY, CLARK DURANT ET AL.,
Plffs. in Err.,

AMANDA M. MCCLURE, EXRX., AND L. F. SHERMAN, EXR. of NATHANIEL MCCLURE, Deceased, JOHN MATHER ET AL.

(See S. C., 10 WALL., 511-515.)

Constitution of a State, is a contract—federal question.

The Constitution of a State is a law within the meaning of the prohibition of the Constitution of the United States, that no State shall pass a law impairing the obligation of contracts.

Where the State has passed no law in regard to the bonds which would impair their obligation, and the Constitution of the State was in force, when the bonds were issued, no question arises under the 25th section of the Judiciary Act.

[No. 38.]

Argued Nov. 9, 1870. Decided Jan. 23, 1871.

IN ERROR to the Supreme Court of the State of Iowa.

The history and facts of the case fully appear in the opinion of the court.

Messrs. Jas. Grant & Smith, for plaintiff in error.

(No counsel appeared in this court for the defendant in error.)

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa. The case is brought into this court under the 25th section of the Judiciary Act of 1789. 1 Stat. at L., 73.

NOTE.—What laws are void as impairing obligation of contracts. Constitutionalality of laws or repeal or modification of statutes. See note to *Fletcher v. Peck*, 10 U. S. (6 Cranch), 87.

Nathaniel McClure, and the other complainants who are such in their own right, filed a bill in equity in the District Court of Washington County, whereby they sought to enjoin the collection of taxes, to be applied in the payment of the interest upon certain bonds issued by that county to the Ohio and Mississippi Railroad Company, as set forth in the bill.

Samuel S. Owen, the county treasurer and collector, and S. P. Young, the county judge, were made defendants.

McClure died, and his legal representatives were made parties complainant in his stead. A preliminary injunction was granted. The Ohio and Mississippi Railroad Company prayed to be made a party; was made a party accordingly; and filed an answer, alleging, among other things, that Thomas Durant, Betsey D. Tracey, Joseph E. Sheffield, Clark Durant, Thomas Dunn and William Newton were *bona fide* holders of \$182,000 of said bonds, and that, without their being parties, no decree could be made in the cause. The complainants amended their bill making those persons defendants, and those defendants thereupon prayed to have the cause removed to the District Court of the United States for the Southern Division of Iowa. The application was overruled. They then filed an answer, wherein they maintained the validity of the bonds, and averred that they and the other holders, held them *bona fide*, and prayed that the county judge and the county treasurer should be decreed to collect the amount of taxes requisite to pay the interest which had accrued. They afterwards filed a supplemental answer, in which they set forth that, on the 15th of August, 1860, Clark Durant, for himself and the other defendants, owners of said bonds, commenced, in the District Court of the United States for the District of Iowa, an action at law against the County of Washington upon the bonds and coupons referred to in the bill, to recover the installments of interest due thereon for July, 1859, January, 1860, and July, 1860, and that the County of Washington appeared and pleaded in bar the same matters that are set up in the bill, and particularly that the issuing of the bonds was unconstitutional and void, that judgment was rendered in favor of the plaintiff, and that the said county thereupon removed the cause to the Supreme Court of the United States, where it was still pending. The Board of Supervisors were subsequently made defendants in this case. The District Court of Washington County decreed a perpetual injunction as prayed for. The case was taken by appeal to the Supreme Court of the State. In that court the defendants filed two supplemental answers. In the first it was alleged that since the filing of their preceding answer the case of *Durant v. Washington Co.* [*ante*, 164], taken to the Supreme Court of the United States, had been dismissed from that court, and that the judgment of the District Court of the United States for the District of Iowa then stood in force, and was unsatisfied. The second answer sets forth that on the — day of —, 1867, the defendants, Clark Durant and others, by the judgment of the Circuit Court of the United States for the District of Iowa, upon due process of law, recovered a further and other judgment upon interest warrants of said bonds to the amount of \$70,652.87; that in said action Clark Durant

was plaintiff and the County of Washington defendant, and that the complainants are taxpayers of that county, and privies to said judgment. The Board of Supervisors also answered in the appellate court. A stipulation was filed by the counsel of the parties admitting the facts set forth in the supplemental answers as to the judgments alleged to have been recovered and the dismissal of the writ of error from this court. The motion to remove the cause to the proper court of the United States was renewed and overruled, as it had been in the court below. The Supreme Court of the State affirmed the decree of the District Court of Washington County. The record shows that the counsel for the plaintiff in error waived in the Supreme Court of the State all questions except the one relating to the validity of the bonds. The opinion of the court was confined to that subject. The bonds were held to be invalid upon the ground that they were unauthorized and were forbidden by the Constitution of the State. The same counsel in his brief and argument here has discussed only that subject. He has presented no other proposition for our consideration. Under these circumstances we have not deemed it proper to extend our examination of the case beyond this point.

The question of the validity of the bonds is not one of federal jurisdiction. The Constitution of the United States declares, art. I, sec. 10, that no State shall pass a law "impairing the obligation of contracts." The Constitution of a State is, undoubtedly, a law within the meaning of this prohibition. A State can no more do what is thus forbidden by one than by the other. There is the same impediment in the way of both. But the State has passed no law upon the subject, and the Constitution of the State, which, as construed by the Supreme Court of the State, has worked the result complained of, was in force when the bonds were issued. The 25th section of the Judiciary Act of 1789 specifies the questions of which we can take cognizance in this class of cases, and expressly excludes all others from our consideration. It is clear that the question before us is not within the affirmative category.

If the case had been brought up from the circuit court under the 22d section of the Judiciary Act, this question and all others arising on the record would have been open for examination. The 25th section is more limited in its operation.

The case will be dismissed for want of jurisdiction, and remanded to the court whence it came.

Cited—12 Wall., 283; 13 Wall., 263; 99 U. S., 330; 107 U. S., 790; 109 Mass., 352.

THE COMMONWEALTH OF PENNSYLVANIA, *Plff.*,

v.

THE QUICKSILVER MINING COMPANY.

(See S. C., 10 Wall., 558-556.)

Suit by State—avowment of locality of corporation.

A State may bring a suit in this court against a citizen of another State, but not against one of its own.

An averment that a corporation is a body politic in the law of, and doing business in the State of California, is insufficient to establish that the defendant is a California Corporation, as a jurisdictional fact.

[No. 11. Orig.]

Argued Jan. 20, 1871. Decided Jan. 23, 1871.

ON MOTION to dismiss.

This action was brought in this court by the plaintiff, upon a judgment rendered in the Court of Common Pleas of Dauphin County in the State of Pennsylvania. The declaration averred that the defendant was a body politic in the law of, and transacting business in the State of California. This motion to dismiss was made on the ground of no jurisdiction.

Mr. Matt. H. Carpenter, for defendant.

Mr. F. Carroll Brewster, for plaintiff:

Jurisdiction of corporations attaches in the courts of the United States from the place where their business is done. 5 M'Lean, 461.

The circuit courts have no jurisdiction of a cause in which a State is a party. *Gale v. Babcock*, 4 Wash. (C. C.), 199, 344.

Citizenship, when spoken of in the Constitution in reference to the jurisdiction of the Federal Courts, means nothing more than residence.

Cooper v. Galbraith, 3 Wash. (C. C.), 546; *Gassies v. Ballou*, 6 Pet., 761; *Shelton v. Tiffin*, 6 How., 163; *Butler v. Furnessworth*, 4 Wash. (C. C.), 101; *Read v. Bertrand*, *Id.*, 514; *Gardner v. Sharp*, *Id.*, 609; *Prentiss v. Barton*, 1 Brock., 389.

A corporation created by and transacting business in a State is to be deemed an inhabitant of the State, capable of being treated as a citizen for all purposes of suing and being sued.

R. R. Co. v. Lelton, 2 How., 437; *Marshall v. R. R. Co.*, 16 How., 314; *Wheeden v. R. R. Co.*, 4 Am. L. Reg., 296; *R. R. Co. v. Wheeler*, 1 Black, 286 (66 U. S., XVII., 180); *Greeley v. Smith*, 3 Story, 76; *R. R. v. Shepard*, 5 M'Lean, 455; *French v. Ins. Co.*, 5 M'Lean, 461.

The *narr.* filed in this expressly avers that the defendant is "A body politic in the law of, and transacting business in the State of California."

Mr. Justice Nelson delivered the opinion of the court:

This is a motion to dismiss the action from the docket. It is placed upon the ground that no cause of action, within the jurisdiction of the court, is disclosed on the face of the declaration. The averment is, "The Commonwealth of Pennsylvania, by her Attorney-General, complains of the Quicksilver Mining Company, a body politic in the law of and doing business in the State of California, of the plea the said Company render unto the said Commonwealth the sum of \$100,000, etc."

By the 2d section of the 8d article of the Constitution it is ordained that the judicial power shall extend "to all controversies between a State and the citizens of another State." The second clause of this section provides "that in all cases affecting ambassadors, etc., and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." In all other cases before mentioned it shall have appellate jurisdiction.

This second clause distributes the jurisdiction. See 10 WALL.

tion conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any.

The 13th section of the Judiciary Act (1 Stat. at L., 73), which provides for the jurisdiction of this court, accords with this construction.

It provides "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, and except, also, between a State and citizens of another State or aliens, in which latter case it shall have original, but not exclusive, jurisdiction."

A State, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another State, but not against one of her own. And the question in this case is, whether it is sufficiently disclosed in the declaration that this suit is brought against a citizen of California. And this turns upon another question, and that is whether the averment there imports that the defendant is a Corporation created by the laws of that State; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on this subject. *Marshall v. R. R. Co.*, 16 How., 314.

The court is of opinion that this averment is insufficient to establish that the defendant is a California Corporation. It may mean that the defendant is a Corporation doing business in that State by its agent; but not that it had been incorporated by the laws of the State. It would have been very easy to have made the fact clear by averment, and being a jurisdictional fact, it should not have been left in doubt. Indeed, it was admitted in the argument that the defendant was a Pennsylvania Corporation, and the jurisdiction sought to be sustained by a suit against this agency. We have already shown that this is unavailable to support the jurisdiction.

Motion granted.

THE STEAMER DANIEL BALL, BYRON D. BALL AND JESSE GANOE, Claimants, *Appts.*,

UNITED STATES.

(See S. C., "*The Daniel Ball*," 10 Wall., 557-566.)

Grand River is navigable water—commerce between States.

Grand River is a navigable water of the United States, within the meaning of the Acts of Congress of July 7, 1838, and Aug. 30, 1852.

Those Acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State.

There is no distinction between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State.

[No. 57.]

Submitted Nov. 22, 1870. Decided Jan. 23, 1871.

APPEAL from the Circuit Court of the United States for the Western District of Michigan.

NOTE.—To what places the jurisdiction of admiralty is confined. See note to *Allen v. Newberry*, 62 U. S., XVI., 110

The libel in this case was filed by the appellee, in the District Court of the United States for the Western District of Michigan. The history and facts of the case are fully stated in the opinion of the court.

Mr. Andrew T. McReynolds, for appellants:

Grand River is a domestic stream, and not a navigable water of the United States. These navigation laws only require vessels propelled in whole or in part by steam, navigating the waters of the United States, to be licensed, etc.

In the case of *Wilson v. The B. B. Creek Marsh Co.*, 2 Pet., 250, the court said that the stopping of the navigation of the creek was a proper exercise of the power of the State, unless it was in contravention of some law of commerce, and that Congress had passed no such Act.

I refer to the case of *Veazie v. Moor*, 14 How., 568, which arose on the Penobscot River, in the State of Maine. That river is entirely within that State. It was held, in that case, that a license to carry on the coasting trade did not authorize a vessel to navigate the upper waters of that river, the State having entire control over that river, as the law then existed.

I also refer to the *Pussac Bridges* case (reported in App., XVI., 799).

The framers of the Constitution supposed the State would be best able to establish all necessary regulations for such commerce, and all proper police regulations for such highways. They have not authorized Congress to interfere, and Congress has never done so by attempting to subject this stream to regulations specially applicable to it. The case falls strictly within that of *Veazie v. Moor*, 14 How., 569.

This steamer was engaged exclusively in domestic trade. If not, there is no such thing as the domestic trade of a State, and Congress may take jurisdiction of the whole commerce of the country.

The railroads entirely within a State, which transport bags of grain or barrels of fruit destined eventually for a distant market, may be subjected to congressional police regulations.

Mr. Amos T. Akerman, *Atty. Gen.*, for appellee:

The common law doctrine as to the navigability of waters has no application to this country. The true rule is the navigable capacity of the stream.

The Genesee Chief, 12 How., 457; *The Magnolia*, 20 How., 296 (61 U. S., XV., 909); *Hine v. Trevor*, 4 Wall., 555 (71 U. S., XVIII., 451).

Grand River, on which the steamer Daniel Ball was employed, is a navigable stream, from its junction with Lake Michigan as far up as Grand Rapids at least.

The stream must not only be navigable, but also be one over which commerce is or may be carried on between different States or with foreign nations; inasmuch as those statutes seem to be founded upon Art. 1, sec. 8, of the Constitution, conferring upon Congress power "To regulate commerce with foreign nations and among the several States" (see *U. S. v. The James Morrison*, 1 Newb., 241; also *Gray v. Clinton Bridge*, 16 Am. Law Reg. O. S., 152). and should be construed to be only co-extensive therewith. Yet it sufficiently appears, from the facts in the case, that goods, wares and mer-

chandise, destined and marked for ports and places in States other than that in which they were shipped, have been transported over Grand River, thus making that river, in reality, a channel of interstate commerce.

The fact that the river lies wholly within the territorial limits of a single State, is immaterial.

Waring v. Clarke, 5 How., 441; *Gilman v. Phyl.*, 8 Wall., 718 (70 U. S., XVIII., 96).

When a commodity has commenced to move as an article of trade or traffic between a place in one State and a place in another State, it denotes commerce between the States, and the means employed in moving it from place to place, over every part of the entire line, is an employment in that commerce.

Mr. Justice Field delivered the opinion of the court:

The Act of July 7, 1838, 5 Stat. at L., 304, provides, in its 2d section, that it shall not be lawful for the owner, master or captain of any vessel propelled in whole or in part by steam, to transport any merchandise or passengers upon the bays, lakes, rivers or other navigable waters of the United States, after the first of October of that year, without first having obtained from the proper officer a license under existing laws; that for every violation of this enactment the owner or owners of the vessel shall forfeit and pay to the United States the sum of \$500; and that for this sum the vessel engaged shall be liable, and may be seized and proceeded against summarily by libel, in the District Court of the United States.

The Act of August 30, 1852, 10 Stat. at L., 61, which is amendatory of the Act of July 7, 1838, provides for the inspection of vessels propelled in whole or in part by steam, and carrying passengers, and the delivery to the collector of the district of a certificate of such inspection, before a license, register or enrollment under either of the Acts, can be granted; and declares that if any vessel of this kind is navigated, with passengers on board, without complying with the terms of the Act, the owners of the vessel shall be subject to the penalties prescribed by the 2d section of the Act of 1838.

In March, 1868, the Daniel Ball, a vessel propelled by steam, of one hundred and twenty-three tons burden, was engaged in navigating Grand River, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places, without having been inspected or licensed under the laws of the United States; and to recover the penalty provided for want of such inspection and license, the present libel was filed.

The libel, as amended, describes Grand River as a navigable water of the United States; and in addition to the employment stated above alleges that in such employment the steamer transported merchandise shipped on board of her, destined for ports and places in States other than the State of Michigan, and was thus engaged in commerce between the States. The answer of the owners who appeared in the case admits substantially the employment of the steamer as alleged, but sets up as a defense that Grand River is not a navigable water of the United States, and that the steamer was engaged solely in domestic trade and commerce,

and was not engaged in commerce between two or more States, or in any trade, by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

It was admitted by stipulation of the parties that the steamer was employed in the navigation of Grand River between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between those places; that she was not enrolled and licensed for the coasting trade; that some of the goods she shipped at Grand Rapids and carried to Grand Haven were destined and marked for places in other States than Michigan; and that some of the goods which she shipped at Grand Haven came from other States and were destined for places within that State.

It was also admitted that the steamer was so constructed as to draw only two feet of water, and was incapable of navigating the waters of Lake Michigan; that she was a common carrier between the cities named, but did not run in connection with nor in continuation of any line of steamers or vessels on the lake, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven, carrying merchandise, and a line of railway was running from Detroit, which touched at both the cities named.

The district court dismissed the libel. The circuit court reversed this decision, and gave a decree for the penalty demanded.

From this decree the case is brought, by appeal, to this court.

Two questions are presented in this case for our determination.

First: whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the Acts of Congress; and,

Second: whether those Acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all as to the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide-water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundred of miles above as they are below the limits of tide-water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. *Genesee Chief*, See 10 WALL.

12 How., 457; *The Hino v. Trevor*, 4 Wall., 555 [71 U. S., XVIII., 451]. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in *Gilman v. Philadelphia*, 8 Wall., 724 [70 U. S., XVIII., 99], "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the Nation, and subject to all the requisite legislation of Congress."

But it is contended that the steamer, Daniel Ball, was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is, undoubtedly, an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from federal control



all commerce not thus designated and, of course, that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. *Gibbons v. Ogden*, 9 Wheat., 194. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

We perceive no error in the record, and the decree of the Circuit Court must be affirmed.

Cited—11 Wall., 415; 20 Wall., 489; 107 U. S., 682; 109 U. S., 396, 681; 6 Ben., 45, 46, 114; 1 Bro., 180, 335; 4 Sawy., 297; 30 Wis., 506; 106 Mass., 447; 9 Ill., 335; 43 Am. Rep., 278, 280 (39 Ark., 403).

JOHN DOE, EX DEM. MARY A. BROBST, *Ply.*
in Err.,

v.

RICHARD ROE, with notice to JOHN P.
BROCK ET AL.

(See S. C., "*Brobst v. Brock*," 10 Wall., 519-587.)

Sufficient defenses in ejectment—new trial, when denied—mortgage, what is—rights of mortgagee—presumption—mortgage sale—redemption—bill in equity, proper remedy.

Where the court below, in an action of ejectment, ruled two defenses sufficient, and the ruling was correct, it is not material what may have been the instruction given to the jury respecting other parts of the case.

This court will not, in such case, reverse the judgment in favor of defendant, and send the case back for a new trial, if it be certain that the plaintiff cannot recover in the action.

A mortgage, as between the parties to the instrument or their privies, is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem.

The mortgagee, after breach of the condition, may enter or maintain ejectment for the land. And having entered, he cannot be dispossessed by the mortgagor, so long as the mortgage continues in force.

Where one has a right to enter only in virtue of the mortgage of which he was assignee, it is a legal presumption that his entry was in right of it, and under color of his title, and he acquired possession to the extent of the mortgage deed.

An irregular or void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had.

As a general rule, a mortgagor, after his mortgagee has been in possession twenty years, cannot be heard in advancing a claim to redeem; it is presumed he has released his equity.

The only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity.

[No. 12.]

Argued Dec. 13, 1870. Decided Jan. 30, 1871.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The plaintiff in error brought an action of ejectment in the court below, for lands in the State of Pennsylvania. Judgment having been rendered for the defendants, the plaintiff sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. R. J. Brent, Crittenden and Geo. W. Woodward, for plaintiff in error:

The proceedings by way of *scire facias sur mortgage* have not operated to transfer any title to the purchasers thereunder, who are the defendants in error.

By these proceedings it appears that no *scire facias* issued until Nov. 8, 1825.

At that date Michael Brobst, to whom, and to whose terre-tenants, the writ issued, was dead.

Here then is a *scire facias* issued in 1825 against a dead man and his terre-tenants. Such a writ was void on general principles; but if not, it is unwarranted by the Act of Pennsylvania, which requires the *sci. fa. sur mortgage* to issue against the mortgagor, his heirs, executors, etc.

Act of 1705, sec. 6; Purd. Dig., 234, sec. 100; Dunl. Dig., 51, 52.

It might be sufficient, if against his executors and administrators. 2 Whart., 365.

There is no provision of law which authorized a *scire facias* sur mortgage against Michael Brobst, with notice to his terre-tenants, as was attempted in this case. It must be against executors, etc., of deceased. 1 Watts, 411.

Before the Act of 1705, sec. 6, the only remedy of a mortgage was by sequestration. 12 Serg. & R., 242.

It would seem to result that where a purchaser claims by title derived from a *scire facias* sur mortgage he must show that the proceedings were substantially authorized by the legislative Act. Under this Act, the terre-tenant need not be made a party. 1 Watts, 491.

A return "*nil*" might have been deemed service so as to authorize a sale; but there is no such return.

There does not seem to have been any judgment entered on the return of this writ, that the plaintiff may have execution, as expressly required by the 6th section of the above Act, except the docket entry of judgment.

It is also clear that the sheriff did not levy on or seize the property, as required by this writ, and by the 6th section of the Act of 1705; but without any levy or seizure whatever, sold the property, Mar. 23, 1828. Dunl. Dig., 52.

Here then is a void sale by the sheriff, who had never seized or levied on the property sold. 1 Miles, 286; 2 Wils. & S., 289.

The *scire facias* was only issued in 1825, and served on Jacob Rodeberger as terre-tenant in same year, at which date John Brobst, the purchaser, was absent from the State.

As to him or the mortgagor, the return should have been "*nil*." After alienation, the mortgagor cannot waive the requirement of law.

Elkenton v. Pithon, 1 Troub. & H. Pr., 570.

There is nothing to show that Rodeberger was more than a naked tenant. A terre-tenant who is to be served, must be one who owns the lands by contract with the mortgagor; and that was John Brobst, the alienee, who should have been defendant and served, or returned "*nil*." 16 Serg. & R., 482.

The return should show of what lands he was terre-tenant. 5 Watts, 300.

The Act of 1705, section 6, requires the *sci. fa.* and judgment to justify execution.

Dunl. Dig., 51; 4 Whart., 428.

The *sci. fa.* is *in rem* and a mode of foreclosure *strictissimi juris*.

Purd. Dig., 284; sec. 100, and notes; *Ransom v. Williams*, 2 Wall., 318 (69 U. S., XVII., 804); 2 Hill. Mortgage, etc., 47; 5 Md., 164; 7 Harr., 88.

If so, there was no seizure of the thing sold. These cases decide:

1. That as the judgment on *sci. fa. sur* mortgage is to sell the land described in *sci. fa.*, the writ must clearly describe it and there must be a judgment, or the defect is not cured by sheriff's deed.

2. That irregularities in this proceeding avoid the sale, and they are unlike irregularities in personal suits, and are not cured by sheriff's deed acknowledged in court.

3. The *sci. fa.* can only be brought where lands lie, and if no personal service, there must be two *nil*s. 2 Whart., 7.

One *nil* return might support the sale. 7 Serg. & R., 279.

Here the only service professes to be on Jacob

Rodeberger, a terre-tenant, and there is no return of *nil*, or service on Michael Brobst or his tenants, or on John Brobst, his alienee, which is clearly illegal. *Cowan v. Getty*, 5 Watts, 581.

Upon these facts the sale was void so far as John Brobst, the alienee, was concerned. 5 Watts, 585.

The *sci. fa.* is said to be a substitute for foreclosure, and stands in legal effect the same as a foreclosure suit in equity would. 8 Watts, 152.

If this be so, it is clear that the mortgagor could not be foreclosed without service of process on him, in the case of a bill to foreclose.

As Rodeberger stated that he was holding under Boyer, who claimed to be the equitable assignee of the mortgage, his *scire facias* might just as well have been served on himself as on his own tenant.

Here the sheriff returned simply that he sold after public notice, and ignores personal service.

The Supreme Court held that there is no presumption of notice, and it must be proved where jurisdictional. *Ransom v. Williams* (*supra*).

The defendants, so far as the Wood mortgage is concerned, do not claim as assignees of Boyer or of the mortgage, but only under the sale made by the sheriff to Frailey, under proceedings to foreclose that mortgage on 25 tracts, in which proceedings there was no service of the *scire facias* on any terre-tenant of the Deborah Grant tract, or any other person interested therein.

Messrs. George W. Biddle and Brock, for defendants in error:

It has been decided in Pennsylvania that the entry of judgment in a *sci. fa.* on a mortgage, after one return of *nil* *habet*, cannot affect the competency of a judgment or of the sheriff's sale upon it, when offered in evidence in another suit. *Allison v. Rankin*, 7 Serg. & R., 269.

It is at best an irregularity which might make the judgment reversible on error.

So, also, in *Feger v. Keefer*, 6 Watts, 297, in which the judgment on which the sale was made was decided to be void in the preceding case of *Feger v. Kroh*, 6 Watts, 294, yet the title to the purchaser under the sale was held good.

But the judgment on this Wood mortgage was merely erroneous, and not void.

The proceeding was not upon an original cause of action, but upon that which was the equivalent of the record of the court, namely: a mortgage acknowledged and recorded and already a lien on the defendant's property.

The writ of *scire facias* was substantially *meane* process, and required no personal service.

In *Warden v. Tainter*, 4 Watts, 277, the court says: "But is it necessary that the court should have jurisdiction of the person in a proceeding by *scire facias* upon a mortgage? If it be, then I apprehend that many judgments and sales of mortgaged land made under them, that have hitherto been considered valid, or void."

We have also the additional fact apparent, that before this judgment was entered, the sheriff had gone upon the land to look for the mortgagor, for the purpose of serving a writ upon him.

The judgment was, therefore, valid to sustain a sale made under it.

The judgment entered in this proceeding cannot be attacked in this court.

See 10 WALL.

No judgment of a court having jurisdiction of the matter can be attacked collaterally in another court.

Campbell v. Kent, 8 Penr. & W., 80; see, also, *Hauer's Appeal*, 5 Watts. & S., 474, and the cases there cited; *Hiestler v. Fortner*, 2 Binn., 47; *Hartman v. Ogborn*, 54 Pa., 122; *Boyd v. Miller*, 52 Pa., 481; *Miller v. Milford*, 2 Serg. & R., 35; *Roemer v. Denig*, 18 Pa., 484; *Louber's Appeal*, 8 Watts. & S., 889.

No attempt is made by him or his heirs nor by his alienee, in all this period, either to review the proceeding or to impeach it in any way, or to enter upon the mortgaged land, or to pay the taxes upon it, or to exercise any act of dominion or ownership over it.

At the end of twenty years, the right of a mortgagor to redeem, or against a mortgagee claiming to be in possession, is barred. Their right, therefore, to redeem now is gone.

In the case of *Slizer v. Bk.*, 16 How., 571, on a question of the right of mortgagors to redeem land, which, by improvements and the general increase of the value of real estate, had become of great value, the court dwells with great emphasis upon this state of things. It says: "Thirty years have elapsed since it was sold under the appearance, at least, of judicial authority;" and cases are therein cited to show that twenty years' undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem.

Mr. Justice Strong delivered the opinion of the court:

Much of the very elaborate argument addressed to us on behalf of the plaintiff in error was directed to the consideration of questions not necessary to the decision of this case. Whether the judgment in the *scire facias* upon the mortgage was absolutely void, or only irregular, we are not called upon now to determine, for on the trial of the case in the court below no effect was allowed to it. The learned judge who presided at the trial did not rule that the judgment was valid, or that the sale made under it divested the equity of redemption of the mortgagor, or of John Brobst, to whom the equity had been conveyed. It is true the defendant set up that he had acquired title under that sale and, had that been his only defense, it would be necessary to consider whether it was sufficient to extinguish the equity of redemption. But there were several other defenses, two of which the court below ruled sufficient to protect the defendant in his possession. If the ruling was correct, or if either of these defenses was perfect, it matters not what may have been the instruction given to the jury respecting other parts of the case. It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action. In *Greenleaf v. Birth*, 5 Pet., 185, it was stated to be "a general rule that where there are various bills of exceptions filed according to the local practice, if, in the progress of the cause, the matters of any of those exceptions become wholly immaterial to the merits as they are finally made out at the trial, they are no longer assignable as error, however they may have been ruled in the court below. There must be

some injury to the party to make the matter generally assignable as error." So in *Campbell v. Pratt*, 2 Pet., 354, the court refused to reverse a decree of the circuit court, although an error had been committed, as no benefit could result to the appellant from the reversal.

Without noticing, therefore, for the present at least, the particular exceptions taken in the court below, we proceed to inquire whether the record exhibits any insuperable obstacle to the plaintiff's recovery in this action. Both parties claim under Michael Brobst, who, on the 27th day of September, 1816, became the owner of one undivided fourth part of twenty-five adjoining tracts of land, of which the tract now in controversy was a part. The whole body was then, and during many years thereafter, wild, uncultivated and uninhabited. While thus, the owner, Michael Brobst, on the sixth day of March, 1817, mortgaged his interest in the entire body of lands to Samuel Wood to secure the payment of fifteen hundred dollars, with interest, on the first day of April, 1821. This mortgage, by subsequent assignments made in the same year, became the property of Boyer. On the 15th of May, 1817, after the execution of the mortgage, Michael Brobst conveyed his remaining interest in the lands to John Brobst in fee, who does not appear ever to have made any entry upon them, or to have claimed possession prior to his death, which occurred in 1861. It is as an heir and devisee of John Brobst that the lessor of the plaintiff claims. The defendants claim under Samuel Wood, the mortgagee, through Jacob K. Boyer, the assignee of the mortgage. They also set up several other titles, which it is not necessary now to notice. It thus appears that what John Brobst acquired by the deed of Michael Brobst to him was only an equity of redemption. As between his grantor and Samuel Wood, or Samuel Wood's assignees, the legal title was then in the latter, and so it continued notwithstanding the conveyance of the equity of redemption to John Brobst.

It is true that a mortgage is, in substance, but a security for a debt, or an obligation, to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. Formerly, if the condition was not strictly performed, the estate of the mortgagee, at first conditional, became absolute, and the mortgagor's right to redeem was lost. The estate or interest, though defeasible at its inception, became unconditional on the failure of the mortgagor to pay the money secured, or fulfill the condition at the time appointed for performance. *Pow. Mort.*, 9, 10; 2 Bl. Com., 158; *Litt.*, 332.

Courts of equity have in modern times relieved against such forfeitures and, in favor of a mortgagor, have extended the time for redemption. But such courts, as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bids to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Penn-

sylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land. And having entered he cannot be dispossessed by the mortgagor so long as the mortgage continues in force. Applying these principles to this case, it is plain that John Brobst, having acquired only an equity by the deed from Michael Brobst, neither he nor his heirs can recover in ejectment against those in possession under the mortgage while the mortgage remains in existence, or until there has been a redemption.

It is true that in the State Courts of Pennsylvania ejectment may be maintained upon an equitable title, but such has never been the rule in the Federal Courts. It becomes, therefore, a material inquiry whether the legal title which was in Samuel Wood has ever been acquired by John Brobst or his heirs, and also whether the defendants are in possession under Wood, and by virtue of the mortgage. It has already been noticed that Boyer became the assignee of the mortgage in 1817. It was assigned by Wood to Dunn, and by Dunn to Boyer. The assignments were, undoubtedly, sufficient to transmit the rights and estate of the mortgagee. When the debt secured by the mortgage fell due in 1821, no effort was made to redeem, and none has been made to the present day. There is no evidence that any one was in actual possession of the lands before 1821, or at any time before the condition of the mortgage was broken. But after that time Boyer had possession by his tenant, Jacob Roderberger, who occupied a house upon the body of lands mortgaged, certainly as early as 1825. In regard to this there is no dispute and no contradictory evidence. It is true Roderberger was resident upon one of the twenty-five tracts which adjoins the tract now in dispute. But, though for the purpose of acquiring title from the Commonwealth several patents were taken, they described collectively but one tract. Several patents were required under the law of the State when there were, as in this case, several warrants. The warrants were each issued for four hundred acres, and an allowance of six per cent., and the law required the patents to follow the surveys made on each warrant. The whole twenty-five tracts belonged to one person. They were all patented to George Grant on the 9th and 10th days of May, 1816, and they adjoined each other, so as to constitute one tract or body. Grant sold them together, as a whole, to Thomas B. Smith, who in turn sold an undivided fourth part of the whole body to Michael Brobst by one deed. So Michael Brobst mortgaged his entire estate in the whole to Wood, and conveyed his equity of redemption by one deed to John Brobst. From the beginning the entire body of land was treated as one subject of grant or mortgage, though held under several conveyances. After Grant became the owner nothing in the title ever separated the tracts before Boyer took possession. Having been paid for originally by one person, and one warrant calling for another as an adjainer, it is not probable the interior lines of the block were ever run. We have not the surveys before us, but when surveys in Pennsylvania are laid in a block (that is, so as together to constitute one tract), under warrants issued at the same time and calling for each other, it is not

required, nor is it usual, that the surveyors run more than the exterior lines.

It is then to be presumed that there was nothing upon the ground to distinguish one part of the entire body from any other part, and the mortgage treated it all as one hypothecation. The entry of Boyer, therefore, by his tenant, Roderberger, upon any part of this large tract must be held to have been an entry upon the whole, a taking possession of the whole. There is nothing in *Ellis v. Pearl*, 10 Pet., 413, in conflict with this. On the contrary, it was there held, as had been frequently held before, that one, entering under color of title by deed, is deemed to have taken possession co-extensive with the bounds of the deed, that is, of all the land conveyed by the deed, if it is not in any adverse possession. Here Boyer entered under a deed. Having a right to enter only in virtue of the mortgage of which he was assignee, it is a legal presumption that his entry was in right of it, under color of his title, and that he intended to assert his claim to the entire subject of the grant. It follows that the entry transferred the possession of the whole body of the land from John Brobst to Boyer, and that no matter where his "*pedis possessio*" was taken, he acquired possession to the extent of the mortgage deed. There is no distinct evidence how long he continued an actual occupation by his tenants. It is enough that Brobst never afterwards sought to regain possession, and the presumption of law, therefore, is, that the possession remained in Boyer so long as his rights under the mortgage continued. On the 8d of November, 1825, he caused a *scire facias* to be issued under the statute law of the State against the mortgagor, with notice to terre-tenants, requiring them to show cause why the lands should not be sold, and the proceeds of sale applied to the payment of the debt. This writ was not served upon the mortgagor, or upon John Brobst, the owner of the equity of redemption. The sheriff's return was: "Served upon Jacob Roderberger, terre-tenant." Nevertheless, a judgment was entered on motion. That judgment was, that the lands mortgaged be sold to satisfy the debt. Had the judgment been authorized, even though erroneously entered, a sale under it would have passed to the purchaser both the interest of the mortgagee in the lands and the equity of redemption then in John Brobst.

But it is contended the judgment was void in law because no service of the *scire facias* was made upon the mortgagor, or the actual terre-tenant, John Brobst (no one but the holder of the title being recognized as a terre-tenant), and because there was no return of "*Nisi*" in default of such service. We shall not discuss that. Assuming that the objection is well taken, and so it was assumed in the court below, it is still true that the record exhibited a formal judgment. Upon this a writ of *levari facias* was issued, and all the lands described in the mortgage were sold under it to Charles Fraley, on the 22d of March, 1828, to whom a sheriff's deed was duly made. Fraley purchased at Boyer's instance, with Boyer's money and, of course, for Boyer. Subsequently, at Boyer's request, he conveyed the property to John Smull, whose title the defendant, Brock, has. In regard to all this there is no controversy. The evidence submitted by the plaintiff shows

how Frailey purchased and conveyed. Now, the worst that can be said of the sheriff's sale under the judgment so obtained is, that it did not pass the title to the equity of redemption; that it did not operate as a foreclosure of the mortgage. But did it not, in connection with Frailey's deed to Smull, made at Boyer's instance, and the subsequent conveyances by which Brock became invested with the title, operate to transmit to Brock the rights of the mortgage? We think it did. It would be "passing strange" if Boyer, after having requested Frailey to buy at the sheriff's sale, and after having furnished him with the money to purchase, and directed him to convey to Smull, could have asserted his mortgage against Smull or Smull's grantee. Beyond question the conveyance by Frailey under the circumstances was a conveyance, in effect, by Boyer, and it passed all the right to the land which Boyer had. It is not necessary to this conclusion that we should hold the sale under the judgment cut off the equity of redemption. We express no opinion upon that subject. It is enough that an irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had. For this, authority is hardly needed. We may, however, refer to *Gilbert v. Cooley*, Walk. Ch., 494, where it was held that though a statutory foreclosure of a mortgage be irregular, and no bar to the equity of redemption, yet the purchaser at the sale succeeds to all the interest of the mortgagee. In that case there was no evidence that the purchaser bought at the instance of the holder of the mortgage. *A fortiori*, must one who has bought from the mortgagee, or from a purchaser at such a sale for the mortgagee, as in this instance, obtain all the rights which the mortgagee held. To the same effect as *Gilbert v. Cooley* is the case of *Jackson v. Bowen*, 7 Cow., 18. If, therefore, it could be held that Boyer's possession, through his tenant, Roderberger, did not, of course, extend over the Deborah Grant tract (which is the tract in contest in this suit), it would still be established that the defendants are assignees of the mortgage in possession. The principal defendant, Brock, consequently, is clothed with the rights of the mortgagee. He is protected by the legal title, even though it be conceded that the equity of redemption is still in existence. From 1821 to 1861, the date of John Brobst's death, and, indeed, until 1865, when this suit was brought, no claim for redemption was ever asserted. As a general rule, a mortgagor, after his mortgagee has been in possession twenty years, cannot be heard in advancing a claim to redeem. As was said in the court below, it is presumed he has released his equity. A chancellor will not entertain stale claims. It is true that in most cases where this doctrine has been avowed, the mortgagee had been in continued actual occupancy, having not merely a right, but a *pedis possessionem*. But the cases are not rested upon that ground, nor is it easy to see how that can make any difference in the rule when the mortgagor is out of possession, and knows, or is bound to know, that a right is asserted against him. The refusal of a court of equity to interfere is because of the laches of the holder of the equitable right, and a sleep of forty years, such as there was in this case, may well raise every presumption against a

claim merely equitable. All such rights are imperfect, and hence they must be asserted with vigilance.

It was said in the argument, on behalf of the plaintiff in error, that the lapse of more than twenty years raised a presumption that the mortgage had been paid, and that the mortgagee's rights had been extinguished before this suit was brought. No such point appears to have been presented in the court below, and hence it ought not to be mooted here. But how any such presumption can arise against a mortgagee, or his alienee, when he has been in possession under the mortgage, we have not been shown. Even if it could, it was completely rebutted in this case by the evidence submitted by the plaintiff in error. It was proved, without contradiction, that Michael Brobst, the mortgagor, became insolvent, and died in 1820, before the mortgage debt became due, never having been married, and leaving no personal representatives, and none but collateral heirs. John Brobst, his alienee, also became insolvent, removed to the western part of the State, and thence to Maryland in 1827, where he resided until his death in 1861, never having returned to Pennsylvania, so far as it appears, and having been supposed to be dead. These facts, shown by the plaintiff, were quite enough to repel any presumption of payment arising from the lapse of time. Had they been submitted to the jury, it would have been their duty to find that the legal presumption, if any could arise under the circumstances, was rebutted. To this the authorities are numerous. *Fladong v. Winter*, 19 Ves., 196; *Blacket v. Wall*, 8 Mees. & R., 119, n.; *Daggett v. Tallman*, 8 Conn., 176; *Newman v. Newman*, 1 Stark., 101; *Shields v. Pringle*, 2 Bibb, 387; *Boardman v. De Forest*, 5 Conn., 1; *Bailey v. Jackson*, 16 Johns., 210; *Goldhawk v. Dane*, 2 Wash. (C. C.), 323.

The defendant, Brock, then, if all his other titles are shut out of view, is, as has been said before, in the position of a mortgagee in possession, and the lessor of the plaintiff has at most only an equity of redemption—an equity more than commonly stale. From 1825, when Roderberger was certainly in possession under Boyer, until 1865, when this suit was brought, no attempt was made to assert the equity or to redeem the land. Meanwhile extensive improvements have been made upon the property, and it has been converted from a wilderness to a populous settlement. It is hardly probable that at this late day a bill to redeem would be entertained by any chancellor. But this we need not now decide. It is sufficient that there has been no redemption. It has been held that ejectment will not lie at the suit of a mortgagor against his mortgagee in possession, after breach of the condition, even if the money secured by the mortgage be paid or tendered. This was said by the Supreme Court of Massachusetts in *Hill v. Payson*, 8 Mass., 559, and solemnly decided by the same court in *Parsons v. Wallis*, 17 Mass., 419, where may be found a thorough discussion of the subject. The doctrine of that case is, that the only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity. This was shown to be in accordance with the rules of the

common law, as well as implied in the statutes of the State, and this seems to rest upon correct principles. If it were not so, a mortgagor might remain quiet until his mortgagee in possession (the property being unimproved, as in this case) had made improvements necessary for obtaining any income therefrom. He might then tender the debt and interest, and recover the possession without making any compensation for the improvements. The mortgagee in such a case would have no remedy for his disbursements. But if the mortgagor must file a bill to redeem, asking for equity, he may be compelled to do equity. Hence, there is justice and fitness in holding that the legal title remains in the mortgagee until redemption, though the debt has been paid. It is observable that the Statute of 7 Geo. II., ch. 20, enacted that a mortgagee shall not maintain ejectment, after payment or tender by the mortgagor of principal, interest, and costs. There could have been no necessity for such an enactment if the legal title had not remained in the mortgagee. The point has never been decided by this court, but in *Gray v. Jenks*, 3 Mas., 520, *Judge* Story intimated at least that such was his opinion, though the case did not call for such a decision. It is true a different rule is said to prevail in New York from that held in Massachusetts, but it is not the rule of the common law, nor can it be so promotive of justice.

This is all that need be said of the case. Were it conceded that the circuit court was in error in instructing the jury that the sale under the Kutz and Levan judgment passed whatever title John Brobet had (which we do not assert), or that the rulings respecting the partition and the tax title were erroneous, it would not avail the plaintiff in error, because, for the reasons mentioned, there can be no recovery in this action.

The judgment of the Circuit Court is affirmed.

Cited—21 Wall., 301; 91 U. S., 28; 104 U. S., 406; 111 U. S., 503; 5 Sawy., 101; 62 Ind., 152; 24 Ohio St., 111, 114.

PINCKNEY C. BETHELL, *Plff. in Err.*,

v.

ELIZABETH A. DEMARET, Widow of
JOSEPH T. HAWKINS, Deceased, ET AL.

(See S. C., 10 Wall., 537-540.)

Judiciary Act—construction of—state decision.

The authority conferred on a court to hear and determine cases in a State, is not the kind of authority referred to, as an authority exercised by any State in the 25th section of the Judiciary Act.

A decision of a state court was not repugnant to the Constitution, which simply held that certain promissory notes and a mortgage in question were nullities, on the ground that the Confederate cur-

rency, which constituted the consideration, was illegal according to the law of the State at the time the contract was entered into.

[No. 344.]

Submitted Jan. 20, 1871. Decided Jan. 30, 1871.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to dismiss.

The history and facts of the case fully appear in the opinion of the court.

Mr. J. A. Campbell, for defendant in error:

We understand the decision of the Supreme Court of the United States in *R. R. Co. v. Rock*, 4 Wall., 177 (71 U. S., XVIII., 381); to determine that the Supreme Court will not review a judgment of this sort under the 25th section of the Judiciary Act.

The record is defective in failing to disclose that any question of the kind mentioned in the 25th section of the Judiciary Act was raised in the Supreme Court of the State, and determined by the Supreme Court.

We do not discover that any Constitution, statute or treaty of the United States was cited to the court, under which the validity of the contract was claimed to be supported. Nor do we find any Constitution or Statute of the State to have been drawn in question in the cause. The contest was on a matter of fact.

Mr. Miles Taylor, for plaintiff in error:

The contract sued upon by the plaintiff in the writ of error, was valid Apr. 8, 1862, under the Constitution and laws of the State of Louisiana, as then construed; and under the settled jurisprudence of the United States, it is clear that no subsequent action of the Legislature or of the Judiciary of the State of Louisiana could impair its obligation.

Gelpcke v. Dubuque, 1 Wall., 175 (68 U. S., XVII., 520); *Havemeyer v. Iowa Co.*, 8 Wall., 294 (70 U. S., XVIII., 38).

In the Constitution of Louisiana, adopted in 1868, it was declared (art. 127) that "All agreements, the consideration of which was Confederate money, notes or bonds, are null and void, and shall not be enforced in the courts of this State." That this constitutional provision, so far as it was intended to operate on agreements entered into in the State, on or before Apr. 8, 1862, is repugnant to that clause in the Constitution of the United States which prohibits the several States from passing any law impairing the obligation of contracts, is too plain to require argument.

Under the 25th section of the Judiciary Act of 1789, the right to have a final judgment or decree of a state court re-examined by the Supreme Court of the United States, is as perfect, where the validity of an authority exercised under any State on the ground that it is repugnant to the Constitution of the United States, is drawn in question, as when the validity of the statute of a State is called in question on that ground.

The Supreme Court of Louisiana, in the discharge of its judicial functions, exercises an authority under the State of Louisiana, whenever it renders a decision in a cause brought before it. In rendering its decisions, it is bound by the Constitution of the United States, and the laws made in pursuance thereof, which are the supreme law of the land (art. 6, Const.) and every

NOTE.—Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty, or Constitution of U. S. See note to *Matthews v. Lane*, 3 U. S. (4 Cranch), 382; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 304; and note to *Williams v. Norris*, 26 U. S. (12 Wheat.), 117.

Contracts payable in Confederate notes, tender of. See note to *Thorington v. Smith*, 75 U. S., XIX., 301.

decision which is repugnant to any provision of the Constitution of the United States, is open to re-examination before the Supreme Court of the United States, on a writ of error.

Mr. Justice Nelson delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Louisiana.

The suit was brought by Bethell against the defendants, in a District Court of the State, to enforce a mortgage given to secure the payment of two notes of \$7,500 each, given by them for the loan of Confederate currency on the 2d of April, 1862, payable in two and three years after date, with interest. Such proceedings were had that the plaintiff recovered judgment and the mortgaged premises were directed to be sold to pay the judgment; whereupon an appeal was taken to the Supreme Court of the State, where the judgment was reversed and the suit dismissed. The decision was placed on the ground that the Confederate money was illegal, and constituted no valid consideration for the two notes and mortgage at the time they were executed, according to the Code of the State. Arts. 1887, 1889, 2026; 17 Am. R., 261.

The court say in its opinion in the present case, that "He (the plaintiff in error) is endeavoring to enforce a contract, the consideration of which is Confederate currency. The nullity of contracts founded upon that unlawful currency, has been frequently determined."

There was no federal question presented to the court below by the plaintiff in error, so far as appears from the record. The counsel in opposition to this motion relies, in his argument, upon the clause of the 25th section, "Or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, etc., and the decision is in favor of such validity." There is no statute of a State in question here.

But it is insisted that there was an authority under the State of Louisiana exercised in the case drawn in question, and which was repugnant to the Constitution, and the decision in favor of its validity, and that is, the Supreme Court of the State were acting under the authority of the State at the time its decision was rendered.

There are two answers to this ground: 1. That the authority conferred on a court to hear and determine cases in a State, is not the kind of authority referred to in the 25th section; otherwise every judgment of the Supreme Court of a State would be re-examinable under the section; and 2d. The decision of the court was not repugnant to the Constitution. It simply held that the promissory notes, together with the mortgage in question, were nullities, on the ground that the "Confederate currency," which constituted the consideration, was illegal according to the law of the State at the time the contract was entered into.

As no federal question appears in the record, the motion to dismiss must be granted.

Motion granted.

Cited—13 Wall., 433; 14 Wall., 10, 666; 19 Wall., 577; 92 U. S., 130, 287; 93 U. S., 599; 98 U. S., 333; 109 Mass., 381.

MERCHANTS' NATIONAL BANK OF BOSTON, *Plff. in Err.*

THE STATE NATIONAL BANK OF BOSTON.

(See S. C., 10 Wall., 604-676).

Corporation bound by contract by agents—certified check—authority of cashier—additional stamp.

Where a party deals with a corporation in good faith, and is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, the corporation is bound by the contract, if not *ultra vires*, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances.

The certificate of a bank that a check is good, is equivalent to acceptance.

A certified check is not against the policy of the Banking Act, and is a legal and valid investment.

Cashier of a bank has authority to certify checks. Checks, after being certified, do not require an additional stamp.

[No. 27.]

Argued Apr. 19, 1870. Decided Jan. 30, 1871.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Suit was brought in the court below by the plaintiff in error to recover for certain gold coin and gold certificates. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. W. M. Evarts, S. Bartlett and J. G. Abbott, for plaintiff in error:

As to defendant's view that, in the absence of definition by charter, by-law or vote, the law prescribes the extent and limit of the powers of the cashier, it is submitted that it is supported neither by principle nor authority.

A cashier, the offspring of modern commerce is, as stated by Baron Parke, of bill-brokers, "Not a character known to the law with certain prescribed duties; but his employment is one that depends entirely on the course of dealing. It may differ in different parts of the

NOTE.—*Certification of checks; liability of bank on.* A bank is liable on a check certified by it, whether the drawer had sufficient funds or not. Certification operates as a payment of the debt for which the check was drawn and the drawer is released from liability. *French v. Irwin*, 4 Bax., 401; S. C., 27 Am. Rep., 769; *First Natl. Bk. of Jersey City v. Leach*, 52 N. Y., 350; S. C., 11 Am. Rep., 708; *Cooke v. State Natl. Bk. of Boston*, 52 N. Y., 96; S. C., 11 Am. Rep., 667.

Bank certifying check without funds is only liable on it to bona fide holder without notice of that fact, nor is bank liable on bank officer's certification of his own check. *Atlantic Bk. v. Merchants Bk.*, 10 Gray, 532; *Claffin v. Farms, & Co.*, Bk., 25 N. Y., 293.

The theory of the law is that where a check is certified as good by a bank, the amount thereof is then charged to the account of the drawer. *Smith v. Miller*, 43 N. Y., 171; *Mead v. Merchants Bk. of Albany*, 25 N. Y., 148; *Farms & Merchants Bk. v. Butchers & Drovers Bk.*, 16 N. Y., 125; *Merchants Bk. v. State Bk.*, *supra*.

The holder of a certified check may demand pay-

country. The nature of these powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place."

Poster v. Pierson, 1 Crompt. M. & R., 858.

Defendant must admit that in the absence of regulations by charter, by-law or vote, the powers and duties of the cashier may be shown by the course of dealing, lawfully committed to his charge by the Bank.

In no one of the cases decided by this court and relied on by defendant, nor, as it is believed, in any decision of the state court, has the court attempted to rest its decision upon an assumed judicial knowledge of the common law powers and duties of the cashier, where the acts in question were within the pale of the charter.

Fleckner v. Bk., 8 Wheat., 398, is believed to be the earliest case. The question was whether a cashier had a right to indorse the note in suit. In the course of the opinion it is said: "We are very much inclined to think that the indorsement falls within the ordinary duties and rights of the cashier, at least if his office be like that of similar institutions. 'The cashier is usually,' etc. 'It does not seem too much to infer.' 'But waiving this consideration.' The case is decided on another ground.

Bk. v. Dandridge, 12 Wheat., 64, was debt on a cashier's bond. The court says: "If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose; and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.

"The cashier was duly appointed, and he was permitted to act in his office under the express sanction of the directors for several years. If he had never given any bond whatever during the period, yet his acts within the scope of his authority would have bound the Bank."

See, also, *Minor v. Bk.*, 1 Pet., 46.

"The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from regulations prescribed by the Board of Directors," etc. It would not only be inconvenient but perilous for the customers or any other persons dealing with the bank to transact their business with the officers upon any other presumption. The officers of a bank are held out to the public as having authority to act according to the general usage practiced in course of their business, and their acts within the scope of such usage would bind the

bank in favor of third persons having no other knowledge."

Then follows, next, the case of *Bk. v. Dunn*, 6 Pet., 51, in which the defense was set up by an indorser that, prior to the discount of the note, both the president and cashier represented to him that the note was secured and his liability nominal. The evidence was held as inadmissible, both as contradicting the note and upon the ground that "All discounts are made under the authority of directors, and it is for them to fix any conditions." "The agreement was not made by persons who have power to bind the bank in such cases, nor have they power to bind the bank except in discharge of the ordinary duties." There is no other or further remark in the case as to the powers of cashiers.

The last case is *The U. S. v. Bk.*, 21 How., 356 (62 U. S., XVI., 130). Although it recites from *Fleckner v. Bk.*, a case, as we have seen, not decided on that point, the statement there made, as to the powers and duties with which it was believed by the court that a cashier is "usually intrusted," and declares them to be his ordinary duties; yet, notwithstanding these recitals, the case must be taken to have been really decided upon the ground that the contract to transfer the \$100,000 was *extra vires*. Thus the court states: "We think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, to test that fact by an inquiry into the corporate ability which has been given to them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them." Such was the view of this court which decided the case of *Bk. v. Dunn*, 6 Pet., 51.

Unless the case was decided in this point, no reason could have existed for making the foregoing a part of the judgment.

But the real contest turns upon the following propositions, which are decisive on the question whether the case was properly withdrawn from the jury:

(a) If, in the absence of regulation by charter, by-law or vote, and with no evidence as to the powers actually exercised by the cashier and acquiesced in by the banks, nor of the powers usually entrusted to cashiers of banks established in the same community, the court can judicially know what the powers and duties of such cashiers are—yet it is a principle perfectly well settled that, under the foregoing circumstances (and even when by-laws and votes on the subject exist), evidence of the powers

given in the usual course of business. *Dorsey v. Abrams*, 35 Pa. St., 299; 27 Am. Rep., 637.

Certification of a check by the drawee at the request of the indorser before delivery to the holder, does not release the indorser. *Mut. Natl. Bk. v. Rotgé*, 28 La. Ann., 933; S. C., 26 Am. Rep., 128.

A bank having erroneously certified a note to be "good," can correct the mistake before liabilities have been incurred or losses sustained in consequence of such certification, and evidence of usage to the contrary is incompetent. *Second Natl. Bk. v. Western Natl. Bk.*, 51 Md., 128; S. C., 34 Am. Rep., 300.

Where a bank certifies a raised check, some States hold that the bank so certifying becomes liable for the amount to a *bona fide* holder presenting it. *La. Natl. Bk. of N. O. v. Citizens' Bk. of La.*, 28 La. Ann., 189; S. C., 26 Am. Rep., 92; *Helwege v. Hibernia Natl. Bk.*, 1 La. Ann., 520.

It is also held that the teller may certify a check. *Farms. Bk. v. Butchers', &c., Bk.*, 14 N. Y., 624; 16 N. Y., 123; *Mead v. Merchs. Bk.*, 25 N. Y., 143; *Irrving Bk. v. Wetherald*, 36 N. Y., 336; *contra*, *Mussey v. Harle Bk.*, 9 Met., 813.

Bank is not bound by certification of a check not

habitually or usually exercised by the cashier, with the knowledge and acquiescence of the bank, defines and establishes as to the public these powers; provided that the powers thus exercised may be conferred on such cashier by the directors or corporation, without violation of the charter.

(b) The evidence, offered by plaintiff at the trial of the cause, was competent and sufficient to have been submitted to the jury, on which they might lawfully find that the powers habitually or usually exercised by defendant's cashier with their knowledge, embraced the power to make for the defendant the contracts declared on, or some one or more of them, and that such powers might, without violation of the charter or law, be confined to such cashier.

To hold that the public may not safely confide in the existence of powers which by charter can be lawfully delegated and which are openly exercised, but must investigate and find if these powers have been the subject of by-law or vote, and act accordingly, would not only suspend the business of commerce, but tend to make transactions with corporations a snare and a cheat.

Plaintiff contents itself with a reference to the doctrine as stated in the decisions of this court already cited, and to a few other cases and treatises, viz.:

Bk. v. Dandridge, 12 Wheat., 64; *Minor v. Bk.*, 1 Pet., 46; Story, Ag., ed. of 1863, secs. 114, 116; *Wild v. Bk.*, 3 Mas., 505; *Nicoll v. Amer. Ins. Co.*, 3 Wood. & M., 530; *Smith v. Glass Co.*, 8 C. B., 668; 11 C. B., 897.

So far as the public is concerned, it is wholly immaterial whether the powers thus exercised are in disregard of the by-laws of the Corporation or not, provided they are within the corporate powers conferred by the charter. *Agar v. Ins. Co.*, 8 C. B. (N. S.) 725; *Bk. v. Turquand*, 6 Ell. & Bl., 327; *Prince Wales Ins. Co. v. Ath. Ins. Co.*, 8 C. B. (N. S.), 756, n.

The struggle of the cause will be upon the second proposition, embracing as it does both law and fact, viz.: was the evidence offered by the plaintiff competent and sufficient to be submitted to a jury in support of the claims made by the declaration?

1. The main original contract (laying aside, for the present, the question of certified checks), as claimed by plaintiff, and of which evidence (sufficient at least to be submitted to the jury) was offered by it, was a contract for the purchase and delivery of gold by plaintiff to defendant.

2. The charters of both Banks, in terms, au-

thorized them to carry on the business of banking by (among other things) "buying and selling exchange, coin and bullion," so that the contract set up by the plaintiff was within the corporate powers of both parties. Act, Jan. 3, 1864, sec. 8.

3. The transaction, then, being legitimate, and in its character forming part of the business of both banks, the principal question is: has the plaintiff forever lost this large sum of money by improperly confiding in the assumed powers of defendant's cashier? The buying and selling of gold must, of course, be intrusted, under general powers, to some officer of the Bank. A vote of directors, authorizing each daily or hourly transaction, would be impracticable.

4. In this attitude of the case, plaintiff now asks the attention of this court to the evidence offered by it as to the powers habitually exercised, with the knowledge of defendant, by its cashier, to the end that the correctness of the ruling withdrawing the case from the jury may be determined.

5. In connection with this, it further asks attention to the evidence of the officers of numerous other national banks established at Boston, as to the powers and duties usually exercised by their cashiers in dealing with the public and with other banks; the competency of which evidence is thus declared by the court.

"Considering that all insurance companies in Boston have similar charters, and the same kind of officers to conduct their business, we think that there is competent evidence that presidents of insurance companies in that city are generally held out to the public as having authority to act in this matter, viz.: to make oral insurance."

Com. Ins. Co. v. Union M. Ins. Co., 19 How., 318 (60 U. S., XV., 636); see, 19 Pa. St., 172; *Ang. & Ames, Corp.*, 8th ed., 298.

Where the authority of an agent is left to be inferred by the public from powers usually exercised by the agent, it is sufficient if the transaction in question involves precisely the same general powers, though applied to a new subject-matter.

If it be shown that defendant's cashier had habitually, with the knowledge of the Bank, dealt with the public as authorized to buy and sell exchange; and still more, if that power is shown to have been habitually exercised by the cashiers of all other banks established in the same community and "having similar charters" (*Com. Ins. Co. v. Union Mut. Ins. Co.*, *supra*), then the power to buy and sell gold (the right to do both which is conferred

ing can recover back the excess over the real amount even from a *bona fide* holder. *Parke v. Roser*, 67 Ind., 500; S. C., 33 Am. Rep., 102; *Natl. Bk. of Com. v. Natl. Mechs. Bk.*, 35 N. Y., Sup. Ct. (3 J. & Sp.), 232; *Marine Natl. Bk. v. Natl. City Bk.*, 50 N. Y., 67; S. C., 10 Alb. L. J., 380; S. C., 17 Am. Rep., 67; *Security Bk. v. Natl. Bk.*, 67 N. Y., 458; *Natl. Park Bk. v. Ninth Natl. Bk.*, 55 Barb., 87; *Espy v. Bk. of Cincinnati*, 85 U. S. (18 Wall.), 604; *Natl. Bk. of Com. v. Natl. Mechs. Bkg. Assn.*, 55 N. Y., 211; S. C., 14 Am. Rep., 232.

Certifying bank is bound only as to signature of the drawer and its own certification. *Natl. Bk. of Com. v. Natl. Mechs. Bkg. Assn.*, 55 N. Y., 211; S. C., 14 Am. Rep., 232.

The certification of a check guarantees only the genuineness of the signature of the drawer and that he has sufficient funds to meet it which will not be withdrawn. *Marine Natl. Bk. v. Natl. City Bk.*, 50 N. Y., 67; S. C., 17 Am. Rep., 305; *Farma & Mechs.*

Bk. v. Butchers' & Drovers' Bk., 16 N. Y., 135; *Espy v. Bk. of Cincinnati*, 85 U. S. (18 Wall.), 604; *Meads v. Merchs. Bk.*, 25 N. Y., 143; *Irrving Bk. v. Wetters*, 36 N. Y., 385.

The ordinary form of certification is for the proper bank officer to write the word "good," adding sometimes name or initials. The statute in some States now requires a distinct promise written and signed. In the absence of statute a verbal statement by the bank officer that the check is good, or promise by bank to pay it, is sufficient, provided it induced holder to take it. *Barnett v. Smith*, 10 Post., 226; *Pope v. Bk. of Albion*, 50 Barb., 226; *Bank v. Petzel*, 41 Ill., 492; *Carr v. Natl. Security Bk.*, 107 Mass., 46; *Nelson v. First Natl. Bk.*, 48 Ill., 36.

Bank is not liable on certification of check dated ahead, at least to parties taking it before due. It bears on its face until due notice that it was not certified in the usual course of business. *Clarke Natl. Bk. v. Bk. of Albion*, 52 Barb., 592.

by the same clause of the charter) may be inferred by the jury.

If a cashier is shown to have usually or frequently pledged in writing the credit of the bank, in the usual course of the business, with the knowledge of the bank, and such is shown to be the usage of other banks as before stated, it is evidence from which the jury may infer that he is authorized to pledge that credit in all transactions authorized by the charter, and which could lawfully be confided to a cashier.

When the powers exercised are shown to be of the same character, involving, both in form and substance, the same identical obligation and the same consequence to the principal, and in the course of his business, it cannot be necessary to show that in their previous exercise they have been applied to contracts for the same article. See, *Tripp v. Paper Co.*, 13 Pick., 291.

The elementary treatises and authorities establish this view. Story, Ag., ed. 1863, p. 98, sec. 87.

Sm. Merc. L., ed. 1850, p. 151, says: "He who accredits another by employing him, must abide the effects of that credit, and will be bound by contracts made by innocent third persons in the seeming course of that employment and on the faith of that credit, whether the employer intended to authorize them or not. Am. Lead. Cas., ed. 1857, p. 573.

"With regard to the limits of the general agency, which is created by a series of acts in course of dealing, the language of Lord Eldon in *Davison v. Robertson*, 3 Dow., 219, has generally been considered as defining the principle with accuracy. From the general nature of the acts permitted to be done, the law would infer an authority; the law would say that such an authority might exist without a special mandate."

This is illustrated in *Bk. v. Norton*, 1 Hill, 502. The doctrine was, in that case, applied where the agent of a firm who, with its knowledge and assent, was in the habit of drawing bills and making notes and indorsements for it, had made an acceptance, but no proof was offered that he had ever previously made an acceptance. The principal was charged. The case is cited as sound, in Pars. Merc. L., p. 135, n., and Paley, Ag., ed. of 1856, p. 169, n.

In *Watkins v. Vince*, 2 Stark., 368, Lord Ellenborough carried the doctrine so far as to hold that a son who had signed for his father in three or four instances and had accepted bills of exchange, could bind the father by a guaranty.

In *Prescott v. Flinn*, 9 Bing., 19, Ch. J. Tindall says: "It may be admitted that an authority to draw does not impart in itself an authority to indorse bills, but still the evidence of such authority to draw is not to be withheld from the jury, who are to determine on the whole evidence whether such authority to indorse exists or not."

The cashier of defendant was intrusted by it with powers so large and comprehensive in dealing with the funds of the Bank, giving its checks, pledging its credit and making its contracts and purchases, that instead of these transactions going regularly as they occurred through the books of the Bank, and being credited or debited to the accounts to which

they severally belonged, there was opened on the books of the Bank one general account with the cashier, in which all the debits (and of course the credits) arising out of them, were entered to his debit or credit.

These transactions thus entered on the books embraced: giving checks in lieu of bills where discounts are made; giving checks for the purchase of exchange; giving checks for money borrowed of other banks.

The amount of checks thus given for exchange, and in lieu of bank-bills on discounts, during the five months prior to the transaction now under investigation, was \$2,500,000, and in addition, the amount of such checks given for money borrowed of other banks during the same period, was the \$1,500,000.

Regular printed blank checks were kept by the Bank, to facilitate these operations of its cashier.

From the evidence derived from the officers of more than twenty banks of Boston, in relation to the dealings of such banks with each other, a usage is shown by which, without by-law or vote, powers are intrusted to cashiers of such banks, to borrow and lend the money of their banks of and to each other, to buy and sell exchange of and to each other, and in all such transactions to pledge the credit of their respective banks, usually by cashier's check, sometimes by certificates or memoranda; that these transactions are frequent, involving large sums of money, and that they are uniformly conducted in faith of the implied powers of cashiers, without inquiry.

In view of this evidence, we ask if it ought to be determined that there was evidence proper to be submitted to a jury, from which they might infer that, as among the wide powers openly exercised by Smith, the defendant's, cashier, in numerous instances and for large amounts, was the authority to purchase exchange, he had or had not also entrusted to him the power to purchase gold, and thus to find their verdict for the plaintiff.

It has been determined by the same judge who delivered the opinion of the court in *Bk. v. Dunn*, 6 Pet., 51, relied on by defendant, that "The cashier of a bank authorized by its charter to deal in bills of exchange, may accept such bills as the agent of the bank. This is in the scope of his agency, and is sanctioned by universal usage."

La Fayette Bk. v. State Bk. of Ill., 4 McLean, 208; see, also, *Sturges v. Bk.*, 11 Ohio St., 53.

It was legally fit to be submitted to a jury to find that defendant's cashier, clothed as he was with the powers stated in the proofs, had or had not the incidental power to certify the checks declared on, and thus support the counts in the declaration framed on those checks.

The form of pledging the credit of the Bank at the moment the gold was received, viz.: by certifying the checks of the parties for whom the arrangement was made, is of the same character and nature as a cashier's certificate of deposit, checks or memorandums of credit referred to in the testimony as to usage. Like these it is an absolute, and not a contingent promise to pay, and in view of the wide powers exercised by defendant's cashier, the jury had a legal right to infer

that this mode of pledging the credit of the Bank, suited as it was to the circumstances (the cashier having full authority to make the purchase) was within his delegated powers.

But if, in the judgment of the court, the power to certify these checks was not, under the evidence, legally fit to be submitted to the jury, still the right to recover the purchase money for the whole stands unaffected by the giving of those checks. They were received in the faith that, in the dealing of bank with bank, defendant's cashier had authority to certify them. Indeed, as to the \$75,000 check, taken by defendant's cashier from plaintiff's teller, in the absence of the cashier, the check was taken without authority, in faith of the occurrence a few hours previous, when such checks had been received by the cashier.

But, however these checks may have been received, they purported to be delivered to the plaintiff in payment for the gold. If they were void, no payment has been made. It is equivalent to a payment in forged bills. The debt remains.

Bk. v. Smith, 5 Conn., 71; *Puckford v. Maxwell*, 6 T. R., 52; *Young v. Adams*, 6 Mass., 182.

A suggestion was made at trial, that plaintiff was bound to elect whether to proceed on the counts founded on the check, or on those for the money due for the gold, and further that no recovery can be had on the latter count, while the checks remained in the hands of plaintiff. We submit that plaintiff was not bound to elect (see, *Meserve v. Norris*, 3 Cush., 408); that the checks may be delivered to plaintiff or placed on file for his use "at any time before final judgment."

Bridge v. Batchelder, 9 Allen, 394.

The two grounds on which plaintiff thus placed its cause, assumed the one, that the power to purchase exchange and gold—the other that the power to certify checks in dealings between bank and bank, may be lawfully delegated to a cashier. Both these positions are denied by defendant, who asserts that all quasi-judicial powers, as it calls them, are vested solely in directors, and that no other than a mere ministerial duty can be intrusted to a cashier; so that, in the daily if not hourly recurrence of purchases of exchange or gold, the adjustment of balances between banks at the clearing house and giving checks for these balances, or obtaining temporary accommodation or checks to provide for these balances, and all similar arrangements disclosed in the evidence as being the uniform practice of this defendant, and of all the other banks in Boston, all are void, and there can be no other protection to the public except by first ascertaining if there be a regular vote of the Board of Directors as to each separate transaction, since upon defendant's theory no general power can be granted to the cashier.

Defendant's proposition is founded on the doctrine that if a charter prescribe the mode in which the officers of the Company must act or contract, that mode must be strictly pursued and the power cannot be delegated.

Ang. & Ames, Corp., 8th ed., 383; *Lyon v. Jerome*, 26 Wend., 485.

But this doctrine has no application in this cause, since the National Currency Act pre-

scribes neither the mode nor the officers by whom the act or contract necessary to the course of business shall be made, but merely confines the general oversight and management to a Board of Directors.

This precise question—as to power of the directors to authorize other officers of a bank, by a general vote, to exercise in the name of the bank, at all times, the power to borrow money and give notes—has been raised and carefully discussed in a case where the charter in terms provided that the affairs of the company shall be conducted by the directors, and a careful judgment of *Chief Justice Tilghman*, displaying as it does the practical difficulties which would arise from a denial of the power, seems conclusive.

Ridgway v. Bk., 12 Serg. & R., 256; *Ang. & Ames, Corp.*, 8th ed., p. 267.

As to incidental powers of banks to borrow money, see *Beers v. Glass Co.*, 14 Barb., 358.

If the power to borrow money at all times for the purposes of the bank and give notes therefor, can be delegated by the directors to the cashier, surely the power to purchase exchanges and gold in pursuance of the charter can be so delegated. Whether the power to delegate to a cashier authority to certify checks exists, has nowhere been settled. As to conferring such authority on tellers by usage, the power is negatived in Massachusetts (*Mussey v. Bk.*, 9 Met., 306), while in New York it is settled that such power may be conferred.

Far. & Mech. Bk. v. Butch. & Drov. Bk., 16 N. Y., 125; *Meads v. Bk.*, 25 N. Y., 148; 2 Duer, 121; 4 Duer, 219.

The Statutes of the United States in 1864, ch. 173, sec. 110, recognizes certified checks and makes them, in common with the circulation, subject of taxation.

Whether the control of the great leading business for which a bank is created, viz.: loans and discounts, can be delegated, may be doubted.

Bk. v. Dunn, 6 Pet., 56; *Bk. Com'rs v. Bk. of Buffalo*, 6 Paige, 497.

The prevailing practice known and acted upon by the public undoubtedly is, to apply to a Board of Directors for discounts. But it by no means follows that the whole of the other functions of a bank can be performed by a Board of Directors, upon each hourly transaction, and the authorities cited above are repugnant to any such doctrine.

Morris, B. E. Curtis, C. B. Goodrich, and B. F. Thomas, for defendant in error:

Had the cashier of the defendant Bank authority to certify the checks of Mellen, Ward & Co., and by such certificate to bind the defendant to their payment?

This question resolves itself into two others:

1. If it were in the power of the Corporation or its directors to clothe the cashier with the authority to certify the checks in question, has it done so, either expressly or by implication of law? Was it competent for the Corporation or its directors to delegate such authority to the cashier as to bind the Corporation and its stockholders?

II. It is clear upon the record that no express authority had been given to the cashier to certify checks. No such power is conferred upon the cashier by Act of Congress under

which the Corporation is organized, and from which it derives all its powers and functions. Stat. at L., 1864, ch. 106; 13 Stat. at L., 99.

By the Act of Congress the entire control and management of the Bank are vested in the directors. With this view, both as to qualification and responsibility, the office and trust of directors is most carefully guarded.

III. If, then, the cashier of the defendant was authorized to certify the checks sued upon, it was through the action of the directors, direct or indirect.

No such power is conferred upon the cashier by any by-law. There has been no vote of the directors to confer such a power upon the cashier; no ratification or sanction by the directors as a board or separately, of the use of such power by the cashier; no evidence that the defendant's cashier ever, in a single instance, before or since the Acts in question, made any certificate upon any check of depositor or stranger.

How, then, if at all, have the directors clothed the cashier with the power to make the contracts declared on?

They had the power to appoint a cashier and "define his duties;" not to transfer nor make over to him the duties and powers of the directors.

If, as, in substance, plaintiff claims the cashier may, by the appointment of the directors, or by their sanction or toleration, become the Bank and exercise all its powers and discharge all its duties, the provisions to the Act of Congress which have intrusted to the directors all these duties and functions, and held them responsible for their diligent and honest administration, are not merely a dead letter but a snare.

There would seem to be but one of two grounds upon which it could be argued that the cashier had the power.

1. That it was inherent in the office, so that when one was appointed cashier, he might *virtute officii*, certify checks. 2. That the directors had held him out to the world as clothed with the power, so held him out to the world that they would be estopped to deny it.

His powers and duties are executive and ministerial, not discretionary nor *quasi* judicial. His function is to carry into effect the contracts made by the directors and to execute their orders. If in carrying into execution the contracts and orders of the directors, his acts sometimes assume the form of contracts, they are ancillary and accessory, and not substantive and independent agreements.

Story, Ag., secs. 114, 115.

In *Minor v. Bk.*, 1 Pet., 46, it was held that no usage, even under the sanction of the Board of Directors, would justify a cashier in allowing customers to overdraw.

Even the express sanction of the directors would not have given validity to the acts of the defendant's cashier in the certifying of the check sued on. The case at bar is not merely a case of overdraw by depositor, but a case of drawing to the amount of \$600,000 by a firm which was not a depositor, and which had not and never had had funds in the Bank.

In *Bk. v. Dunn*, 6 Pet., 51, this court held that the president and cashier of a bank acting together, had no power to bind the bank by See 10 WALL.

a representation to an indorser, where there was collateral security, that he would not be bound by his indorsement.

See, also, *Bk. v. Jones*, 8 Pet., 12.

The more recent and leading case in this court is that of *The U. S. v. Bk.*, 21 How., 356 (62 U. S., XVI., 130). This case recognizes and affirms as settled law, that the making of a contract involving the payment of money or the purchase or sale of property, is not within the ordinary business of the cashier, and if a party relies upon such contract by a cashier, he must show (at least) a special delegation of power from the directors.

It is suggested that the contract in this case in 21 How. (*supra*) was one which the corporation itself could not make, was *ultra vires*. It is enough to say that the case was neither argued nor decided on that ground. It was argued and decided on the power of the cashier to make the contract.

See, also, *Kirk v. Bell*, 16 Q. B., 290, and 13 Eng. L. & E., 889; *Hoyt v. Thompson*, 5 N. Y., 321; *Bk. Comrs. v. Bk. of Buffalo*, 6 Paige, 497; *Lyon v. Jerome*, 26 Wend., 485; *Wild v. Bk.*, 3 Mas., 505; *Salem Bk. v. Gloucester Bk.*, 17 Mass., 1; *Mussey v. Bk.*, 9 Met., 806; *Atlantic Bk. v. Merch. Bk.*, 10 Gray, 533; *Bk. v. Stewart*, 37 Me., 523; *Percy v. Milaudon*, 3 La., 568.

The leading case in Massachusetts is *Mussey v. Bk.*, *supra*.

The evidence tended to show that it was the usage of the teller, during all the time of his holding office, to certify checks; that his doing so was known to the Bank and not forbidden; that it was the usage of the tellers of other banks to do the same thing. The court held that such evidence would not warrant the jury to infer that the power of so doing was an inherent power in his office; and that a usage for him to certify that a check was good, so as to enable the holder to use it at his pleasure, was bad.

The cases decided in the courts of New York, do not really touch the question of authority, as they rest upon admissions in the pleadings or in agreed statements of facts, that the usage was for cashiers to certify. In *Farm. & Mech. Bk. v. Butch. & Drov. Bk.*, 4 Duer, 219, the question was as to a certification when the drawer had no funds, but the check had passed into the hands of a *bona fide* purchaser without notice.

S. C., N. Y., 623; *S. C.*, 16 N. Y., 125.

The duty of signing contracts is simply ministerial and executive and not discretionary. The cashier is to sign such contracts as the corporation makes through its directors. The power to sign without more, excludes the idea of a power to make. The contracts to be signed are contracts of the Bank. The checks to be signed are the checks of the Bank, and not of third persons.

Fearns v. Filica, 7 Man. & Gran., 518.

The drawer of the check is the debtor to the payee. It is his contract, he standing to the payee as the maker of a promissory note or the acceptor of a bill of exchange. The check does not contemplate or require acceptance, and in the usual course is not accepted.

Thomp. Bills, 409; *Mullick v. Radakissen*, 9 Moore, P. C., 69.

Smith put his name upon contracts made by

Mellen, Ward & Company, which had their existence as contracts when signed by Mellen, Ward & Company. They were in no sense contracts made by the directors, or which had been prepared by them for signature by the cashier.

Upon the evidence, the contracts, if made at all, were made by the cashier while absent from the office and banking house of the Corporation, fixed by its organization certificate.

Stat. at L., 1864, sec. 8.

The attempted distinction between the *prima facie* and the final effect of the signature to contracts, would furnish no protection to the Bank nor its stockholders, as in the hands of purchasers without notice it would be conclusive, and thus the whole power of the Bank be put into the cashier's hands.

If *The Bk. v. Warren*, 7 Hill., 91, sustains such a distinction, it is certainly in conflict with the cases in this court.

A party contracting with a corporation of limited and defined powers, or a servant or agent of said corporation of limited agency, is always put upon his inquiry as to the extent of the power of both principal and agent.

See, among other cases, *Bk. v. Winchester*, 8 Allen, 109; *Zabriskie v. R. R. Co.*, 28 How., 398 (64 U. S., XVI., 497); *Pierce v. Madison & Ind. R. R. Co.*, 21 How., 443 (62 U. S., XVI., 184); *Salem Bk. v. Gloucester Bk.*, 17 Mass., 1.

A natural person may appoint an agent to do what he may do himself. Not so with corporations. They can exercise no powers not delegated, and must use them in the mode prescribed by their charter.

He who relies upon a contract as binding upon a corporation when such contract can be made by its directors must show affirmatively, not only that the directors made it, but that it is within the scope of their powers and duties.

Burnes v. Pennell, 2 H. of L. Cas., 520.

The plaintiffs must show upon the evidence that the directors, in fact, empowered the cashier to make them, or held him out to the world as clothed with such authority. The appointment to the office of cashier was a limitation of his powers.

U. S. v. Bk., 21 How., 356 (62 U. S., XVI., 180).

It is simple assumption to say that the defendant Bank held out the cashier as its organ to do the entire business of banking. It put the president, directors, cashier and other officers into the Bank to do each his appropriate work.

As plainly as if it had been printed in broad letters upon its door-posts, defendant said "This Bank is organized and open for business under the Act of Congress of June 8, 1864. Contracts must be made with the directors."

So far as the evidence concerns the conduct of the defendant Bank and its relations with its cashier, it tends to show that the cashier had, before these transactions, been accustomed to borrow money of other banks to make up deficiencies at the clearing house and give his check therefor; to lend money for the same purpose, and receive a cashier's check therefor; to sell exchange on New York, and to draw on the Bank's correspondents for the same; to buy exchange on New York, and give a cashier's check for the same; and, when discounts had been

made, to give checks in lieu of bills to customers of the Bank.

None of these acts, if proved to have been done by the cashier of his own motion, would have any tendency to show or warrant the jury in finding that Smith had authority to go to plaintiff's Bank and certify checks of Mellen, Ward & Co., given to the plaintiff in payment of a previous loan to them or in payment for gold, which the plaintiff was under contract to sell to it.

But defendant submits that there is nothing in this part of the plaintiff's evidence to warrant the conclusion that in any of these transactions the cashier of the defendant Bank acted *mero motu*, without the direction of the president and directors.

No force can be given to these acts of the cashier, unless it appears that they were done either under a general authority given him by the directors, or by his own motion and sanctioned by the directors. If done with the advice or consent of the directors or president at the time, they have no weight or significance.

But, assuming that the borrowing of money of other banks, dealing in New York exchange and giving checks to customers in lieu of bills when bills were scarce, was done by the cashier, and done with such knowledge and acquiescence on the part of the directors as to bind the defendant, they have no tendency to show that the defendant's cashier had authority to certify checks or buy and sell gold.

Calling cashiers of twenty banks to prove the borrowing of other banks and giving checks therefor, and the purchase and sale of New York exchange, and the absence of evidence of the certifying of the sealed checks by a cashier, is the most forcible of negatives pregnant. It shows not merely that there is no evidence in the case, but that there is none to be had.

So far as the evidence tends to show a usage or course of business, it clearly marks and defines it; and the line of demarcation falls entirely outside of the class of acts counted upon by the plaintiff.

The suggestion is new to defendant, that a power to pledge the credit of the principal for one purpose has any tendency to show the power to pledge it for another and distinct purpose.

The law does not extend nor expand the powers of agents by analogy. On no subject are its rules of limitation more rigid. For examples: "A mandate to draw bills is held not a mandate to indorse. Authority to sign bills belonging to a specified class, the principal will not be bound if the agent sign bills, not belonging to that class. Authority to sign bills for a certain purpose, the principal not bound if the agent signs for other purposes. An authority to accept for an individual does not authorize to accept for a company, of which the individual is a member. Authority to sign in the course of a particular business does not authorize the agent to sign bills, either for his own accommodation or for that of another.

Thomp. Bills, 152, ed. of 1865; *Davidson v. Stanley*, 2 Man. & G., 721; *Murray v. E. I. Co.*, 5 B. & Ald., 204.

The case of *Bk. v. Norton*, 1 Hill, 503, is not in conflict. The person accepting the bill was the general agent of the defendant and was in the habit of drawing bills and making notes for his principal.

Usage can never be resorted to, to vest in an agent a power the law has not conferred. See the two well considered cases in Massachusetts of *Dickinson v. Gay*, 7 Allen, 29; *Dodd v. Furlow*, 11 Allen, 426.

Usage, in any technical or legal sense, is out of the question.

Boulting v. Harrison, 6 How., 259; *U. S. v. Buchanan*, 8 How., 102; *Adams v. Otterback*, 15 How., 589; *Thompson v. Biggs*, 5 Wall., 668 (72 U. S., XVIII., 704).

Evidence is introduced to show, not technical usage, but that, according to the ordinary course of business in Boston, cashiers of banks take upon themselves to do certain acts, without first getting authority from the president or directors.

In appointing a cashier, they charged him with the powers and duties which the law had declared to be inherent in the office of cashier; as to modes and forms of business, they authorized him to follow the usage and custom of the city of the Bank's location, so far as they did not conflict with positive law, but these were the outside limits.

Upon the evidence defendant submits that there is no usage nor course of business shown among the banks in Boston upon which the plaintiff relies, which would sanction or tolerate the acts of defendant's cashier.

There is no usage, practice or course of business, general or limited, for cashiers of banks to certify checks or buy gold of their own motion and without the order or request of the president or directors.

Nor does it follow, because the cashier might pay or guaranty the payment of a check where there were funds, he could do it where there were not.

Fur. & Mech. Bk. v. Butch. & Drov. Bk., 16 N. Y., 125; *The Freeman v. Buckingham*, 18 How., 182 (59 U. S., XV., 341); *Bk. v. Winchester*, 8 Allen, 109; *Grant v. Norway*, 10 C. B., 665.

As the cashier had no authority to buy the gold for the Bank nor contract for its deposit there, the defendant could not be responsible for it until, with the knowledge and consent of the directors, it had been mingled with the defendant's funds.

Atlantic Bk. v. Merch. Bk., 10 Gray, 582; *Skinner v. Bk.*, 4 Allen, 290.

And as the cashier had no authority to deal with the gold, either by purchase or receiving it on deposit for Mellen, Ward & Co. to draw upon it, he clearly has not the power to bind the defendant by any declarations concerning the transaction.

When Smith made this declaration he was not acting as agent of the defendant.

If there were any evidence tending to show that the directors, either expressly or impliedly authorized the cashier to certify these checks, the Bank would not be bound. Even the directors are but trustees for the stockholders, and the law will protect their interests and property.

The banks are the financial agents of the government, and their officers are public functionaries, to be kept within the strict line of power and duty. They are not to be considered as private corporations whose principal object is individual trade and individual profit, but as public corporations, created for public and na-

tional purposes. *Osborn v. Bk.*, 9 Wheat., 738.

Such a power delegated to the cashier or recognized even in the directors, would imperil the whole system.

The second of the grounds on which plaintiff rests is, a sale of gold certificates and coins to the defendant through its agent and cashier, Smith. The considerations as to the power of the cashier to enter into contracts by certifying the checks already suggested, apply with equal force here.

The cashier had no authority to make the purchase; none under the Act of Congress; none under the by-laws; none under any vote of the directors; none under the oral consent of the directors or any one of them; none under any practice or any precedent of his own.

If the cashier had made the most formal purchase of the plaintiff's gold, the defendant could not be held on.

If one delivers money to the cashier of a bank, when absent from the bank, to deposit or to pay a note in the bank, he makes the cashier his agent to deposit or pay; and if the money be lost or stolen before it reaches the bank, the bank is not liable.

Manhattan Co. v. Lydig, 4 Johns., 877; *Bulford v. Randall*, 1 Gray, 605; *Thatcher v. Bk.*, 5 Sandf., 121.

If the cashier had the power to purchase, the plaintiff had no right to sell. The gold which went out of the Merchants' Bank that day was the gold on which, as security, the Merchants' Bank had advanced to Mellen, Ward & Co., fifteen per cent. short of its market value. The transaction between the plaintiff Bank and Mellen, Ward & Co., was a loan.

The amount advanced by the Bank was some \$62,000 less than the market value of the gold certificates. The amount advanced is wholly inadequate as a price, and this inadequacy is justly regarded as one of the most important tests. Owners do not sell for considerations so manifestly inadequate. *Russell v. Southard*, 12 How., 189.

At the time of the delivery, Carter and Smith were present. Carter said he had come in for his gold. It was delivered. The delivery in contemplation of law was to Carter, the only person present competent to receive. Whether the manual caption was by Carter or Smith is immaterial.

Frost v. Cloutman, 7 N. H., 15.

The plaintiff cannot, in this suit, proceed upon the certified checks as given in payment for the gold, and at the same time charge the defendant upon the contract for the price of the gold, as for goods sold and delivered. If the plaintiff repudiates the checks it may fall back upon the contract of sale; but not until then. Under the well settled law of Massachusetts, the checks were payment, and if the Bank is not liable, Smith individually, and the drawers, still are.

French v. Price, 24 Pick., 18.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts. The plaintiff in error was the plaintiff in the court below. It appears by the bill of exceptions, that upon the evidence in behalf of the plaintiff being closed, the defendant's coun-

sel moved the court to instruct the jury that it was not sufficient to warrant them to find a verdict for the plaintiff upon either of the counts in the declaration. This instruction was given. The jury found for the defendant. The plaintiff excepted, and has brought that instruction here for review. This renders it necessary to examine the entire case as presented in the record. According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court. The facts disclosed in the bill of exceptions are neither numerous nor complicated. The defendant called no witnesses. There is no conflict in the testimony. The questions which it is our duty to examine are questions of law. None are made upon the pleadings, and it is unnecessary to consider them. It is sufficient to remark, that the declaration is so framed as to meet the case in every legal aspect which it can assume.

On the 26th of February, 1867, Fuller, the plaintiff's cashier, received from the Second National Bank of Boston \$200,000 of gold certificates, and paid the Bank, upon their delivery, the amount of their face and a premium of 25 per cent. Payment was made in currency and legal tender notes. The next day he received from the same Bank \$200,000 more of like certificates, and paid for them at the same rate in currency and a ticket of credit by the Merchants' Bank in favor of the National Bank for \$175,000. Both transactions were pursuant to an arrangement with Mellen, Ward & Co., brokers, in Boston. The market premium upon gold at that time was 40 per cent. It was understood between Fuller, the cashier, and Mellen, Ward & Co., that the latter might receive the same amount of gold from the Merchants' Bank, at any time thereafter, by paying the amount advanced, compensation for the trouble the Bank had incurred, and interest at the rate of six per cent. There had been like transactions upon those terms between the parties prior to that time. The president of the Bank was consulted in advance as to both the purchases from the Second National Bank, and approved them. The following testimony is taken from the record:

"George H. Davis testified as follows: I am the paying teller of the Merchants' Bank. From about the 1st of January, 1867, and previous to the 23d of February, the Bank several times received gold, or gold certificates from Mellen, Ward & Co., for which it paid currency at the rate of \$125 for \$100 in gold. At that time they had deposited in the Bank about \$90,000 in gold. No note, memorandum, or check was taken connected with it in any way. The gold was added to the gold of the Bank; on my cash-book it was added to the item of gold, and the gold was mixed with the gold of the Bank in the vault. If it consisted of certificates, they were put in a pocketbook kept in my trunk with other certificates and bills. (The paying

teller's book was put in, and from the entries in it on the 26th, 27th and 28th of February, 1867, it appeared that the gold received from Mellen, Ward & Co., was added to the gold of the bank.)"

On the 28th day of February, Carter, of the firm of Mellen, Ward & Co., and Smith, the cashier of the State Bank, called together at the Merchants' Bank. Carter said to Fuller, "We have come in for gold." Smith, the cashier, said, "We have come to get an amount of gold," and that he would "pay for it by certifying these checks," referring to two papers which Carter held in his hand. The teller handed Fuller 84 gold certificates of \$5,000 each, making the sum of \$420,000. Fuller announced the amount. Smith said that was the amount wanted, and the amount covered by the checks. He received the certificates, certified the checks, and handed them over to the plaintiff's cashier. They were drawn by Mellen, Ward & Co. upon the State National Bank in favor of Fuller, the plaintiff's cashier, or order, and were certified "Good; C. H. Smith, cashier." One was for \$250,000, and the other for \$275,000. Smith thereupon left the Bank with the certificates in his possession. Nothing was said by Fuller to Carter, or by Carter to Fuller, in relation to the checks, and Fuller did not know what checks Smith referred to until they were delivered to him. Smith did not certify or deliver the checks until he had got possession and control of the funds upon which his certificates were apparently founded, and this was known to the plaintiff's agent when he received the checks. Later, on the same day, Smith and Carter called again at the Merchants' Bank. Fuller was absent. Smith received \$60,000 more of gold and gold certificates from the teller, and gave in return a check for \$75,000, drawn by Mellen, Ward & Co. on the State Bank, payable to "gold or bearer." Like the two previous checks, it was certified "Good; C. H. Smith, cashier." This arrangement was in pursuance of the same agreement as that under which the gold certificates were delivered in the earlier part of the day. Both transactions were alike within its scope.

On the 1st of March, Havens, the president of the Merchants' Bank, called at the State Bank and complained that Smith had not paid the checks. Smith said he was going out to get the money. Havens inquired, "Didn't you have the money—the gold? Were not gold certificates delivered to you?" He answered, "Yes; I had them here, but they are not here now. I am going out to get it, and will come in and attend to it." Subsequently, in the same conversation, he said, "You hold the State Bank." Later in the day Havens called upon Stetson, the president of the State Bank. Stetson denied that Smith was authorized to certify the checks, and appealed to a director who was present. The director was silent. In an account which Fuller rendered to Mellen, Ward & Co. after their failure, showing the disposition of various collaterals which Mellen, Ward & Co. had deposited from time to time with the Merchants' Bank, the amount paid for gold was put down as a loan, and interest was charged, but in his testimony before the jury he denied that the money was loaned, and insisted that the gold was bought by the Merchants' Bank.

The agreement between Mellen, Ward & Co. and the Merchants' Bank rested wholly in parol. No written voucher was given or received on either side touching any of the transactions between the parties. The record discloses nothing else in this connection which it is material to consider.

The State Bank was organized under the Act of Congress "to provide a national currency," etc., of the 3d of June, 1864, 13 Stat. at L. 99. The 8th section of that Act authorizes such associations, by their directors, to appoint a cashier and other officers, and to exercise, "under this Act, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes, according to the provisions of this Act," etc. It is further provided that the directors may, by by-laws, regulate the manner in which its business shall be conducted and its franchises enjoyed; and that its general business shall be transacted at an office "located in the place specified in its organization certificate."

The 5th of the articles of association authorizes the Board of Directors to appoint a cashier and such other officers as may be necessary, and to define their duties. The 7th by-law declares that the cashier "shall be responsible for the moneys, funds and other valuables of the Bank, and shall give bonds," etc. The 17th by-law requires that all "contracts, checks, drafts, receipts, etc., shall be signed by the cashier or by the president, and that all indorsements necessary to be made by the Bank shall be under the hand of the cashier or president," unless absent.

The by-laws contain nothing further upon this subject. The directors failed to define more specifically the powers and duties of the cashier.

Smith, the defendant's cashier, exercised habitually very large powers without any special delegation of authority. An account was kept on the books of the Bank with him as cashier, which represented these transactions, and printed blank checks were kept in the Bank to facilitate them. The checks given by him for the proceeds of bills discounted and for the purchase of exchange during the five months preceding the 23d of February, 1867, amounted in the aggregate to \$2,500,000. This was exclusive of his clearing-house checks. His checks for money borrowed of other banks, during the six months preceding the same 23d of February, amounted to \$1,447,000. A large number of the cashiers of other banks in Boston were examined, and testified that they exercised the same powers under like circumstances. There is no proof that either they or Smith ever certified checks. It is not shown what became of the gold. Perhaps some light is thrown on the subject by the remark of the president of the Merchants' Bank to the president of the State Bank, "that the latter had better go to the sub-treasury, and that he would perhaps find his gold there." We find no reason to doubt that both banks, as represented by their cashiers, acted in entire good faith

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throughout the transactions, until they were closed by the delivery of the last of the certified checks. Neither could then have anticipated the difficulties and the conflict which subsequently arose.

The first question presented for our consideration is: what was the title of the plaintiff, and what were the rights of Mellen, Ward & Co., in respect to the gold certificates delivered by the Second National Bank to the Merchants' Bank? No very searching analysis of the facts disclosed is necessary to enable us to find a satisfactory answer to this inquiry. It does not appear that Mellen, Ward & Co. had any connection with the certificates received from the Second National Bank until after the plaintiff took the action which they invoked, and came into possession of the property.

The Merchants' Bank applied for them, bought them, paid for them, received them, and deposited them with its other assets of like character. It does not appear that any special mark was put upon them, or that anything was done to distinguish them from the other effects of the Bank with which they were mingled. Upon the face of the transaction it was a simple sale by the Second National Bank, whereby the entire title and property became vested in the plaintiff. But gold was then at a premium of 40 per cent. in currency. The Merchants' Bank paid but 25, according to the contract between the Bank and Mellen, Ward & Co. The latter were to pay, and it is presumed did pay, the additional 15 per cent. This was a part of the consideration upon which the Merchants' Bank entered into the contract. It is evident that the Bank did not agree to deliver to Mellen, Ward & Co. the identical gold certificates which were purchased, but gold, or its equivalent in certificates to the same amount, and any gold or any certificates would have satisfied the contract. The Bank cannot, therefore, be regarded as holding the certificates in pledge. The want of the element, that the identical certificates were to be delivered, is conclusive against that view of the subject. If Mellen, Ward & Co. had tendered performance and called for gold, and the Bank had failed to respond, Mellen, Ward & Co. could have sustained an action for the breach of the contract. But they could not have maintained detinue, trover or replevin against the Bank. The real character of the transaction was, that the Bank took the title and entire property; but Mellen, Ward & Co. had the right to purchase from the Bank the like amount of gold, or its equivalent in certificates, according to the terms of the contract, which were, that they should pay what the Bank paid, compensation for its trouble, and interest from the time the purchase by the Bank was made.

In respect to the \$60,000 of gold and gold certificates delivered by the teller in the absence of the cashier, and the excess of gold certificates over \$400,000 delivered by the cashier, the facts are substantially the same as those in regard to the \$400,000, except that the excess of certificates, and what was delivered by the teller, had reference to gold and gold certificates deposited in the Bank by Mellen, Ward & Co. This difference is not material. With this qualification the same re-

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marks apply which have been made touching the \$400,000 of certificates, and we are led to the same legal conclusions.

The transactions between the State Bank and the Merchants' Bank were apparently of the same character as that between the Merchants' Bank and the Second National Bank. What the understanding between Mellen, Ward & Co. and the defendant was, is not disclosed in the evidence. But it is fairly to be inferred that it was the same as that between them and the Merchants' Bank. When the arrangement was proposed by Carter to Fuller, on the 22d of February, Carter said that "when the gold was taken from the Merchants' Bank he thought it would go through some other bank or banks." The assent of Mellen, Ward & Co. to the sale to the State Bank by the Merchants' Bank extinguished their claim upon the latter. The Merchants' Bank certainly had a title of some kind, and whatever it was it passed to the State Bank, unless the contract was void, because the State Bank had no corporate power, or its cashier had no authority to make the purchase. The Act of Congress expressly authorizes the banks created under it to buy and sell coin. No question of *ultra vires* is, therefore, involved.

If the Merchants' Bank held the certificates as a pledge it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period. *Mores v. Conham*, Owen, 123; *Anon.*, 2 Salk., 522; *Coggs v. Bernard*, 8 Salk., 268; *Whitaker v. Sumner*, 20 Pickering, 899, 405; *Thompson v. Patrick*, 4 Watts, 415; Story, Bailm., sec. 324.

But we are entirely satisfied with the other view we have expressed upon the subject. *modus et conventio vincunt legem*.

It is insisted by the defendant's counsel that the transaction was a loan to Mellen, Ward & Co. As the Bank parted with its title, if there were a loan in the eye of the law, it would not in anywise affect the conclusion, at which we have arrived.

Recurring to the subject of the authority of the cashier of the State Bank to make the purchase, and excluding from consideration for the present the certified checks, three views, we think, may be properly taken of the case in this aspect.

1. If the certificates and the gold actually went into the State Bank, as was admitted by Smith to Havens, then the Bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase, and this question should have been submitted to the jury.

2. It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith had authority to bind the defendant by a contract which he made with the Merchants' Bank.

3. Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting

for the corporation, and there is nothing to excite suspicion of such defect or irregularity; the corporation is bound by the contract, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

The jury should have been instructed to apply this rule to the evidence before them.

The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court. *Supervisors v. Schenck*, 5 Wall., 784 [72 U. S., XVIII., 560]; *Knaz Co. v. Aspinwall*, 21 How., 539 [63 U. S., XVI., 208]; *Bissell v. Jeffersonville*, 24 How., 288 [65 U. S., XVI., 668]; *Moran v. Com.*, 2 Black, 722 [67 U. S., XVII., 342]; *Gelpcke v. Dubuque*, 1 Wall., 203 [68 U. S., XVII., 524]; *Mercer Co. v. Hackett*, 1 Wall., 93 [68 U. S., XVII., 549]; *Mayor v. Lord* [ante, 704]; *British Bank v. Turquand*, 6 E. & B., 327; *F. L. & T. Co. v. Curtis*, 7 N. Y., 466; *Stoney v. Ins. Co.*, 11 Paige, 635; *Soc. for Savings v. New London*, 29 Conn., 174; *Com. v. Pittsburgh*, 34 Pa., 496; *Com. v. Allegheny Co.*, 37 Pa., 287.

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. *R. R. Co. v. Quigley*, 21 How., 209 [63 U. S., XVI., 75]; *Green v. Lond. Omnibus Co.*, 7 C. B. (N. S.), 290; *Life and Fire Ins. Co. v. Mech. Ins. Co.*, 7 Wend., 81.

Corporations are liable for the Acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances. *Ranger v. The Great West. R. R. Co.*, 5 H. of L. Cas., 86; *Thayer v. Boston*, 19 Pick., 511; *Bk. v. Johnson*, 24 Me., 490; *Ang. & Ames, Corp.*, secs. 382, 388.

Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. *Sloan v. Brit. Aus. Co.*, 7 H. & M., 608; *Hern v. Nichols*, 1 Salk., 289. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The Bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result. *Derell v. Odell*, 8 Hill, 216.

Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there was any misleading, ought to suffer rather than the other party. *Far. and Mech. Bk. v. Drivers' and Butchers' Bk.*, 16 N. Y., 133; *Wolland Can. Co. v. Hathaway*, 8 Wend., 489.

In *The Bk. U. S. v. Davis*, 2 Hill, 465, Nelson, Ch. J., said: "The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud."

The director had fraudulently appropriated

the proceeds of a bill discounted for the drawer. It was held the drawer was not liable.

The reasoning of *Justice Selden* in *The Farm. and Mech. Bk. v. Butchers' & Drovers' Bk.* [supra], is also strikingly apposite in the case before us. He said: "The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selections are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be responsible?"

The same principle was applied in *The R. R. Co. v. Schuyler*, 85 Barb., 536; *S. C.*, affirmed, 84 N. Y., 30.

It was explicitly laid down by Lord Holt, in *Hern v. Nichols*, 1 Salk., 289. He there said: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger," "and upon this the plaintiff had a verdict."

Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants' Bank, and the Bank, under the circumstances, had a right to believe him.

We have thus far examined the controversy as if the certified checks were void or had not been given. It remains to consider that branch of the case. Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. *Grant, Bkg.*, 89, 90; *Keene v. Beard*, 8 C. B. (N. S.), 373; *Serie v. Norton*, 2 Moody & R., 404, n.; *Boehm v. Sterling*, 7 T. R., 430; *Alexander v. Burchfield*, 7 Man. & G., 1067.

All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual. *Robson v. Bennett*, 2 Taunton, 395; *Grant, Bkg.*, 89; *Chit. Bills*, 10 ed., 261; *Boyd v. Emmerson*, 2 Ad. & E., 184; *Kilsby v. Williams*, 5 B. & Ald., 816; *Story, Prom. N.*, secs. 489, 490.

By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for

payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the Bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the Bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the Bank for redemption and is extinguished by payment.

It cannot be doubted that the certifying Bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion.

A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in "certified check account," and when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process.

The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand large sums of money.

It is computed by a competent authority that the average daily amount of such checks in use in the City of New York, throughout the year, is not less than \$100,000,000.

We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity.

Our conclusions as to their legal effect are supported by authorities of great weight. *Bickford v. Nat. Bk.*, 42 Ill., 238; *Willels v. Phoenix Bk.*, 2 Duer, 121; *Barnet v. Smith*, 10 Fost. (N. H.), 256; *Meads v. Mech. Bk.*, 25 N. Y., 146; *Far. and Mech. Bk. v. Butchers' and Drov. Bk.*, 4 Duer, 219; *Far. and Mech. Bk. v. Butchers' and Drov. Bk.*, 14 N. Y., 624; *Brown v. Leckie*, 43 Illinois, 497; *Gir. Bk. v. Bk. of Penn.*, 39 Pa. St., 92.

Congress has made them the subject of taxation by name. 13 Stat. at L., 278.

But it is strenuously denied that the cashier had authority to certify the checks in question. To this there are two answers.

1. In considering the question of his authority to buy the gold, the evidence that he had given his checks for loans to his Bank, and for the proceeds of discounts, was fully considered. Our reasoning and the authorities cited upon that subject apply here with equal force. We need not go over the same ground again. The questions whether the requisite authority was not inferable, and whether the principle of estoppel *in pais* did not apply, should in this connection also have been left to the jury.

2. As before remarked, the organic law expressly allowed the Bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be re-

sponsible "for the moneys, funds and all other valuables of the Bank;" and that "all contracts, checks, drafts, receipts, etc., shall be signed either by the cashier or president." The power of the bank to certify checks has also been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with its authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office. *Wild v. The Bank of Passamaquoddy*, 3 Mas., 506; *Burnham v. Webster*, 19 Me., 384; *Elliott v. Abbot*, 12 N. H., 556; *Bk. of Vergennes v. Warren*, 7 Hill, 91; *Lloyd v. Bk.*, 15 Pa. St., 172; *Badger v. Bk.*, 26 Me., 428; *Bk. of Ky. v. Schuyllkill Bk.*, Pars. Sel. Cas., 182; *Fleckner v. Bk. U. S.*, 8 Wheat., 360.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit this authority as they deem proper, but this would not affect those to whom the limitation was unknown. *Bk. v. Norton*, 1 Hill, 501; *Bk. of Vergennes v. Warren*, 7 Hill, 94; *Beers v. Phoenix Glass Co.*, 14 Barb., 358; *Far. and Mech. Bk. v. Butchers' and Drov. Bk.*, 14 N. Y., 624; *Bk. v. Aymer*, 3 Hill, 262; *Barnes v. Bk.*, 19 N. Y., 156.

The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In *Barnes v. Ontario Bk.*, 19 N. Y., 156, the cashier had issued a false certificate of deposit. In *The Farm. & Mech. Bk. v. Butchers' & Drovers' Bk.*, 14 N. Y., 624; *S. C.*, 16 N. Y., 183, and in *Mead v. Bk.*, 25 N. Y., 146, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

It is objected that the checks were not certified by the cashier at his banking house. The provision of the Act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling

Bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection. *Bk. of Augusta v. Earle*, 13 Pet., 519; *Pendleton v. Bk. of Ky.*, 1 T. B. Mon., 183.

It is also objected that each of the checks, after being certified, required an additional stamp. The Act of Congress relating to the subject directs certified checks to be included in the circulation of the bank for the purpose of taxation. 13 Stat. at L., 278. This is a conclusive answer to the objection.

In *Brown v. London*, 1 Lev., 298, judgment in a suit upon two accepted bills of exchange was arrested after verdict because "entire damages were given, and the count, upon one of the bills, failed to aver that by the custom of merchants and others trading in England the acceptor was obliged to pay. This was in 1671. Other decisions in this class of cases, not less remarkable, are familiar to those versed in the learning of the elder reports. The law merchant was not made. It grew. Time and experience, if slower, are wiser law-makers than legislative bodies. Customs have sprung from the necessities and the convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions.

We have disposed of this case as it is before us.

How far it may be changed in its essential character, if at all, by a full development of the evidence on both sides in the further trial, which will doubtless take place, it is not for us to anticipate.

The judgment below is reversed, and a venire de novo awarded.

I am requested to add that *Mr. Justice Miller* was not present at the argument of this case, and did not participate in its decision.

Mr. Justice Clifford, dissenting:

Persons uniting to form an association for carrying on the business of banking, are required, as a condition precedent to their right to do so, to make an organization certificate, specifying, among other things, the name assumed by the association, the place where its operations of discount and deposit are to be conducted, designating the State, Territory or district, and also the particular county and city, town or village, and shall transmit the same, duly acknowledged, to the Comptroller of the Currency, to be recorded and carefully preserved in his office; and the provision is that the usual business of the association shall be transacted at an office or banking house located in the place specified in their organization certificate. 13 Stat. at L., 101.

Such an association, when duly organized, have a succession by the name designated in the organization certificate for the period of twenty years, and they may adopt a common seal, may make contracts, sue and be sued, complain and defend in any court of law or equity as fully as natural persons, and may elect or appoint directors, and may exercise all such incidental powers as may be necessary to carry on the business of banking. They may also, by their Board of Directors, appoint a president, vice-president, cashier and other officers,

and define their duties, * * * and they may, by their directors, dismiss said officers, or any of them, at pleasure, and may appoint others to fill their places. By the terms of the Act the directors shall consist of "not less than five," and the express enactment is that the affairs of the association shall be managed by the directors.

Evidence that that requirement is regarded as one of importance, and that it is intended to be peremptory, is also found in the provision prescribing the qualifications of directors as well as in the one defining their duties. None but citizens of the United States are eligible under any circumstances, and the further regulation is that three fourths of the number must have resided in the State, Territory or district, one year next preceding their election, and that they must be residents of the same during their continuance in office.

Besides these guaranties of fidelity, the additional requirement is that each director shall own in his own right at least ten shares of the capital stock, and when appointed or elected shall make oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of the Act under which the association was formed. 13 Stat. at L., 102.

Organized under that Act, as both of these Banks were when they assumed the name and character of national associations, they are both subject to its provisions and bound by its regulations.

Three checks were held by the plaintiffs, each dated Boston, Feb. 28, 1867, and signed Mellen, Ward & Co., with the words, "Good—C. H. Smith, cashier," written across the face of the checks. Separately described they read as follows: (1) State National Bank pay to J. K. Fuller, cashier, or order, \$250,000. (2) State National Bank pay to J. K. Fuller, or order, \$275,000. (3) State National Bank pay to Gold, or bearer, \$75,000.

Smith was the cashier of the defendant Bank, and the plaintiffs claimed that the defendants, inasmuch as Mellen, Ward & Co. had failed, were liable to pay the whole amount, as the words written across the face of the respective checks were in the handwriting of their cashier; and the defendants refusing to pay the same as requested, the plaintiffs commenced an action of *assumpsit* against them in the circuit court, the declaration containing eleven counts.

Eight of the counts are founded upon the checks, of which it will be sufficient to refer to the first, which alleges in substance that the signers of the checks made the same to enable the defendant Bank to obtain from the plaintiff Bank certain gold certificates held by the latter, of great value, and that the plaintiff Bank received the checks and delivered to the defendant Bank the gold certificates, and that the defendants, in consideration thereof, declared that the checks were good, and promised to pay the same on presentment, as more fully set forth in the record.

Two of the counts, to wit: the ninth and tenth, allege a sale and purchase of the gold certificates for the sum of \$600,000, and that the defendants have refused to pay as they promised. See 10 WALL, U. S., Book 19,

Superadded to these is a count for money had and received for the same amount, which is in the usual form. Process was issued and served, and the defendants appeared and pleaded the general issue, and upon that issue the parties went to trial.

Pursuant to the usual course the plaintiffs introduced the checks described in the declaration, and examined the officers of their Bank in support of the cause of action therein set forth. They also read from the books of the defendant Bank, produced for their use by the order of the court passed on their motion, the fifth of the articles of association of that Bank, and article seventeen of their by-laws. Besides the officers of their own Bank, they also examined the book-keeper of the defendant Bank in respect to the account of their cashier as exhibited in the general ledger of the Bank.

Twenty two of the cashiers of the national banks doing business in that city were also examined by the plaintiffs in respect to the powers of a cashier as exemplified in the usage there of such institutions, no one of whom testified that he, as cashier of a national bank, ever certified as good the check of a third person under any circumstances.

Certain other exhibits were also introduced in the course of the examination or cross-examination of the witnesses, as, for example, the letter of the president to the Comptroller of Currency, and the exchange slip, so called, showing that the checks in suit were not sent to the clearing-house with the other transactions of that day, and that they remained in the hands of the paying teller until the president took the same the next day to present them to the State Bank.

No testimony was introduced by the defendants; but the court, when the plaintiffs rested, on the prayer of the defendants, instructed the jury that the plaintiffs, on the whole evidence, were not entitled to recover, and the jury, under that instruction, returned a verdict for the defendants. Exceptions were taken by the plaintiffs to that ruling, and they sued out a writ of error and removed the cause into this court.

Power to grant a peremptory nonsuit is not vested in a circuit court; but the defendant may, if he sees fit, at the close of the plaintiff's case, move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to warrant the jury in finding a verdict in his favor, and that their verdict should be for the defendant, as was done in this case. Such a motion is not one addressed to the discretion of the court, but it presents a question of law which it is the duty of the court to decide in view of the whole evidence, and the decision of the court in granting or refusing the motion, is as much the subject of exceptions as any other ruling of the court in the course of the trial.

In considering the motion, the court proceeds upon the ground that the facts stated by the witnesses examined by the plaintiff are true, but that those facts as proved, with every inference which the law allows to be drawn from them, would not warrant the jury in finding a verdict in his favor. When viewed in that light the plaintiff's case, as shown in the evidence, presents a question of law, and it is well settled by the decisions of this court, that it is the duty

of the circuit court to give the instruction whenever it appears that the evidence is not legally sufficient to serve as the foundation of a verdict. *Schuchardt v. Allens*, 1 Wall., 370 [68 U. S., XVII, 646]; *Parks v. Ross*, 11 How., 362; *Bliven v. Screw Co.*, 23 How., 433 [64 U. S., XVI., 514].

Founded as the ruling was upon the assumption that the cashier of the State Bank had no authority under the circumstances to certify the checks in suit, it becomes necessary to examine that question. Whether he had such authority or not presents a mixed question of law and fact dependent upon the evidence and the legal principles applicable to the case.

Testimony was introduced by the plaintiffs showing that the president of the plaintiff Bank exercised very comprehensive powers, including the loan of money, discounts, and the general superintendence of all the affairs of the Bank, he reporting and holding himself responsible to the directors for the performance of his duties.

On Saturday, the 23d of February, 1867, the cashier of the plaintiff Bank informed the president, as the latter testified, that Mellen, Ward & Co. were going to purchase in New York a large amount of gold, and that they desired to know whether the Bank would take it as it arrived, and pay for it at the rate of \$125 in currency for every \$100 of gold. Inquiries were made upon the subject by the president, and explanations were given to him by the cashier, but the result was that the president told the cashier that he might take the gold and pay for it on the same terms that he had taken gold on several previous occasions from the same parties.

Reference is there made to the conceded fact that those parties had, at several times within two or three months previous, brought gold in to that Bank and received currency for it on the same terms as those proposed to the cashier, and the president testified that he told the cashier that he might take the gold as it arrived on the same terms, and that he, the cashier, might give the parties the right to come into the Bank at any time afterwards "and take the gold from the Bank, paying the Bank for the gold \$125 in currency for every \$100 in gold, and such premium or compensation as would be equivalent to interest," taking no obligation or note of any kind, but to rely entirely on the purchase of the gold.

Two hundred thousand dollars of gold arrived on the 26th of the same month, and the president states that he was informed by the cashier on that day that it was in the Second National Bank, in gold certificates. Not being familiar with such certificates he advised the cashier that he had better go to the office of the assistant treasurer and ascertain whether the certificates were correct before taking them as previously arranged. On the following day \$200,000 more in similar certificates arrived, and similar directions were given by the president to the cashier. Due inquiry was made at that office in both cases, and all of the certificates, amounting to \$400,000, were received and transferred to the plaintiff Bank.

Correspondence ensued between the Comptroller of the Currency and the president of the Bank, and the president, in reply to the letter of the comptroller, stated that on the twenty-

sixth of the same month the cashier of the Bank made an advance to Mellen, Ward & Co., of \$250,000 in legal tender notes and currency upon \$200,000 in gold certificates, that no note or security was taken for the amount of the advance except a check signed by the parties for \$50,000, to be kept in the teller's cash in order to balance his cash account; that on the following day a similar advance upon gold (certificates) was made by the cashier for the same amount to the same parties and in the same manner in all particulars, no note or obligation being taken for the amount so advanced.

Prior to the first of these transactions the same parties, as the president states in the communication, had deposited in the bank the sum of \$90,000 in gold, and received therefor currency at the rate of \$125 for \$100 in gold, the Bank taking no note or obligation on account of the transaction.

Fuller, the cashier, was also examined, and he testified that the inquiry whether the Bank would take the gold on its arrival and pay for it was made of him by Carter, the junior member of that firm, and that he, the witness, stated to him to the effect that he could not answer the question, that he should have to consult the president in regard to it, that he did consult the president of the Bank, and that the president told him that if it would not interfere with their ability to make their regular discounts he might take the gold on the same terms as the Bank had taken gold of those parties on previous occasions. Notice was accordingly given to Mellen, Ward & Co., by the cashier, as he states, either on that day or on the Monday following, that the Bank would afford them the accommodation.

Gold had been taken by the Bank of that firm before, and the cashier testified that "they asked if the Bank would take gold and pay for it at such time as either party might wish—either the firm of Mellen, Ward & Co., or the Merchants' Bank—at \$125 currency for \$100 gold, they paying the Bank for the trouble, etc., a sum equal to the interest on the amount of the currency loaned, and the witness in response to that question, after having consulted the president, said we would do it."

Evidently both parties understood that the deposit of the gold with the Bank was only for a brief period, and in confirmation of that theory the cashier also testified that Carter said to him, in their preliminary interview, that they, the firm, wanted the Bank "to take the gold and pay for it, and that it would be taken away again in a few days, mentioning, perhaps, the last day of the month or the first day of the following month." He also admits that when the first installment was received he took a check from the parties for \$50,000, but he says it was without the knowledge of the president.

On the 28th of February, which was the last day of the month, at half past one o'clock, Carter and the cashier of the defendant Bank called at the plaintiff Bank and went together to the desk of the cashier, they being outside of the counter. Carter said, "We have come for the gold." Smith, the cashier of the defendant Bank, said, "We have come in to get an amount of gold," and that he would pay for it by certifying the two checks which he held in his hand when he saw that the gold was all right.

Responsive to that remark the cashier of the plaintiff Bank said, step to the paying teller, and he did so, passing on the outside of the counter to that desk, the cashier of the plaintiff Bank passing to the same desk on the inside of the counter, and that the latter said to the paying teller, "The cashier of the State Bank has come to take some gold," and the paying teller immediately handed to the cashier of the plaintiff Bank the package containing eighty-four gold certificates of \$5,000 each, saying "There are eighty-four in the package," to which Smith, the cashier of the State Bank, standing outside the counter, replied, "That is the amount wanted; that is the amount of these checks." They were passed out to Smith and he certified the two checks and handed them to the cashier of the plaintiff Bank. Both were certified in the Bank by the cashier of the State Bank subsequent to the delivery to him of the gold certificates and not until he had examined the certificates; and the president, in his letter to the Comptroller of the Currency, states that the two checks, amounting to \$525,000, were certified as good "on the spot" by the cashier of the State National Bank.

Davis, the paying teller of the plaintiff Bank, was also examined by the plaintiffs, and he testified that the cashier on that day came down to his desk, on the inside of the counter, the cashier of the defendant Bank, accompanied by Carter, being on the outside; that he, the paying teller, handed to the cashier of his Bank eighty-four gold certificates of \$5,000 each, that the cashier counted the same and passed them over the counter to the cashier of the State Bank; that the cashier of the latter Bank handed back two checks drawn by Mellen, Ward & Co. on the State National Bank, one for \$250,000, the other for \$275,000, certified "Good—C. H. Smith, cashier." They were handed to the cashier and by him to the paying teller, and by the latter to the receiving teller, to be added to his account for that day.

Later on the same day, and after the cashier had left the Bank, Ward, of the firm of Mellen, Ward & Co., called at the Bank and said to the paying teller, "We shall want some more gold," and immediately left the Bank, and in a few minutes the cashier of the State Bank and Carter of the same firm came in, and the former handed to the paying teller a check for \$75,000, signed by Mellen, Ward & Co., with the words, "Good—C. H. Smith, cashier," written across the face of the check, which is the third check described in the declaration. Carter wrote the check in the Bank at the desk for customers, situated outside the counter, and it was certified at the same time by the cashier of the State Bank before it was handed to the paying teller.

The check, as the teller testified, called for \$60,000 in gold, and he states that he handed thirty thousand, to wit: \$10,000 in gold certificates and four bags of gold of five thousand each, to Smith, passing it over the counter, and that Carter took the gold and carried it away, but whether or not he also took the gold certificates he cannot state. Thirty thousand remained to be paid, and after Carter left, he, the teller, took from the vault of the Bank six bags of gold, of \$5,000 each, and placed the same outside the counter in charge of Smith, he being

the only person present. Some third person, however, came in while the gold was there, and the impression of the witness is that it was Mellen, of the firm of Mellen, Ward & Co., and that he assisted in carrying it away from the Bank.

Evidently the first question upon the merits is, whether the State Bank received the gold or the gold certificates, withdrawn from the Merchants' Bank, when the checks in suit were given; for if they did, or if they authorized their cashier to certify the same, they are clearly liable for the whole amount claimed by the plaintiffs. Evidence to show that they authorized their cashier to certify the checks is entirely wanting, and it is quite obvious from the whole case that neither the State Bank nor any of its officers, except the cashier, had the slightest knowledge of the transaction or of any of its incidents until the president of the plaintiff Bank, at a quarter past two in the afternoon of the following day, presented the checks to the president of the State Bank for payment.

When presented, the president of the State Bank took them and read them, and immediately replied that they had not authorized their cashier to certify checks, to which the president of the plaintiff Bank rejoined in substance and effect as follows: "He has certified checks, and those checks were given to the Merchants' Bank for gold, the property of that Bank, delivered to him, and that he," the president of that Bank, "wanted payment for that gold." He did not pretend that they had conferred any actual authority upon the cashier to certify the checks, but evidently based his claim upon the ground of an implied legal liability, and there is not a scintilla of evidence in the case tending to show any express authority on the part of the cashier to certify the checks.

Suppose that is so, still it is suggested that there is some evidence tending to show that the gold and gold certificates, when they were withdrawn from the Merchants' Bank, were transferred to, and actually deposited in, the defendant Bank, and the argument is that the circuit court erred in not submitting that question to the jury.

Before the president of the plaintiff bank visited the president of the State Bank he called on the cashier of that Bank, and whatever evidence there is in the case applicable to the issue, which it is supposed should have been submitted to the jury, consists of the conversation which took place between those officers during that interview before the other officers of the defendant Bank knew anything of the transaction.

Just after one o'clock of that day the president of the plaintiff Bank called on the cashier of the State Bank with the checks in his hands, and he states the conversation as follows: "I said to him, I thought you were coming in to pay the gold for those checks early in the morning. Question.—To pay the gold? Answer.—To pay the money. I didn't say gold; to pay the money on those checks early in the morning. The cashier replied, Yes, I am going out now to attend to it and get the money. Get the money? said I; didn't you have the money—the gold? Were not the gold certificates delivered to you? Yes, said he, I had them here, but they are not here now; I am going out to get it, and will come in and attend to it. I spoke

rather abruptly and said he should do it immediately. He looked up and said, You hold the State Bank. I came back and laid the checks on the desk of the teller."

Grave doubts were entertained by the circuit judges whether the evidence, if it had been objected to, would have been admissible, as it can hardly be maintained that the cashier, under the circumstances, was the agent of the Bank to make any such admission in respect to a past transaction; and still graver doubts were entertained whether the supposed admission was understandingly made, as it was obvious that the cashier was abruptly and unexpectedly arraigned for his unauthorized and illegal acts in terms of complaint and in tones of accusation and command, but the judges were quite satisfied, even if the language as reported was deliberately employed, that the statement was untrue; that the admission, even if it was made, was contrary to the fact; that every dollar of the gold and of the gold certificates went directly from the Merchants' Bank to the office of the assistant treasurer for the benefit of the drawers of the checks, as the circumstances abundantly prove.

Regarded in that light, it is settled law that the remark of the cashier was entitled to no weight, as it was an admission contrary to the fact. Direct proof to that effect was not introduced in this case, as the defendants did not introduce any testimony, but the circumstances shown in evidence were equally persuasive and convincing, leaving no doubt in the mind of the circuit court that the whole fund withdrawn from the Merchants' Bank was transferred directly to the office of the assistant treasurer to supply a corresponding deficiency in the deposits in that institution which had been embezzled and loaned to the persons whose firm name was signed to the checks.

Some of the circumstances referred to have already been mentioned, and there are many others reported in the transcript which tend very strongly in the same direction. Enough is exhibited in the record to show, beyond all doubt, that Mellen, Ward & Co. were extensively engaged in speculations; that they were largely interested in copper stocks; that in their first interview with the cashier of plaintiff Bank they disclosed to him the fact that they only wanted the Bank to take the gold for a few days, naming the day when they would desire to withdraw the same, and the arrangement as completed with the cashier, and as sanctioned by the president of the Bank, gave them the right to call for that amount of gold whenever they might see fit by paying for the same at the same rate, and additional sum equal to interest from the time the gold was deposited in the Bank to the time it should be withdrawn. Authority was given to the cashier to take the gold as it arrived, on the terms proposed, and he was told at the same time that the parties depositing it would be allowed to call for the same amount on the same terms, paying also for the trouble a sum equal to interest while it remained in the Bank.

Weighed in the light of these explanations it must require the exercise of much incredulity not to see in the acts, conduct and declarations of the parties, plenary proof that the gold and gold certificates, for which the checks were

given, were withdrawn from the Bank in pursuance of that arrangement. First Carter appears; then Ward; then Carter again, and finally Mellen, the three being all the members of the firm.

They had informed the cashier through their junior partner that the gold "would be taken away" on the last day of the month or the first day of the following month, and on the last day of the month Carter called and said "We have come for the gold," and when Ward came at a later hour on the same day, to give notice that their necessities were not fully supplied, he made no inquiry, nor did he submit any proposition, but said, "We shall want some more gold," and immediately left, showing conclusively that the contract had been previously made; and finally Mellen, the senior partner, called to assist in carrying away the last \$30,000, which, with the \$30,000 previously taken, was delivered by the teller in the absence both of the cashier and of the president.

Loaned and withdrawn as the gold and gold certificates were but for one day, the president the next forenoon, when he found that the same were not returned, nor the amount of the checks paid, immediately took the matter into his own hands. He at once, or just before one o'clock, having previously "heard that there was trouble at the sub-treasury," called upon the cashier of the State Bank, and failing to obtain satisfaction there, he proceeded, at a quarter before two on the same afternoon, to the room occupied by the president and directors of that Bank, and he states that he found the president of the Bank and two or three other persons present. Much of what was said on the occasion has already been narrated and need not be repeated.

Two of the persons present were the president of the State Bank and his predecessor in that office, and the president of the plaintiff Bank testified that they were considerably excited; that he informed them that he had just heard that there was trouble at the sub-treasury; that he thought they had better go to that office, adding that if they did perhaps they would find their gold there, offering at the same time to go with them if they desired him to do so, and it appears that he and those two persons went to the room of the assistant treasurer, and that he introduced them to that officer, saying that they had come to see if a large amount of gold had not been placed there to the credit of the State Bank.

What further was said or done on the occasion does not appear, as the plaintiffs' testimony stopped there in respect to that interview, and none was introduced by the defendants. Sufficient, however, was given to satisfy the court, beyond doubt, that every dollar of the gold and gold certificates was transferred to that institution for the benefit of the drawers of the checks, and that no part of the same was ever received by the defendant Bank.

Courts of justice have sometimes said that it is necessary in all cases to leave the question to the jury if there is any evidence, even a scintilla, in support of the issue, but it is well settled law that the question for the judge is not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved

is established. *Ryder v. Wombwell*, L. R., 4 Exch., 39.

Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant a jury in finding a verdict in favor of that party. *Giblin v. McMullen*, L. R., 2 P. C. App., 385.

Formerly it used to be held, say the court in that case, that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but that a course of recent decisions has established a more reasonable rule, to wit: that in every case, before the evidence is left to the jury, there is or may be a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Jewell v. Parr*, 18 C. B., 916; *Toomey v. Railway Co.*, 3 C. B. (N. S.), 150; *Wheellon v. Hardesty*, 8 Ell. & B., 262, 266.

Apply that rule to the present case and it is clear to a demonstration that the ruling was correct, as there is no evidence reported which would warrant a jury in finding that the gold or gold certificates or any part of the same ever went into the defendant Bank. *Schuchardt v. Allen*, 1 Wall., 369 [68 U. S., XVII., 646].

Express authority in the cashier, either from the directors or under any Act of Congress, to certify the checks of third persons is not pretended, and it appearing that no part of the funds withdrawn from the plaintiff Bank was ever received by the defendant Bank, or that they had any knowledge of the transaction prior to the interview between the presidents of the respective Banks, the plaintiffs are forced to invoke usage as the source of the cashier's authority to certify the checks, or to put their case, as in the opinion of the court, upon the legal proposition that the power of the cashier to perform those acts is inherent in the office; that the certificates of the cashier import on their face that he was authorized to exercise that power in behalf of the Bank, and that it makes no difference whether the acts were performed in the banking house of the institution or elsewhere, provided it appears that he added to his signature the word "cashier," at the time he certified the instruments.

Whether a usage exists or not, to confer power to do an act which otherwise would not be authorized, is a question of fact dependent upon the evidence, and he who alleges that such a usage exists must prove it, unless it is general and of such long standing that it has become incorporated into and may be regarded as a part of the commercial law, which cannot be pretended in this case, as it clearly appears that no such usage exists in the State where the transaction took place. No such evidence was introduced, and the settled rule of law in the highest judicial tribunal of the State is that the cashier of a bank possesses no such authority, unless it is specially delegated to him by the directors, which is in exact accordance with the rule prescribed in the Act of Congress giving to the directors the power to appoint or elect a cashier, and to manage the affairs of

See 10 WALL.

the institution. 13 Stat. at L., 102; *Mussey v. Bank*, 9 Met., 318.

Such a power, say the court in that case—that is, the power of certifying checks—is, in fact, a power to pledge the credit of the Bank to its customers and is a power which, by the constitution of a bank, can alone be exercised by its president and directors, unless specially delegated by them and, consequently, it cannot be implied as a resulting duty or authority in any individual officer. Evidence of usage, therefore, cannot confer any original, inherent and implied power to certify such instruments. Checks had been certified in that case by the teller, but the rule as laid down is equally applicable to cashiers, as the court say that the authority is vested in the president and directors, and that it cannot be implied as a resulting duty in any individual officer, which includes the cashier as well as the teller. *Mussey v. Eagle Bk.* [*supra*].

Established as that rule was in that State more than twenty-five years ago, by the unanimous decision of the highest court of the State, it is not strange that no cashier in the State could be found who would testify that there was any such usage as is supposed by the plaintiffs. They called twenty-two cashiers, including the cashier of their own Bank, but they did not venture to ask the question at all whether there was any such usage, though one or more of the number volunteered to say that none such existed, which was equally well proved by the silence of all the others. Proof of usage authorizing a cashier to certify checks, even if such proof would confer such an authority, which is denied, is certainly wanting, as there is not a scintilla of evidence to that effect to be found in the record.

Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed in the particular trade to which the contract refers, are used in a particular sense, and different from the sense which they ordinarily import, and it is also admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admissible to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous and doubtful, but it is never admissible to vary or contradict what is plain. Where the language employed is technical or ambiguous, such evidence is admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general principle or rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law. *Oelricks v. Ford*, 23 How., 63 [64 U. S., XVI., 538]; *Barnard v. Kellogg*, 10 Wall., 388 [*ante*, 987]; *Ins. Co. v. Wright*, 1 Wall., 457 [68 U. S., XVII., 505]; *Simmons v. Law*, 3 Keyes, 219; *Beirne v. Dord*, 5 N. Y., 97; *Bliven v. Sereia Co.*, 23 How., 481 [64 U. S., XVI., 513]; *Dickinson v. Gay*, 7 Allen, 37; *Dodd v. Farlow*, 11 Allen, 428; *Spartali v. Benecke*, 10 C. B., 222; *Trueman v. Loder*, 11 Ad. & E., 598; *The Rec-side*, 2 Sumn., 567.

Whether such evidence is admissible or inadmissible to prove such an authority, it is quite clear that there was none in this case of any

kind, and certainly none which would have warranted the jury in finding that the cashier of the defendant Bank had any authority whatever to bind his Bank by his certificates that the checks were good.

Interrogatories, however, were put to the cashiers examined as witnesses touching their powers in respect to other transactions, and they testified that the business at the clearing-house was usually conducted by the cashier of the Bank, and that in adjusting balances occurring there the cashiers whose banks belonged to that association were accustomed to draw checks for that purpose, and that they were in the habit of receiving each other's checks in such adjustments as the checks of their respective banks; and they also testified that they bought and sold New York funds, as their banks redeemed very largely in that city, which created a necessity for the daily use of such funds in conducting the usual and regular operations of the banks; but the circuit court was of the opinion that the evidence was entirely unimportant in this case, as there was no evidence of any usage showing that the cashiers were authorized to certify the checks of third persons, and the judges were confirmed in that conclusion by the fact that it had long been the settled law of the State that no individual officer of a bank possessed any such authority.

Giving full effect to the usage proved, it only shows that a cashier may borrow money of the other banks, in the settlement of balances through the clearing-house, and that he may sign the checks given for the same, and that he may buy and sell New York funds, that is, he may buy for use in redeeming their bills, and he may sell the same when they have an excess beyond what is necessary for that purpose; but the evidence, in the opinion of that court, had no tendency to prove that the cashier of a national bank might certify the checks of a third person, as in this case, as the settled law everywhere is, that a power evidenced by usage must be considered as defined and limited by the usage. *The Floyd Acceptances* [ante, 169].

Nothing remains but to examine the question, whether there is any such inherent power in the office of a cashier as is supposed by the plaintiffs, as it is clear that the Act of Congress confers no such power, and that there is no proof of any such usage in the case even if it be admitted that evidence of usage would be sufficient to establish that theory. Special reference to the by-laws of the Bank is unnecessary, as it is not pretended that they confer any such power upon the cashier, and there is not a particle of evidence that the directors, directly or indirectly, ever gave him any such power.

Before attempting to answer the inquiry, what are the usual and ordinary duties of a cashier, it becomes necessary to look somewhat more closely at the circumstances which attended the transaction at the time the checks were certified. None of the checks were signed by the drawers or certified by the cashier in the banking house of the defendants. On the contrary, the cashier left his own Bank and went to the banking house of the plaintiffs, and there, in the presence of the cashier of the plaintiffs, who knew full well what the arrangement was between his Bank and the signers of the checks; and that, by virtue of that arrangement, they

had a right to withdraw from the Bank on that day that amount of gold and gold certificates; and that he as cashier was fully authorized by the president of his Bank to deliver it to them on the terms and conditions specified in the arrangement.

He knew, also, that he himself, as cashier, had no authority to certify checks; that the law of the State did not authorize such an act; that he had never done such an act; that it had never been done by the cashier of a national bank in that city; that the act of certifying these checks had not been done in the usual course of business, nor in the presence of the directors of the defendant Bank, as he testifies that the first two checks, amounting to \$535,000, were certified "in the Bank after the delivery and examination of the certificates;" and the president of the Bank, in his letter to the Comptroller of the Currency, states that they were certified as good on the spot by the cashier of the State National Bank.

Known to the cashier of the plaintiff Bank as all the antecedent circumstances were, the judges of the circuit court did not entertain a doubt that he knew full well that the gold and gold certificates were withdrawn for the benefit of the drawers of the checks, and that the cashier of the defendant Bank certified the checks as a mere surety or guarantor. Unmistakably, he knew that the funds were withdrawn only for a day, for he testified that he was informed when the arrangement was made that the same would be taken away on the last day of the month or the first day of the following month, and the president, in his interview with the cashier of the defendant Bank the next day, just before one o'clock, opened the conversation by saying, "I thought you were coming in to pay the gold or the money on those checks early in the morning." Both the president and cashier of the plaintiff Bank knew what that arrangement was, and the cashier also knew all the circumstances which attended the execution of the checks and the delivery of the funds. Actual knowledge of all the circumstances on the part of the cashier of the plaintiffs is fully proved, and if he wanted more information he knew that the means of knowledge were at hand, as the cashier of the State Bank was there in his presence, and that if he was not satisfied with his answers he could ascertain the whole truth from the directors.

Suppose it be conceded, for the sake of the argument, that the checks were negotiable instruments, standing upon the same footing as bills of exchange and promissory notes, still the plaintiffs cannot recover if the cashier had no power to execute the certificates, as all the facts and circumstances were known to the cashier of their Bank. Indorsees of such negotiable instruments for value in the usual course of business are not obliged to make inquiries, as was held in *Goodman v. Simonds*, 20 How., 367 [61 U. S., XV., 942]; but it was also held in that case, and is believed to be settled law everywhere, that an indorsee in such a case must not willfully shut his eyes to the means of knowledge which he knows are at hand for the reason that such conduct is equivalent to notice and is plenary evidence of bad faith. *Stagg v. Elliott*, 12 C. B. (N. S.), 380.

Precisely the same rule was laid down by

Baron Parke in the case of *May v. Chapman*, 16 Mees. & W., 355, and the same rule has been applied by this court in the case of *The Lulu* [*ante*, 906], decided at the last term.

He knew that he himself had no authority to do such an act as cashier; that the law of the State forbade it; that no cashier of a national bank in that city had ever exercised any such authority, and that the means of ascertaining whether the cashier of the defendant Bank had such authority were at hand, and the rule, under such circumstances, is well settled that the party must inquire before assuming to act or take the risk that the necessary authority exists.

Examined in the light of the undisputed circumstances, the case is as strong for the defendants as it would be if the defect of authority had been apparent on the face of the instruments, as it, in fact, was to one having such knowledge. Where the defect or infirmity appears on the face of the instrument, the question whether the party who took it had notice or not is a question of law, and must be determined by the court as matter of construction. *Goodman v. Simonds* [*supra*]; *Andrews v. Pond*, 13 Pet., 66; *Fowler v. Brantly*, 14 Pet., 818; *Brown v. Davis*, 8 T. R., 80.

Unable to maintain the suit upon these grounds, the plaintiffs are forced back to the grounds assumed by their president in his first interview with the president of the defendant Bank, when he said, in effect, that your cashier has certified those checks and I want payment for the gold, and to that it comes at last. Undoubtedly, the cashier of the defendant Bank certified the checks, but the circumstances show that the cashier of the plaintiff Bank must have known that he did so without the knowledge of the directors, and if the cashier of the defendant Bank had no authority, and the cashier of the plaintiff Bank knew it, it is clear to a demonstration that the defendant Bank is not liable. Circumstances, altogether inconclusive if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute the most convincing and conclusive proof. *Castle v. Bullard*, 28 How., 187 [64 U. S., XVI., 429].

Repeated decisions of this court have determined the question that the power to certify the checks of third persons in behalf of the corporation is not inherent in the office of the cashier of a bank, and also that the exercise of such a power is not within the scope of his usual and ordinary duties.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank, and their acts within the scope of such usage, practice and course of business, will, in general, bind the bank in favor of third persons possessing no other knowledge. *Minor v. Mechanics' Bk.*, 1 Pet., 70.

So where a contract was made by the president and cashier of a bank with the indorser of a promissory note due to the bank, that he should be discharged in a certain event, this court held that it was not a part of their duty to make such a contract, and that they had no power to bind the bank except in the performance of their ordinary duties, which was a

much stronger case than the one before the court, as the president of the bank joined with the cashier in making the contract. *U. S. Bk. v. Dunn*, 6 Pet., 59.

His ordinary duties are quite extensive, but it is settled law in this court that they do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. *U. S. v. Bk. of Columbus*, 21 How., 864 [62 U. S., XVI., 183].

Authority to certify the checks in this case, except what is supposed to be implied, is not pretended; and if it were the theory could not be supported for a moment, as there is no such evidence reported and none such was introduced.

Recurring to the two principal checks it will be seen that the plaintiff Bank or their cashier, which is the same thing, is the payee, and inasmuch as the same were certified in the presence of the cashier of the plaintiffs, who knew all the circumstances, the suggestion that they are innocent holders as against the defendants cannot be supported. If a bank may be held liable in any case upon a certificate of their cashier that a check is good when they have no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the bank is bound by his representation, notwithstanding it is false and unauthorized. *F. & M. Bank v. B. & D. Bk.*, 16 N. Y., 131.

Substantially the same concession is also made in the case of *N. Riv. Bk. v. Aymar*, 8 Hill, 266, and in *F. & M. Bk. v. B. & D. Bk.*, 14 N. Y., 631. Like concession is also made in the case of *R. R. Co. v. Schuyler*, 34 N. Y., 72. Evidently the case of *The Mech. Bk. v. R. R.*, 13 N. Y., 615, makes the same concession, even if it does not fully sustain the English doctrine as exemplified in the leading case of *Grant v. Norway*, 10 C. B., 696, which, in the judgment of the circuit court, contains the true rule. *Kirk v. Bell*, 12 Eng. L. & E., 889; *Coleman v. Riches*, 29 Eng. L. & E., 839.

Much vacillation is exhibited in the decisions of the New York courts upon this subject, but they agree at present that the certificate of the cashier or teller, as the case may be, if regular in form, and unattended with any special circumstances, amounts to a representation that the drawer of the check has funds in the bank to meet the same, and that the certificate unexplained binds the bank whether accurate or erroneous, but that no such consequences will follow if there is anything on the face of the instrument to show the contrary, or if the payee or holder knew that the authority of the cashier to make the certificate depended upon the existence of funds in the bank to meet the liability, and that the bank had none such at the time, and that the payee or party presenting the check knew that fact. *Clarke Nat. Bk. v. Bk. of Albion*, 52 Barb., 596; *Bank v. Wetherald*, 36 N. Y., 337; *Meads v. Merch. Bk.*, 25 N. Y., 145.

Carefully examined it will be found that in every one of the cases decided by the courts of that State where the more stringent rule is applied the check was presented at the Bank in the usual course of business, and that the Act of the cashier in making the certificate did in

fact amount to an actual representation that the Bank held the funds of the drawer to meet the demand.

Some of those decisions are, doubtless, inconsistent with the decisions of this court and with the English decisions and those of the Supreme Court of Massachusetts upon the same subject; but there is not one of them, if the facts of the case before the court are properly examined and understood, which will sustain the claim of the plaintiffs.

Beyond all question the cashier of the plaintiff Bank represented his Bank, he was an agent with full authority, and what he knew in respect to the transaction in question must be regarded as known to his Bank. Viewed in the light of the circumstances, it is clear that he did not receive the certificates as a representation that funds to that amount were in the State National Bank to meet the checks. He knew that the fact was not so, as the drawers were the customers of his own Bank, and the case does not show a single instance in which they ever had any dealings with the defendant Bank. Instead of that he regarded the acts of the certifying cashier as constituting the defendant Bank a surety of the drawers of the checks to his Bank, and the conduct of the president the next day in first arraigning the signer of the certificates before he presented the checks to the president of the defendant Bank strongly confirms that view of the evidence.

Agents, held out as such by their principals for certain defined purposes, well known to the public, cannot bind their principals by any acts done outside of the scope of their authority, as defined by the well known purposes of their agency. Masters of vessels are authorized to sign bills of lading, and the instruments, when duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board, or were actually delivered into the custody of the master; but it is well settled law that the owners are not liable if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board nor delivered into the custody of the master. *The Freeman*, 18 How., 187 [59 U. S., XV., 348]. Like principles are applied in all cases where the authority of the agent is limited and the limitations, as defined by the purposes of the agency, are well known to the public. *Mussey v. Beecher*, 3 Cush., 511; *Lowell Bk. v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 Allen, 528; *Grant v. Norway*, 10 C. B., 665; *Stagg v. Elliott*, 12 C. B. (N. S.), 878; *Hubbersty v. Ward*, 8 Exch., 880; *Alexander v. Mackenzie*, 6 C. B., 766.

Persons dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at their peril, see in each case that the paper on which they rely "comes within the power under which the agent acts." *The Floyd Acceptances* [ante, 167].

Where the plaintiff in the suit is the payee of the instrument, the correctness of that rule cannot be questioned, and this court decided in that case that the same rule applies to every subsequent taker of the paper, adding, what is certainly correct, where the suit, as in this case, is in the name of the payee, "that the protection which commercial usage throws around

negotiable paper cannot be used to establish the authority by which it was originally issued."

Cashiers are forbidden by the express decision of this court from making contracts on behalf of their banks not within the scope of their usual and ordinary powers, involving the payment of money, without an express delegation of authority from the directors. *U. S. v. Bk.*, 21 How., 364 [62 U. S., XVI., 138].

Checks signed at the clearing-house and contracts for the purchase and sale of New York funds are authorized by the directors, and are sanctioned by usage, but cashiers have no such authority to certify checks for third persons, which was well known to the cashier of the plaintiff Bank.

Associations organized under the Act of Congress to carry on the business of banking are required by the express words of the Act to transact their usual business at an office or banking house, located in the place specified in their organization certificate, and no individual officer ought to be allowed to leave his Bank and go elsewhere to make large contracts without the instruction of the directors. Unless his power in that behalf is limited to the established place of business he may go wherever he pleases for that purpose, and if he certifies checks anywhere within the four seas of our continent, the Bank is bound by his contracts. Stockholders and depositors should take warning if such is the law, as the national banks are liable at any moment to be overwhelmed with pecuniary obligations, and involved in utter ruin.

For these reasons, I dissent from the judgment of the court in this case, and I am authorized to say that *Mr. Justice Davis* also dissents, and concurs in this opinion.

Cited—18 Wall., 620; 98 U. S., 325; 94 U. S., 284, 245; 95 U. S., 443; 96 U. S., 34, 604, 720; 97 U. S., 278, 579; 99 U. S., 656, 678, 683; 100 U. S., 702; 101 U. S., 18, 111, 183, 361; 103 U. S., 286; 9 Bank. Rep., 80; 1 Holmes, 211, 405-412; 7 Blies., 195; 4 Cliff., 338; 11 Am. Rep., 679, 709 (52 N. Y., 114, 360); 17 Am. Rep., 312 (59 N. Y., 77); 17 Am. Rep., 555 (39 Md., 36); 19 Am. Rep., 187 (60 N. Y., 291); 21 Am. Rep., 614 (64 N. Y., 380); 23 Am. Rep., 133 (67 N. Y., 458); 24 Am. Rep., 303, 611, 618 (68 Heisk., 211); 24 Am. Rep., 611, 613 (35 Mich., 498); 29 Am. Rep., 384 (7 Neb., 201); 41 Am. Rep., 601 (18 W. Va., 212).

B. F. MESSENGER, E. J. MESSENGER
AND JAMES MAY, *Plffs. in Err.*,

v.

CHARLES MASON.

(See S. C., 10 Wall., 507-511.)

Constitutional objection—statute of a territory—review of state judgments.

Where the constitutional objection taken in a state court is too general under the 25th section of the Judiciary Act, it cannot be noticed in this court.

NOTE.—Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S. See note to *Matthews v. Zane*, 8 U. S. (4 Cranch), 283; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 304; and note to *Williams v. Norris*, 25 U. S. (12 Wheat.), 117.

It is for state courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorized by statute. See note to *Com. Bk. v. Buckingham*, 48 U. S. (5 How.), 317; and note to *Jackson v. Lamphire*, 28 U. S. (3 Pet.), 280.

This section makes no provision for the re-examination of a judgment in a state court, which upholds the validity of a statute of a Territory in contravention of the Constitution.

It applies only to the case where is drawn in question the validity of a Statute of, or authority exercised under, any State.

[Mr. Justice MILLER took no part in the decision, having been counsel in the case.]

[No. 149.]

Argued Jan. 20, 1871. Decided Jan. 30, 1871.

IN ERROR to the Supreme Court of the State of Iowa.

On motion to dismiss.

The history and facts of the case are fully stated in the opinion of the court.

Mr. J. A. Wills, for plaintiffs in error.

Mr. Charles Mason, in person, for defendant in error.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion to dismiss the writ of error.

The suit was brought by Mason, the defendant in error, in the District Court of the County of Van Buren, in the State of Iowa, to recover the possession of some lots of land in what is known as the "Half-Breed Tract," lying between the Rivers Des Moines and Mississippi. The plaintiff relied, among other evidences of title, upon a judgment in partition of the tract, rendered in the District Court of the Territory of Iowa, in April, 1841, in pursuance of a law of said Territory.

The defendants objected to the admission of the record of judgment, on the ground that the law under which the proceedings were had was unconstitutional and void.

The objection was overruled the record admitted and a verdict and judgment rendered for the plaintiff. On an appeal to the Supreme Court of the Territory by the defendant, the judgment was affirmed; and the case is now here under the 25th section of the Judiciary Act.

It is insisted on the part of the defendant in error, that an examination of the record will show that there is no federal question in the case of which this court can take cognizance.

In the case of *Mamwell v. Newbold*, 18 How., 511 (59 U. S., XV., 506), it was held the objection that "the charge of the court, the verdict of the jury, and the judgment below are each against, and in conflict with the Constitution and laws of the United States," was not sufficiently specific to raise a question within the provisions of this section. The Chief Justice, in delivering the opinion of the court, observes, that "The clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied by the decision of the state court." This court had previously held, in *Lawler v. Walker*, 14 How., 149, that the statement in a certificate of the state court that there was drawn in question the validity of statutes of Ohio, without saying what statutes, was too indefinite, and that the statutes complained of in the case should have been specified. These decisions were re-affirmed in *Hoyt v. Sheldon*, 1 Black, 518 (66 U. S., XVII., 65). It is quite clear, upon these authorities, that the constitutional objection taken in the

See 10 WALL.

present case is too general to be noticed on a writ of error under this 25th section.

As to the effect of the certificate, see *Commercial Bank v. Buckingham*, 5 How., 817; *Lawler v. Walker* (supra), and *Porter v. Foley*, 24 How., 415 [65 U. S., XVI., 740].

One difficulty in bringing the case within this 25th section is, that it makes no provision for the re-examination of a judgment in a state court which upholds the validity of a statute of a Territory in contravention of the Constitution. It applies only to the case where is drawn in question the validity of a statute of or authority exercised under any State. The circumstance, therefore, that the court below held the statute of the Territory providing for partition of lands among tenants in common, valid, is of no importance in the case. *Scott v. Jones*, 5 How., 375.

It has been urged on the argument, however, in view of the certificate of the court, that a right set up under the Ordinance of 1787, by the defendants at the trial, had been denied them, and that the construction of a law of Congress had thus been drawn in question.

The Territory of Iowa was not a part of that to which this Ordinance applied. It was a part of the Louisiana purchase. Its organic law, however, did incorporate into its system of laws, indirectly, many of the provisions of the Ordinance, by extending to its inhabitants the rights and privileges theretofore secured to the Territory of Wisconsin by its organic law, among which were those found in the Ordinance, but the same section that conferred these rights and privileges upon the Territory of Iowa provided that they should be subject to be altered, modified or repealed by the governor and legislative assembly of the said Territory. If, therefore, anything is found in this Act of partition in conflict with these provisions, to that extent they must be regarded as altered or modified, which affords a complete answer to the ground relied upon under the Ordinance. 5 Stat. at L., 239, sec. 12.

Motion granted.

Cited—21 WALL., 549.

THE LIVERPOOL AND LONDON LIFE AND FIRE INSURANCE COMPANY,
Ptff. in Err.

v.

HENRY K. OLIVER, Treasurer and Receiver
Gen'l of the COMMONWEALTH OF MASSACHUSETTS.

(See S. C., 10 WALL., 566-577.)

Insurance business, not commerce—corporation not a citizen—corporation cannot do business in another State except by consent of State—tax on foreign companies.

The business of Insurance is not commerce; and the corporation of one State, having an agency by which it conducted that business in another State, is not engaged in commerce between the States.

A corporation is not a citizen within the meaning of that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

NOTE.—Powers of a corporation beyond the territorial limits of the sovereignty which created it. See note to *Runyan v. Coster*, 30 U. S. (14 Pet.), 122.

A corporation created by a State can exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by its comity and consent.

The Liverpool and London Life and Fire Insurance Co. is a Corporation, as the law of corporations is understood in this country, notwithstanding that several Acts of Parliament declare that it shall not be held to constitute the body a corporation.

The law of Massachusetts, which permits it to exercise its corporate functions in that State, only on the condition of payment of a specific tax, is no violation of the Federal Constitution, or of any treaty protected by said Constitution.

[No. 64.]

Argued Jan. 11, 1871. Decided Feb. 6, 1871.

IN ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts.

The bill in this case was filed by the defendant in error, in the Supreme Judicial Court of Massachusetts, for an injunction against the transaction of insurance business by the respondent until the payment of certain taxes.

A decree having been entered by said court in favor of the complainant, the respondent sued out this writ of error.

The case is fully stated in the opinion of the court.

Messrs. **B. R. Curtis** and **J. G. Abbott**, for plaintiff in error:

The defendant is not, by the laws of Great Britain, a Corporation.

Lindl. Part., 2, 3, 4, 5, 1165; Words. Joint Stock Cos., 232, 41, 275; *Harrison v. Timmins*, 4 M. & Wels., 510; *Bartlett v. Penland*, 1 B. & Ad., 704; *Van Sandau v. Moore*, 1 Russ., 441; *Cape's Err's* case, 2 DeGex. M. & G., 562; *Mayhew's* case, 5 DeGex., M. & G., 837; *Blakeley's* case, 18 Beav., 183; *Burnes v. Pennell*, 2 H. of L. Cas., 523.

The Association falls entirely short of being a Corporation, as usually defined and understood.

Dartmouth College v. Woodward, 4 Wheat., 636; *Bk. v. Billings*, 4 Pet., 562.

Where a corporation is so established by implication, the legislative intention to confer a corporate existence must be certain and plain.

Stebbins v. Jennings, 10 Pick., 189; *School District v. Wood*, 18 Mass., 197; *Med. Inst. v. Patterson*, 1 Den., 61; *S. C.*, 5 Den., 618; *Myers v. Irvin*, 2 Serg. & R., 368; *Ang. Corp.*, sec. 79.

The merchants and traders of each nation respectively, shall enjoy the most complete protection and security for their commerce.

Convention between the United States and Great Britain, of July 3, 1815; 7 U. S. Stat. at L., 228, Volume of Treaties. The above Con. indefinitely extended. 8 U. S. Stat. at L., 361, Volume of Treaties.

The rule of construction of that Treaty must be to deal with it liberally, so that under it, the freest and largest intercourse may take place between the two countries.

Chief Justice Marshall says: "Commerce undoubtedly is traffic, but it is something more; it is intercourse."

Gibbons v. Ogden, 9 Wheat., 189; see, also, *Cooley v. Port Wardens*, 12 How., 299; *Sinnot v. Davenport*, 22 How., 244 [68 U. S., XVI., 248]; *Almey v. Cal.*, 24 How., 169 [65 U. S., XVI., 644]; *Smith v. Turner*, 7 How., 288-418.

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But, whatever may be the power of the State to impose a tax upon subjects of Great Britain greater than that imposed on its own citizens, when doing the same business, no such tax can be imposed on citizens of another State.

Here no tax is assessed on citizens of Massachusetts carrying on the business of insurance, while citizens of New York are taxed four per cent. on the whole amount of their premiums.

If a single citizen of New York has the right to carry on the business of insurance in Massachusetts, then two or any larger number have the same right; nor is the right lost because subjects of Great Britain join with them.

Under the 2d section of Article IV. of the Constitution, the citizens of each State are entitled to all the privileges and immunities of citizens in all the other States.

No citizen of one State can, with the slightest truth, be said to possess and enjoy all the immunities of a citizen of another State, if he is exposed to a tax, when a citizen of the other State is not.

Story, Const., secs. 1805, 1806; 2 Kent, Com. 91; *Corfield v. Coryell*, 4 Wash. (C. C.), 371; *Scott v. Sandford*, 19 How., 398 (60 U. S. XV., 691).

It has been held to meet one of the greatest necessities for adoption of the Federal Constitution, that in any State, every citizen of every other State shall possess the same rights, privileges and immunities possessed by the citizens of that State, and that no discriminating legislation should be permitted in one State against the citizens of any other State.

Lemmon v. People, 20 N. Y., 608; *Frost v. Brisbin*, 19 Wend., 11; *Rogers v. Rogers*, 1 Paige, 184; *Conner v. Elliott*, 18 How., 591 (59 U. S. XV., 497); Sedg. Const., 600.

Mr. Charles Allen, Atty-Gen. of Massachusetts, for defendant in error:

There is no quality whatever which distinguishes a full corporation in Massachusetts, which the present Company lacks. On the other hand, it possesses various qualities which no partnership in Massachusetts can possibly have.

Thomas v. Dakin, 23 Wend., 103; see, *Warner v. Beers*, 28 Wend., 122; *People v. Assessors of Watertown*, 1 Hill, 616; *Supervisors of Niagara v. People*, 7 Hill, 504; *De Bow v. People*, 1 Den., 9.

If, therefore, this Company, in strictness of speech, is only a quasi Corporation, nevertheless quasi corporations are a kind of body recognized by law as deriving corporate privileges, either from legislative grant, or by prescription or usage.

Levy Court v. Coroner, 2 Wall., 508 (69 U. S. XVII., 852); 2 Kent, Com. 278, and notes.

If the plaintiff in error is a foreign Corporation, there is no doubt at all that the Commonwealth of Massachusetts may impose such conditions as may be thought expedient, upon their privilege of doing business in Massachusetts.

The Legislature may exclude them from the State altogether, or it may allow them to come in upon such terms as it sees fit.

Atty-Gen. v. *Mining Co.*, 99 Mass., 153; *Paul v. Va.* (ante, 357).

If the plaintiff in error is not a Corporation,

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it must at least be considered as an Association, consisting of many members, and endowed with certain corporate privileges. But even in that case the argument against it is very nearly as strong.

When an individual becomes a member of a business association, he does not thereby raise the association to his own level, nor confer upon it the privileges and immunities to which he as an individual may be entitled; but, on the contrary, his individual existence is merged in the association, and by becoming a member thereof he must consent to share its burdens, duties and disabilities.

Illustrations which furnish a close analogy to this doctrine are numerous.

The State cannot be sued and cannot be taxed. But the fact that the State owns shares in a corporation will not exempt the Corporation from liability to be sued and to be taxed. The smallest town may tax, and the humblest citizen or alien may sue the corporation in which the State is a stockholder. Nay, even though the State should become the owner of every share in a corporation, and so have the entire beneficial interest therein, it has been held by a sound and wise decision, that the same doctrine applies.

Bk. of S. C. v. Gibbs, 3 McCord, 377; see, also, *Bk. of U. S. v. Planters' Bk.*, 9 Wheat., 907; *Turnpike v. Wallace*, 2 Watts, 316; *Ang. & Ames, Corp.*, sec. 32.

The privileges and immunities which are contemplated by the Constitution are those which are fundamental; as, for instance, the right of going into any State for the purpose of residing therein; the right of taking up one's residence therein and becoming a citizen; the right of free entrance, exit and passage through; the protection of the laws affecting personal liberty.

See *Corfield v. Coryell*, 4 Wash. (C. C.), 381; *Bennett v. Boggs*, Bald., 60; *Smith v. Md.*, 18 How., 71 (59 U. S., XV., 269); *Dunham v. Lamphere*, 3 Gray, 276; *Paul v. Va.* (*supra*).

The right of entering a State and remaining there for the purpose of carrying on a permanent business with a view to profit, and thus of gaining all the benefits of citizenship, without also submitting to the corresponding duties and liabilities, cannot, by any just construction, be included in this provision of the Constitution.

Legislation like that here in controversy has been upheld in New York and New Jersey.

See, *Fire Department v. Noble*, 3 E. D. Smith, 440; *Tatem v. Wright*, 3 Zabr., 440.

That they, as subjects of Great Britain, have certain rights under the Treaty which this law infringes upon, seems to be wholly disposed of by the recent decision of *Paul v. Va.* (*supra*). The business of insurance is not trade or commerce, within the meaning of the Treaty.

Mr. Justice Miller delivered the opinion of the court:

The State of Massachusetts claiming of the plaintiff in error a tax of four per cent. on the premiums received in the course of its business in that State, obtained a decree in her courts enjoining the Company from further prosecution of its business, until the taxes found to be due were paid. The law of Massachusetts under

which this tax was assessed, enacts that "Each fire, marine and fire and marine, insurance company incorporated or associated under the laws of any government or State other than one of the United States, shall annually pay to the Treasurer of the Commonwealth a tax of four per cent. upon all premiums charged or received on contracts made in this Commonwealth for insurance of property."

The case is brought to this court on the ground that in its application to the plaintiff in error, the Statute of Massachusetts is in conflict with the provision of the Constitution which confers on Congress the right to regulate commerce with foreign nations and among the States, and with that which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

Assuming that the plaintiff in error is not a Corporation, but is a partnership or Association of individuals, some of which are subjects of Great Britain, and others citizens of the State of New York, it is argued that the rights of the former are protected by the Treaty between the United States and Great Britain, and the rights of the latter by section 2, article 4, of the Federal Constitution above referred to.

The case of *Paul v. Va.* [*ante*, 357] decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted the business in another State, was not engaged in commerce between the States.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign Corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

This instrument, as far as it could be done without the aid of Parliament, establishes a Company under the name of The Liverpool Life and Fire Insurance Company, with a capital of £2,000,000, which was divided into one hundred thousand shares of £20 each, and declared its purpose to be, making insurance on life and against fire. These shares could be sold and transferred, and executors and administrators represented them in the Company on the death of the owner. If, by the laws of the Association, a share became forfeited, the owner was released from all further liability to the Company. The business of the Company was to be conducted by a Board of Directors exclusively, and they could make by-laws and change and modify them. There was a covenant that suits might be brought by or against the Company in the names of one or more directors,

which should bind the stockholders, and that no stockholder would plead in abatement the nonjoinder of the others; and it was further covenanted that a judgment so obtained against a director might be made out of the property of any of the stockholders. Numerous other provisions are found in the original articles, which consisted of over a hundred sections, but only those are referred to here which bear on the question we are considering. There were also three subsequent deeds of settlement, and three Acts of Parliament were passed to give efficiency to the purposes of the Association.

The first of these Acts provided that the Association might sue and be sued in the name of the chairman or deputy-chairman of the Board of Directors; that the stockholders might sue the Company as plaintiffs, or be sued by it as defendants. It regulated the manner in which the shareholders might be made individually liable for the debts of the Association; and it declared that the Act should not be construed to incorporate said Company or relieve its members from their individual liability, except as provided in the Act.

The second Act of Parliament changed the name of the Company to that which it now bears, and authorized it to make contracts by the new name; and it also contained a provision that the Act should not make the Company a Corporation; and there is a third Act which authorizes amalgamation with another company, and which again provides against its being construed into an Act of incorporation or a limited liability partnership.

It will be seen by this reference to the powers of the Association, as organized under the deed of settlement, legalized and enlarged by the Acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the Act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of the corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that by statute, and by

the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this Company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this Company would, if adopted with the usual formalities, constitute it a Corporation under their general laws, or it would become so by such legislative ratification as is given by the Acts of Parliament we have mentioned.

To this view it is objected that the Association is nothing but a partnership, because its members are liable individually for the debts of the Company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So, also, it is said that the fact that there is no provision either in the deed of settlement or the Act of Parliament for the Company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an Act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Ins. Co., and that which authorized suit against that Company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several Acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a Corporation.

But whatever may be the effect of such declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these Acts, is the exemption from individual liability of the shareholder for the contracts of the Corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is, whether an associa-

tion, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the Association is a Corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

The judgment of the Supreme Court of Massachusetts is affirmed.

Mr. Justice Bradley, dissenting:

Whilst I agree in the result which the court has reached, I differ from it on the question whether the Company is a Corporation. I think it is one of those special partnerships which are called joint stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a Company associated under the laws of a foreign country, it comes within the scope of the Massachusetts Statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the Treaty of 1814 to prevent the States from imposing taxes or license laws upon either British corporations or joint stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

Cited—1 Flipp., 614, 615; 47 Ind. 241; 15 Kal., 636; 85 N. J. L. 118; 28 Ohio, 531, 533; 31 Ohio, 544; 30 Am. Rep., 364, 366 (87 Pa. St., 183, 188); 44 Am. Rep., 388 (92 N. Y., 326).

WILLIAM S. WARD, Executor of NAHUM
WARD, Deceased, Appt.,

v.
UNITED STATES.

(See S. C., 10 Wall., 503-604.)

Continental loan certificates, when invalid—payment of interest.

A claim on certain loan certificates purporting to be issued by the Continental Congress in 1776 rejected, because the certificates were not properly countersigned, and were not used for the benefit of the Government.

The United States can contest the validity of these certificates, notwithstanding the payment of interest for a period of four years, where the interest was paid by mistake, and without authority.

[No. 2.]

Argued Dec. 7, 1870. Decided Feb. 6, 1871.

APPEAL from the Court of Claims.

Suit was brought in the Court of Claims in 1866, by Nahum Ward, Treasurer of the Ohio Company, on forty-three loan office certificates of the United States, each for \$400, payable to Thomas Stone or bearer, with interest at six per cent. per annum, bearing date Dec. 23, 1777, issued in pursuance of a Resolution of the Continental Congress of Feb. 22, 1777.

The court in 1857, Judge Blackford dissenting, gave judgment for the claimant.

See 10 WALL.

Subsequently, in 1864, Congress referred the case back to the Court of Claims. 13 Stat. at L., 591.

Ward's executor prosecuted the cause and, Mar. 23, 1866, the Court of Claims gave judgment against him. An appeal was asked for specifying alleged error.

The court adopted the petition for appeal, with certain modifications, as its statement of ultimate facts, and certified it accordingly with the court's conclusions of law thereon. The ultimate facts thus found by the court, as set out in the petition for appeal so modified, are as follows:

And first the Court of Claims finds as matter of fact:

1. That the forty-three loan certificates which form the foundation and subject-matter of this claim and are set forth in the petition herein, were duly signed by Samuel Hillegas, pursuant to the Resolution of Congress, Feb. 22, 1777, and were sent with others to the loan office of the State of Georgia, to be countersigned by the Commissioner for the State of Georgia, to be by him issued for such loans as might be then obtained.

2. That it is unknown and cannot be ascertained, who was the Commissioner for the State of Georgia, or whether any such commissioner had been appointed and authorized to countersign such loan certificates; and that at the time of the transaction, there was no formal loan office in Georgia; and that a large part of the State was in the possession of the public enemy.

3. That the said loan certificates were not signed by any duly authorized Commissioner for the State of Georgia, but that they bear a certificate in the words following, to wit:

"Countersigned: By order of J. A. Treutlin, Esq., Governor of Georgia. E. Davies, Jr."

4. That there is no evidence to show that E. Davies, Jr., was a Commissioner for Georgia; or that he was ever reputed to be such; or that he was authorized to countersign such loan certificates by the State or by the Governor of Georgia; or that these are the veritable signatures of E. Davies, Jr.

5. That interest on certain loan certificates, similar to those in action, was paid by the Treasury Department up to Dec. 23, 1781, and that on twenty-nine of the certificates in action, interest for four years has also been paid by the defendants and duly noted and indorsed thereupon; and that no objection to these or similar loan certificates or to the authority of E. Davies, Jr., to act as commissioner, was taken by the defendant until the year 1792.

6. That no direct consideration or value ever passed to the defendant from the claimant or any other person for the said loan certificates.

And the court further decide as matter of law:

1. That no cause of action would arise upon the said loan certificates, unless the same were duly countersigned by a Commissioner for the State of Georgia.

2. That, in the absence of other evidence, the indorsements of E. Davies, Jr., do not raise a legal presumption that E. Davies, Jr., was a Commissioner for the State of Georgia, or that he was authorized to countersign such certificates, or that the signatures are the veritable signatures of the said E. Davies, Jr.

3. That the payment and cancellation of certain similar loan certificates and the payment of interest for four years upon certain of the loan certificates in action, do not raise a legal presumption that E. Davies, Jr., was a Commissioner for the State of Georgia, or authorized to countersign such loan certificates, and do not estop nor conclude the defendant from controverting such authority and signature.

Messrs. Thomas Ewing, Jr., Thomas Wilson and H. Stanbery, for appellant:

An examination of the facts found, as explained by the record, and of laws and facts of which this court takes judicial notice, cannot fail to show that this conclusion is erroneous and is ground for reversal.

These certificates are found, by the Court of Claims, to have been executed and emitted, so far as the United States officers dealt with them, in strict pursuance of law.

They are part of a \$18,000,000 loan ordered by Congress Feb. 22, 1777 (Sup. Rec., p. 4; Journ. of Cong., p. 58), and were by that Act required to be countersigned as directed in the Loan Act of Oct. 3, 1776.

The law does not require the countersigner to append to his name any description of his office.

The commissioner was a state officer or agent, to be appointed and removed by the State in its own way and time; to be responsible to the State only, while it was responsible for him to the United States.

Act Oct. 3, 1776, Sup. Rec., pp. 4, 5.

If a vacancy occurred in the office of Commissioner for Georgia, it was the duty of the Governor to fill it, under the Constitution of the State, of Feb. 5, 1777, and which provides, section 19, that "The Governor shall, with the advice of the Executive Council, exercise the executive powers of government according to the laws of the State and the Constitution thereof;" and section 21, "That the Governor, with the advice of the Executive Council, shall fill up all intermediate vacancies that shall happen in office until the next general election."

Maury & Crawford's Dig. Laws of Georgia, p. 9.

The facts found, show that there was a vacancy in the place of Loan Commissioner for Georgia when these certificates were sent there; that it was a state agency, and the Governor was required to make a temporary appointment, with the advice of the Executive Council.

These certificates were not sent to be sold in Georgia and the proceeds remitted to the National Treasury, but were delivered by the General Government to the State, to be disposed of by it, for purposes of local and general defense.

The court find that certificates, of which these formed a part, were charged to and accounted for, by Georgia, in settlement with the United States.

The court further found that "interest on certain loan certificates similar to those in action, was paid by the Treasury Department up to 23d December, 1781; and on 29 of the certificates in action, interest for four years has also been paid by the Department, and duly noted and indorsed thereupon."

The court find that the Treasury Department paid and canceled some certificates of this issue.

It needs no comment on the statement of facts found, to show that the first finding of law is erroneous and is ground of reversal.

As to the second conclusion of law, two facts conclusive of the case were, that Davies was authorized to and did countersign. We do not claim to have proved them by the production of the certificates, but by a claim of circumstances in which the countersignature is a link.

As to the third conclusion of law, the Treasurer of the United States repeatedly paid principal and interest of this issue of certificates; the Auditor-General and Board of Treasury examined and approved his accounts. These acts were done by these officers within the scope of their duty, and are presumed to have been regular, until the contrary appears.

In the accounts of the loan officers with the Continental Treasury, credit was given in March, 1778, of a draft on the Georgia loan office in favor of the Deputy Postmaster-General Clay, for \$202,423, which covered nearly all this issue and other funds—which draft was paid. Now, the fact that the Clay draft was paid shows that the certificates were disposed of by officers of the State or United States.

It has been shown that Congress knew the circumstances attending this issue, and had certificates of this issue before it for five months when it passed the Resolution of August 3, 1780, which related to these and no other Georgia certificates. Therefore, the acts of countersignature and issue were ratified by the United States by this Resolution, and by the payment made in pursuance of it.

"A ratification once deliberately made upon full knowledge of all the material circumstances, becomes *eo instanti* obligatory, and cannot afterwards be revoked." Story, Ag., sec. 242.

"Slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification." Story, Ag., sec. 253.

These certificates were received by the Ohio Company before Oct. 4, 1787, to be used in payment of its purchase from the Government of lands in the north. The Government had, for ten years then past, recognized their validity by act and silence.

Declaring a note to be "good" to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor.

Hicks v. Cram, 17 Vt., 449; *Orout v. De Wolf*, 1 R. I., 398; *Kellogg v. U. S.*, 1 N. & H. (Cl. of Cl.), 810.

Messrs. Amos T. Akerman, Atty. Gen., and T. H. Talbot, Asst. Atty. Gen., for appellee:

I. As certificates, the papers in question are void, not possessing on their face the legal requirements of such certificates. They were never countersigned by the Loan Commissioner of the State of Georgia, as was required by the Resolution which authorized their issue, that of Oct. 3, 1776, nor by that of Jan. 15, 1777. 2 Jour. Cong., 14.

II. Judgment cannot be given in this case as for money had and received, for no consideration is shown to have passed to the defendant.

It is also to be noticed that the appellant's intestate is not shown to be an innocent purchaser, for valuable considerations; furthermore, he acquired them subsequent to their rejection by the Treasury in 1791.

III. Accepting all the views presented for the appellant, still there remains, as matter of law, a very serious objection to the maintenance of this suit, in this: that it is an attempt to enforce the payment of a portion of the public debt (using that term in its stricter sense) of the United States, by action in the Court of Claims.

The Attorney-General will maintain that Congress has not conferred on the Court of Claims a jurisdiction which will authorize it to give judgment against the United States for the recovery of any portion of such public debt.

Mr. Justice Davis delivered the opinion of the court:

A Continental Congress, on the 3d day of October, 1776, being in want of \$5,000,000 to prosecute the war, resolved to borrow it on what were called Loan Office Certificates, and to establish a loan office in each State, for the convenience of the lenders of money. The Resolution directed the appointment, by the authority of the State, of a Commissioner of Loans, whose duty it was to receive the certificates from the Treasurer of the United States, and to deliver them for such sums of money as he should be able to borrow. The faith of the Government was pledged to redeem these certificates when countersigned by this officer.

In continuation of its policy on this subject, Congress, on the 15th January and the 22d of February, 1777, provided for a further issue of this class of securities, on the basis of the Resolutions of the preceding October. Accordingly, certificates, in proper form, duly signed by the designated Federal officer, were transmitted to the different loan offices of the country, to be given in exchange for money, when countersigned by the Loan Officer of the State, and the forty-three, which form the foundation of this suit, were a part of those which were sent to the loan officer of Georgia.

The United States deny their obligation to pay the certificates in controversy, because they were not countersigned in conformity with the prescribed regulation of Congress, nor used for their benefit. It will be conceded, if they were not executed as required by the legislation on the subject, that they were irregularly issued, and the United States under no obligation to pay them unless they are estopped in some way from interposing this defense.

It becomes, therefore, of importance, in the first instance, to ascertain whether E. Davies, Jr., who countersigned them, as he says, by order of J. A. Treutlin, Governor of Georgia, was Commissioner of Loans for the State, and whether he negotiated them on account of the United States.

Fortunately, these questions were considered in 1792 by Alexander Hamilton, then Secretary of the Treasury, who was charged by Congress with their investigation. In his report of the 28th of March of that year, he states as the result of diligent inquiry on that subject, that he had been unable to obtain evidence either of the appointment of E. Davies to the office of Commissioner of Loans for Georgia, or that he was ever known or reputed to have acted in that capacity, and that there was no evidence that the paper which he put in circulation had been issued for any purpose of the United

States. With this report papers were transmitted not only justifying the conclusion reached by the Secretary, but tending strongly to show that the certificates were placed in the hands of Davies by the Executive Council of Georgia to purchase goods for the State. These papers consist of an affidavit of John Wereat, Auditor of Georgia, and a long time resident there, denying that Davies, whom he well knew, was at any time Commissioner of Loans; of letters from Richard Wylshyr, Commissioner of Loans of the State in 1791, giving his opinion to the same effect, and a communication from Samuel Steick, of Governor Houston's staff, that the certificates were issued on State account. See *Am. State Papers*, class ix., Vol. Claims 464, 465. This report, with the accompanying papers, was published and, of course, read by the holders of the disputed paper. If in their power to deny it, interested as they were to do so, it would at least have been attempted. As no contradictory proof was furnished to the Treasury Department, always ready and willing to receive it, it is fair to infer that none existed. But this consideration did not prevent the holders of this paper from seeking to get it funded in 1795. They were met by the accounting officers of the Treasury with the same objections taken by Mr. Hamilton and, as these were not removed, the same result followed. In this condition of things, if the controversy had been between individuals, and there had been another forum to hear and decide it, it would have been resorted to at once, unless the decision of the first tribunal was accepted as final. But the holders of these certificates acted differently. Instead of taking an immediate appeal to Congress from the decision of the Treasury, they waited until two decades had passed away. Nahum Ward says that these identical certificates were presented to the Treasury in 1792, by Mr. Talmadge, and remained there until 1812, when they were withdrawn and Congress asked to pay them, on the petition of John Delafield, who professed to possess them in his own right. See Rep., 101, House of Reps., 19th Cong., 1st session, by Mr. Little, from the Com. on Rev. Claims. Why this delay of twenty years? No reason is even suggested for it, and none can be given which is consistent with the conduct of men in the ordinary affairs of life. It is absurd to suppose that anyone, informed of the grounds of objection to a controverted claim, if there were evidence to remove them, would delay action on the subject until thirty-four years had passed since the transaction, out of which the claim had arisen, occurred.

It is said the forum was changed because of newly discovered evidence, and for proof of this we are referred to the reports of Mr. Talmadge, chairman of the committee, on the petition of John Delafield, made to Congress in 1816 with accompanying papers. It is hard to reconcile these reports with the ownership of the property as claimed by Nahum Ward. He says the Ohio Company has owned the forty-three certificates since 1791, and yet Delafield stated in his petition that he owned them, and wished them funded for his benefit, and we must suppose the Congress of that day, and especially Mr. Talmadge, believed the fact as stated by Delafield. At any rate the Ohio Com-

pany is estopped from denying the change of ownership, as Ward says that Mr. Talmadge, who was treasurer of the company from 1791 until 1825, was ordered to sell the certificates by the company, and did sell them at public auction to Delafield. It is true he couples this statement with another, that, notwithstanding Delafield's purchase, they were considered as the company's property; but this would place Mr. Talmadge in the predicament of aiding, while a member of the National Legislature, to procure the payment of a disputed debt for a company of which he was an important officer. See Rep. 101, House of Rep., 19th Cong., 1st session.

And why the necessity of selling at all unless there were an honest purpose of parting with the title to the property? It surely was as easy to prosecute a just claim before Congress in the name of a corporation as in the name of a natural person. If, then, Delafield purchased the claim free from any trust, as we are bound to suppose in order to relieve the Ohio Company and their treasurer from censure, he did it at his own risk and for a venture, and took it subject to all equities. He cannot plead want of notice of the defenses interposed by the United States, because the company of whom he bought, and of which he was a member, were well informed on the subject. It does not appear how or when the title got back in the Ohio Company, nor is it of any consequence, as the company occupies the same position in this litigation that Delafield would had he retained the ownership of the certificates.

But, apart from this view of the subject, these reports do not change the *status* of the parties to this controversy. The evidence they furnish comes too late, is chiefly hearsay in its character, and should have no weight in the determination of the questions in dispute. It consists mainly of lengthy letters from Major Hugh McCall, of Georgia, addressed to Mr. Talmadge, which seem to be in the nature of arguments against the position taken by the Government. One of them is devoted to a futile effort to prove that Wereat and Steick were uninformed of the passing events during Governor Treutlen's administration. It is true the certificate of Mr. Sheftall tends to show that Davies did act in the capacity of Commissioner of Loans, but although it is certified that he had an unusually strong memory, we place but little reliance on his recollection in 1816, of what transpired in the commissary department of Georgia in 1777-78. Especially do we distrust his memory of these events when it is in opposition to the recollection of others, equally trustworthy, who testified in 1792, twenty-four years nearer the time when the certificates were put in circulation.

It is urged that the United States is not in a position to contest the validity of these certificates, because of the payment of interest for a period of four years. The report of Mr. Hamilton takes the ground that the interest was paid by the mistake of the treasurer, and without authority and, therefore, not binding on the United States. It is very clear that there was no purpose on the part of the Government to ratify the acts of Davies, for the paper bearing his name was rejected, as soon as the attention of the proper department was called to it. But it

is not necessary to discuss the general rules of law on the subject of ratification, and to show in what state of case they are applicable, for, in our judgment, under the circumstances of the claim, as they appear in this case, there is no equity raised in favor of the Ohio Company against the United States.

Without pursuing the subject further, or noticing the various reports in Congress adverse to this claim, we are satisfied it is not a just charge on the Treasury of the United States.

The judgment of the Court of Claims is affirmed.

Mr. Justice Field, dissenting:

I dissent from the judgment of the court in this case. I am of opinion that the demand of the plaintiff is a just obligation of the United States, as binding as any part of the public debt of the country.

GEORGE B. STOVALL, Use of DAVID EUBANKS, ET AL. *Pf. in Err.*,

v.

FRANCIS A. BANKS ET AL.,

(See S. C., 10 Wall., 583-589.)

Final decree, what is—surety bound by decree against principal.

A decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is a final decree conclusive upon the parties.

This is so although the decree allowed as payment to be deducted from the amount therein adjudged, any note held by defendant against plaintiff, and a deduction for fees.

Sureties in a bond are bound to the full extent to which their principal is bound.

A surety cannot attack collaterally a decree made against an administrator, for whose fidelity to his trust he has bound himself.

[No. 215.]

Submitted Jan. 31, 1871. Decided Feb. 13, 1871.

IN ERROR to the District Court of the United States for the Northern District of Georgia.

Suit was brought by the plaintiff in error, in the District Court of the United States for the Northern District of Georgia, upon an administrator's bond. Judgment having been given in said court for the defendants, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Mr. John D. Pope, for plaintiff in error:

It does not appear from the face of the decree, that any portion of the litigation was held back for future adjudication. If it had been rendered in the United States Circuit Court, an appeal might have been taken at once, as from a final decree. In *Mills v. Hoag*, 7 Paige, Ch., 19, Chancellor Walworth says: *Chief Justice Savage* defines a final decree to be the last decree which is necessary to be entered, to give to the parties the full and entire benefit of the judgment of the court. The decree in this case comes within that definition, as no further questions nor directions are reserved for the future judgment of the court. And although some

NOTE.—What is "final decree," or judgment of state or other court, from which appeal lies. See note to *Gibbons v. Ogden*, 19 U. S. (6 Wheat.), 448.

further proceedings are to be had before a master to carry into effect the decree, all the consequential directions depending upon the result of those proceedings are given in the present decree. It is true, there may be exceptions to the report, and in that case a further order of the court will be necessary to dispose of those exceptions; but a decree is not the less final in its nature because some future orders of the court may possibly become necessary to carry such final decree into effect.

Forgay v. Conrad, 6 How., 201; see *Thompson v. Nelson* (ante. 94), and *Railroad Co. v. Bradley* (ante. 274). To the same effect are *Whiting v. Bk. of U. S.*, 18 Pet., 15; *Can. Co. v. Beers*, 1 Black, 54 (66 U. S., XVII., 41); and *Michoud v. Girod*, 4 How., 508.

But suppose this decree is not in all respects a final and complete decree; still, it may be and is conclusive as to all matters which it finally disposes of. The cases already cited and quoted from affirm this doctrine. Numerous others might be added. The case of *Pulliam v. Christian*, 6 How., 209, is an instance of a decree which was not final in such a sense as that an appeal would not lie upon it; yet *Justice McLean*, in delivering the opinion of the court, says: "This decree is final only as to the trust deed." It frequently happens that all the points involved in a case are not settled at the same time.

Will the court say that for a mere irregularity, if, indeed, there is any irregularity, in the division of the estate among the heirs, the whole decree must go for naught? Suppose there had been blank dollars awarded to each of the distributees, after the sum to be distributed had been definitely settled and the heirs to the estate determined, would the decree, when offered in evidence, be held void and of no effect?

Every judgment or decree rendered by a court having jurisdiction of person and subject-matter, is conclusive on parties and privies.

It cannot be collaterally attacked, nor can it be vacated anywhere except for fraud, accident, etc., unmixed with negligence on the part of the defendant; and then only in a direct proceeding for that purpose.

It is perfectly clear that all the parties to the record in the case in Morgan Superior Court, are concluded by the decree rendered by that court, notwithstanding that decree may be irregular or erroneous.

Mr. Dawson A. Walker, for defendants in error:

The state court decree was so incomplete that it would not support an action.

See decree, 25, 26; *Sadler v. Robins*, 1 Camp., 253; *Nations v. Jackson*, 24 How., 203 (65 U. S., XVI., 631).

If admitted, the decree would have such effect as it had in the state court.

Act, Cong., 1790.

In a state court it was only *prima facie* evidence as to the surety. Judgments bind none but parties and privies, and there is no such privacy between principal and surety.

Bryan v. Owen, 1 Kelly, 369; *Brown v. Chaney*, 1 Kelly, 414; *Smith v. Gettinger*, 3 Kelly, 142; *Holley v. Wallace*, 10 Ga., 160; *S. C.*, 13 Ga., 391.

If it had been admitted and given that effect, the result in this case would have been the same.

See 10 WALL.

U. S., Book 19.

Mr. Justice Strong delivered the opinion of the court:

This was an action of covenant upon an administration bond, brought for the use of persons claiming to be the distributees of the estate of Alfred Eubanks, deceased, against the administrator, who is the principal obligor, and against his sureties on the bond. At the trial, the plaintiff offered in evidence the record of a suit in chancery in the Morgan County Superior Court, in which the persons for whose use this suit was brought were complainants, and the administrator, with others, who also claimed to be heirs and distributees of the estate of the decedent, were defendants. By that record it appears that the Superior Court adjudged the sum of \$37,743.50, assets of the decedent, to be in the hands of the administrator, and made an order distributing the whole. In the distribution \$3,820 were decreed to be paid to each of the complainants in the bill, and it was ordered they should have executions for the respective sums adjudged to them, on application to the clerk of the court, after four days from this adjournment. The record further exhibits that executions were issued upon the decree, that no objection was made to the issue, and that to all the executions the sheriff returned "No property of the defendant or of the estate of Alfred Eubanks to be found, upon which to levy."

When this record was offered in evidence the district court rejected it, holding that the decree was not final and, consequently, that it could not be read in evidence for any purpose in the case. In this we think there was error.

It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree conclusive upon the parties. We do not overlook the fact that in this instance the court, after having determined the sum due to each of the complainants and directed its payment, and after having awarded execution, went on to direct that the administrator be allowed as payment to the respective parties, to be deducted from the amounts therein adjudged to them, the principal and interest of any note held by him against either of them. It also directed that the several shares of the parties to whom the estate was awarded should be subjected to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator. But we think the decree was not, for this reason, the less final.

Even if the sum decreed was left indeterminate, it was certainly adjudicated that the complainants were entitled to participate in the distribution, and the extent of their interest was defined. But it does not appear that there were any unpaid fees, or that the administrator held any notes against either of the distributees. All that these parts of the decree meant, therefore, was either direction to the sheriff respecting the execution of the *fi. fas.*, or liberty to the defendant to move for a modification of the decree—a motion never made. Plainly they were not intended to prevent the enforcement of the decree by executions against the administrator, for such executions were expressly allowed. It is not unusual in courts of equity to enter decrees determining the rights of parties, and the

extent of the liability of one party to the other, giving at the same time a right to apply to the court for modifications and directions. It has never been doubted that such decrees are final. They are all that is necessary to give to the successful party the full benefit of the judgment. In 2 Daniel's Chancery Practice, 841, 842, the effect of allowing the privilege of making such applications to the *Chancellor*, is stated to be no alteration of the final nature of the decree. Says the author, "A decree with such a liberty reserved is still a final decree, and, when signed and enrolled, may be pleaded in bar to another suit for the same matter." So in *Mills v. Hoag*, 7 Paige, 19, it was said that "a decree is not the less final in its nature, because some future orders of the court may possibly become necessary to carry such final decree into effect." In the case before us no future orders were necessary. The decree was ripe for execution, and execution was ordered.

We are referred, however, to the *nisi prius* case of *Sadler v. Robins*, 1 Camp. N. P., 258. Without dwelling upon the fact that those Reports have not always been considered safe authority, an examination of the case, as reported, will reveal that it does not sustain the ruling of the district court. It was an action of *assumpsit* on a decree of the High Court of Chancery in Jamaica. The decree was for a certain sum, current money of the island, "first deducting thereout the full costs of the defendants expended in the said suit, the same to be taxed by George Howell, Esquire, one of the masters of the said court, and also deducting all and every further payment or payments which the said James Sadler and R. Haywood, or either of them, might, on or before the first day of January, 1806, show to the satisfaction of the said George Howell that they or either of them had paid on account of their said testator's estate." This decree Lord Ellenborough held to be incomplete, and ruled that *assumpsit* would not lie upon it. But it must be observed that there were certainly unascertained deductions to be made. Costs had been expended by the defendants and the plaintiff might have had them taxed, even if the defendants had not appeared to tax them. It was for this reason the decree was adjudged not complete. There was not, as in the present case, an award of execution to enforce the decree, and there could not have been, for there was a reference to a master to ascertain definitely its amount.

It has been argued on behalf of the defendants in error that the decree of the Superior Court, if admitted, would have been only *prima facie* evidence against the sureties in the bond. Were that conceded it would not justify the exclusion of the evidence. But the concession cannot be made. The decree settled that the administrator of the intestate, Alfred Eubanks, held in his hands sums of money belonging to the equitable plaintiffs in this suit, as distributees of the intestate's estate, which he had been ordered to pay over by a court of competent jurisdiction, and the record established his failure to obey the order. Thereby a breach of his administration bond was conclusively shown. Certainly the administrator was concluded. And the sureties in the bond are bound to the full extent to which their principal is bound. A principal in a bond may be liable beyond the stipulations

of the instrument, independently of them, but so far as his liability is in consequence of the bond, and by force of its terms, his surety is bound with him. There may be special defenses for a surety arising out of circumstances not existing in this case, but in their absence, whatever concludes his principal as an obligor concludes him. He cannot attack collaterally a decree made against an administrator for whose fidelity to his trust he has bound himself.

Much of the argument upon both sides of this case has been devoted to the consideration of the inquiry whether the Superior Court of Morgan County and the Supreme Court of Georgia rightly adjudged that the equitable plaintiffs are entitled to a share of the estate of the decedent in the administrator's intestate. That is no longer an open question. It was concluded by the decree offered in evidence. It cannot be tried again in this case.

The judgment of the District Court is reversed, and a new trial is ordered.

Cited—88 Wis., 378; 35 Am. Rep., 199 (65 Ill., 680).

HENRY STAGG, *Plff. in Err.*,

v.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(See S. C., 10 Wall., 589-598).

Insurance agent, compensation of.

An insurance agent who has received the company's circular stating his commissions, and acted on it for fifteen years, received and adjusted his compensation by it, is estopped to deny that it was the contract under which he acted, and is bound by its terms as the measure of his compensation.

Such a contract cannot be altered by proof of usage.

[No. 114.]

Submitted Jan. 31, 1871. Decided Feb. 13, 1871.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

Suit in *assumpsit* was brought in the court below, by the defendant in error, to recover certain money alleged to be due from Stagg, the defendant in that court. The said defendant, Stagg, besides the plea of *non assumpsit*, put in a further plea that the said plaintiff was indebted to him for certain commissions upon renewal policies of insurance issued after his discharge from the agency of said plaintiff. A decree having been entered in favor of plaintiff, the defendant sued out this writ of error.

The case is further stated by the court.

Mr. James C. Moody, for plaintiff in error:

1. The circular of 1849 did not operate to revoke the letter of 1843.

Each of these papers contains two distinct parts, and these parts are to be considered by themselves separately. In each paper there is a power; and in each is a contract; and these two have no more intimate relations, because of being embodied in one paper, than if contained in separate and distinct documents. The

NOTE.—Usage and custom, admissibility in construction of contracts. See note to *Adams v. Otterback*, 56 U. S. (15 How.), 539.

power has no relation whatever to the contract for compensation, since compensation is not in the least material to the validity of the power, which remains the same, with or without compensation, with much or with little.

The only substantial difference between the two is the difference in respect to the compensation proposed.

It is, undoubtedly, competent for a principal, if he desire to get rid of a contract for compensation, to accomplish his purpose by means of a revocation, for he thus cuts under and practically annuls the contract, by destroying the subject on which only it could operate. The power being revoked, no compensation could be earned through executing it.

But the converse is not true. The power remains unaffected, though the contract for compensation be modified or destroyed. This is undeniable, since the validity of a power has no relation to compensation, and is, therefore, in no wise affected by its want.

In so far, therefore, as respects the naked question of revocation, the proposition for a change in the contract for compensation could have no effect; and hence we are bound to accept the paper of Oct. 13, 1848, as the continuing source of the power, unaffected by the circular of 1849.

Was the conduct of the agent such in the premises as to constitute a valid acceptance by him of the proposed change of compensation? It was not, because:

1. There was no consideration to support his acceptance. That agency was his already; fully vested in him under the letter of 1848, and, as we have shown, was unrevoked. To offer that agency, therefore, as a consideration, would not be less absurd than to insist that an offer to sell a man his own farm is a good consideration to support his promise to purchase and pay for it. Yet it cannot be pretended that anything else was offered as a consideration for the agent's acceptance of the proposed change of contract, other than an agency already completely vested in him.

In this view of the case, there could be no valid acceptance, even assuming there had been an express acceptance. But,

2. There was no acceptance at all. The fact, then, that the agent continued to execute the power, under the letter of 1848, cannot be construed into conduct implying an acceptance of any new proposition. He was simply discharging an already existing duty.

3. The circular of 1849 was never intended to revoke the power under the letter of 1848, nor to create a new contract.

It was evidently, as all the circumstances indicate, prepared for use in creating new agencies and for fixing the compensation of the new agents. It was not prepared for the old agents, nor intended to affect their relations to the Company. After it was prepared and ready to be sent out it was, doubtless, considered desirable to have it in the hands also of the old agents, because it was much more elaborate and detailed in its explanation and suggestions touching the best methods of advancing the insurance business than the letter of 1848, which contained substantially the same matter, in a more condensed and less perspicuous form. The circular was an admirable essay on the whole

system of life insurance, setting forth its advantages and pointing out various motives which the agent might advantageously urge.

Mr. J. M. Krum, for defendant in error:

For the purposes of this case we need only to refer to one clause of the last circular, viz.:

"For your services, as above, you will be allowed a commission of ten per cent. on the first premium (cash and notes) and five per cent. on all subsequent renewal premiums, so long as you continue the agent of the Company."

The plaintiff in error having received and acted on this circular, it must be regarded as the contract of the parties in respect to the services rendered or to be rendered, and the compensation to be paid therefor.

The duration of the agency of the plaintiff in error was limited to the pleasure of the parties respectively.

This proposition, if language has any force, is determined in favor of the defendant in error, by the very terms of the circular of Sep. 26, 1849, and the bond of plaintiff in error, dated July 19, 1858.

In the former writing the language is, "So long as you continue the agent of the Company."

In the bond the language is, "Whereas, the above named Henry Stagg has been duly appointed by the directors of said Company, their agent for the City of St. Louis and its vicinity, State of Missouri, during their pleasure."

The money sued for in this case was collected and received by the plaintiff in error after he entered into this bond.

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in error became the agent of the Insurance Company in October, 1849, by his acceptance of a circular which contained this language: "The usual compensation of agent, so far as we know, is 10 per cent. commission on the premium, with one dollar for each policy and 5 per cent. on the premium, on the renewal of the policy." In about a year afterward, he received another circular which, like the former, had much of instruction as to his agency, and which contained, in lieu of the language above cited, the following: "For your services, as above, you will be allowed a commission of 10 per cent. on the first premiums, cash and notes, and 5 per cent. on all subsequent renewal premiums, so long as you continue the agent of the Company." The plaintiff testified that he received and acted on this latter paper for about fifteen years, when he was discharged. He claims in this suit some \$3,000 as the 5 per cent. commission on the renewal premiums of policies originally made by him as agent, which have been received by the Company since he was discharged.

To support this claim, he undertook to prove by other insurance agents that such was the custom, as between insurance companies and their agents.

But the court ruled, as a matter of law, that there was an express contract in the case, and that the custom could not be admitted.

It is also ruled that the later circular, from which we have quoted, was substituted as a new contract instead of the first one, and that its fair construction was to limit the agency to the

pleasure of the Company, and to terminate the right of the agent to commissions on renewal premiums, with the revocation of his agency.

The right of the Insurance Company to terminate the agency of the plaintiff, at its discretion, is not denied by his counsel, nor is there any serious effort to support the offer to prove the custom. Indeed, if the court was right in holding that the contract between the parties was expressed by the language of the second circular, it is quite clear there was no room for usage, for it is there expressly stated that the commission on the renewal premiums, like those on the original premiums, was to be paid only so long as the plaintiff continued to be the agent of the Company.

Nor can we doubt for a moment that the later circular must be held to represent the agreement of the parties as to compensation. After having received that circular and acted on it for fifteen years, received and adjusted his compensation by it, he is estopped to deny that it was the contract under which he acted. If there was any other contract it was for him to show it. He does not do this by producing the circular of the year previous. If there was anything fraudulent, unfair or illegal in the new terms offered, or in the mode in which he was induced to accept them, he should have shown it, but he has not even attempted it.

We are, therefore, clearly of opinion that when it is shown that, as agent of the Company, he received and acted upon that circular, he is bound by its terms as the measure of his compensation.

The judgment of the Circuit Court is, therefore, affirmed.

CALEB P. MARSH, *Plff. in Err.*,

v.

THE BOARD OF SUPERVISORS OF FULTON CO.

(See S. C., 10 Wall., 676-684.)

County subscription for railroad stock, when invalid—county bonds, when invalid—absence of authority to execute them—insufficient ratification by supervisors.

A vote of a County authorizing a subscription by the County to the stock of a railroad corporation does not authorize a subscription to the stock of a branch of that corporation, disconnected from the other portions of the original line, and of comparatively little value.

That the plaintiff was an innocent purchaser of the bonds without notice of their invalidity, cannot affect the liability of the County in such case.

The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.

The protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued.

The power of ratification of the bonds did not lie with the Supervisors. A ratification can only be made when the party ratifying possesses the power to perform the act ratified.

The Supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the previous sanction of the qualified voters of the County; they could not, therefore, ratify a subscription without a vote of the County.

[No. 249.]

Submitted Jan. 31, 1871. Decided Feb. 13, 1871.

1040

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois. Suit was brought in the court below by the plaintiff in error, upon certain bonds purporting to have been issued by the County of Fulton, State of Illinois. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is further stated by the court:

Messrs. O. H. Browning and O. C. Skinner, for plaintiff in error:

It is claimed the bonds are void because the Central Division is named in the subscription book and in the bonds, and because of the passage of the Act of Feb. 14, 1857.

The order of Mar. 5, 1857, directing the subscription to be made by the clerk on the books of the Central Division, etc., is clear recognition and adoption by the County of the Act of Feb. 14, 1857, creating the divisions, and express authority to the clerk to make the subscription to that Division, and issue the bonds to the "Central Division of the Mississippi and Wabash Railroad Company."

The Act of Feb. 14, 1857, was obtained to facilitate the construction of the road, and the Act, in the interest of Fulton County, provided that the Central Division should be constructed by Canton, Fulton County, the principal town of the County.

The County was a public political Corporation; a department of the State over which the law making branch of the State Government had plenary power in modifying or changing its duties, relations and powers.

Robertson v. Rockford, 21 Ill., 451; *Brush v. Shipman*, 4 Scam., 186; 25 Ill., 191.

The Dartmouth College case clearly recognizes this rule as to public corporations. 4 Wheat., 519.

The Act of 1857 may be treated as an authorized legislative direction to a municipal Corporation of the State.

The General Assembly could, by statute, levy taxes on the County to pay repudiated or imperfect obligations of the County, incurred for local purposes, or compel the County authorities to pay such obligations, or validate debts of the County created under color of law, for local improvements.

Shaw v. Dennis, 5 Gilm., 405; *Thomas v. Leland*, 24 Wend., 66; *Gulfsford v. Chenango Co.*, 13 N. Y., 143. Here the Legislature compelled the levy of local taxes to pay a repudiated debt of the town, which could not be collected at law.

Brewster v. Syracuse, 19 N. Y., 116. Here the Legislature levied a tax on the City, to pay for improvements more than the contract price.

Thompson v. Lee Co., 8 Wall., 327 (70 U. S. XVIII., 177), held that the Legislature may validate county bonds, irregularly issued.

Keithsburg v. Frick, 84 Ill., 405, held that Legislature may legalize bonds illegally issued by town. *City v. Lamson* (ante, 725), 8 Ill., 619; in *Freeport v. Stephenson Co.*, 41 Ill., 495, held, that municipal bodies are under control of the Legislature, and that in an Act relating to alteration or change of their duties, no question of vested rights could arise. Page 499 and 50 Ill., 69.

The County of Fulton could no more complain of the legislative action in changing its

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relations to the railroad company, creating the divisions, than it could complain of a statute enforcing payment of a repudiated or illegal demand, or making valid void bonds of the County; and by the Act of Feb. 14, 1857, the County was concluded, even if it had not adopted and acted under it by the order of Mar. 5, 1857, and directed the subscription to be made by the clerk to the "Central Division of the Mississippi and Wabash Railroad Company."

A reasonable discretion will be conceded to the County Board in making the vote effectual, and in carrying out the general intent and purpose of the statutes (which by their titles are declared to be in aid of public improvement), and of the vote under the change sanctioned by the Act of Feb., 1857, or other conditions arising in furtherance of the object sought—railroad facilities.

The transaction being in good faith under the vote, the ordinance of the County Board, and the Act of Feb. 14, 1857, and the bonds having been applied in the interest of the County, substantially to the purpose and as originally intended, this court will look to the substance and general purpose, and reject technical defenses.

The Board might authorize any officer to make the subscription and issue the bonds in the name of the County, and it chose to confer the authority on the clerk, the keeper of its records and of the county seal.

This question is decided in *Clarke v. Hancock Co.*, 27 Ill., 305.

The whole case shows that the real and supposed interest of Fulton County was the creation of the Central and Western Divisions; that the aid given to the enterprise by the subscriptions in the Central Division, including the County aid, might be expended at the locality, and secure to it a railroad; that with this view, all acquiesced in like divisions by the railroad company, prior to the amendatory Act of 1857, and procured that Act, the better to effect the object. The stockholders, of which the County was one, elected Commissioners for this division under the Act, and the enterprise proceeded and the bonds were issued accordingly.

The County is, therefore, estopped from complaint about what was done for its benefit, with its participation, and in pursuance of its record orders.

Mr. S. Corning Judd, for defendant in error:

There was no vote in favor of the company to which the bonds were issued; hence no power, even in the Board of Supervisors, to issue them; much less in the clerk, who executed and delivered them without any authority whatever.

The 4th section of the Act of 1849, Statutes of Illinois, provides that "No subscription shall be made, or purchase or bond issued by any County, * * * unless a majority of the qualified voters of such county * * * shall vote for the same." The same section provides that the notices of the election shall specify the company in which stock is proposed to be subscribed.

Aug. 31, 1857, the Clerk of the County Court of Fulton County, Illinois, signed and delivered to the Commissioners of the "Central Division of the Mississippi and Wabash Railroad

Company," who demanded them for such Division, thirty bonds.

Sep. 16, 1853, the Board of Supervisors of Fulton County passed an order submitting the proposition to the voters of the County, at the then ensuing November election, as to whether or not the said County should subscribe \$75,000 to the Mississippi and Wabash Railroad Co., etc. This was the only proposition submitted to the voters, and no proposition was ever submitted in respect to taking stock in the "Central Division of the M. & W. R. R. Co."

On precisely this state of facts, I say, the Supreme Court of Illinois held this "Central Division of the Mississippi and Wabash R. R. Co.," to which the bonds in controversy were issued, to be a separate and distinct Corporation from the Mississippi and Wabash R. R. Co., to which the subscription was voted. See *Fulton Co. v. Miss. & Wabash R. R. Co.*, 21 Ill., 369-372.

Mr. Justice Field delivered the opinion of the court:

In February, 1853, the Mississippi and Wabash Railroad Company was incorporated by the Legislature of Illinois and authorized to construct a railroad from Warsaw, on the Mississippi River, to the east line of the State.

In September, 1853, the Board of Supervisors of Fulton County, through which County the projected line of the road was to run, ordered that the question be submitted to the voters of the County at the ensuing November election, whether the County should subscribe \$75,000 to the capital stock of this Company, and a like sum to the capital stock of the Petersburg and Springfield Railroad Company, payable in the bonds of the County; such bonds not to be issued to the former Company until its secretary should certify to the Board that \$700,000 had been subscribed to its stock, and five per cent. thereon had been paid. At the election ensuing the vote was taken, and a majority of the votes of the County was cast in favor of these subscriptions.

In April, 1854, the Board ordered its clerk to subscribe the \$75,000 voted to the Mississippi and Wabash Company, and to issue the bonds when it should be certified to him by the secretary of the company that \$700,000 of the stock had been subscribed, and five per cent. thereon had been paid.

In September, 1855, a similar order was made by the Board, requiring its clerk to enter the subscription on the books of the Company in the name of the County of Fulton.

In February, 1857, an Act was passed by the Legislature of Illinois amending the charter of the Mississippi and Wabash Company, by which the line of the railroad was divided into three divisions, designated the Western, the Central, and the Eastern Divisions, and each division was placed under the management and control of a Board of three Commissioners, to be elected by the stockholders of the division, and to be invested with all the powers of the original Board of Directors of the Company over the road in their division.

In April, 1857, the stockholders within the Central Division elected commissioners of the division, who thenceforth until December, 1868,

exercised all the powers conferred by this amendatory Act.

On the books of the Central Division thus organized, the clerk of the County Court of Fulton County, acting as clerk of the Board of Supervisors of that County, made the subscription of \$75,000 in the name of the County, and in September following issued to this division the fifteen bonds which are in suit in this case. These bonds purport to be obligations of the County of Fulton to the Central Division of the Mississippi and Wabash Railroad Company, and pledge the faith of the County and its property, revenue and resources for their payment.

The questions presented for our consideration are, first, whether the bonds issued by the clerk of the County Court of Fulton County to the Central Division of the Mississippi and Wabash Railroad Company were, at the time of their issue, valid obligations of the County of Fulton; and, second, if not thus valid, whether they have become obligatory upon the county by any subsequent ratification.

Were they valid when issued? The answer depends upon the law of Illinois then in force. The clerk of the County Court possessed no general authority to bind the County. He was a mere ministerial officer of the Board of Supervisors; and that body was equally destitute of authority in this particular, except as the law of Illinois gave it. That law authorized any county of the State, and of course, its supervisors, who exercised the powers of the county, to subscribe stock to any railroad company in a sum not exceeding \$100,000, and to pay for such subscription in its bonds, provided such subscription was previously sanctioned by a majority of the qualified voters of the County, at an election called for the expression of their wishes on the subject, and it prohibited any subscription or the issue of any bonds for such subscription without such previous sanction. "No subscription shall be made or purchase bond issued by any county," says the law, "unless a majority of the qualified voters of such county * * * shall vote for the same." And the law further requires that the notices calling for the election "shall specify the Company in which stock is proposed to be subscribed."

These provisions furnish the answer to the first question presented. The only subscription authorized by the voters of Fulton County was that to the Mississippi and Wabash Railroad Company, and one to the Petersburg and Springfield Company. The Central Division of the Mississippi and Wabash Railroad Company was a different corporation from the original Company. It has been so held by the Supreme Court of Illinois in a case involving the consideration of a portion of the bonds in suit and the remaining \$60,000 of bonds of the original subscription.

The amendatory Act of 1857 dividing the road into three divisions, and subjecting each division to the control and management of a different Board, clothed with all the powers of the original Board, so far as the division was concerned, worked a fundamental change in the character of the original corporation, and created three distinct corporations in its place. A subscription to a company whose charter provided for a continuous line of railroad of

two hundred and thirty miles, across the entire State, was voted by the electors of Fulton County; not a subscription to a company whose line of road was less than sixty miles in extent, and which, disconnected from the other portions of the original line, would be of comparatively little value.

But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the County of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law, even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of *Floyd's Acceptances* [ante, 178]. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: "In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the Supervisors of the County are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the Supervisors. But the answer to them all is that the power of ratification did not lie with the Supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified. The Supervisors possessed no authority to make the subscription or issue the bonds in the first instance without the previous sanction of the qualified voters of the County. The Supervisors, in that particular, were the mere agents of the County. They could not, therefore, ratify a subscription without a vote of the County, because they could not make a subscription in the first instance without such authorization. It would be absurd to say that they could, without such vote, by simple expressions of approval, or in some other indirect way, give validity to acts

when they were directly, in terms, prohibited by statute from doing those acts until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition. *McCracken v. San Francisco*, 16 Cal., 624.

We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way when the statute declares that it shall only be created in another and different way.

We perceive no error in the record, and the judgment of the Circuit Court must, therefore, be affirmed.

Cited—16 Wall., 465; 19 Wall., 252; 92 U. S., 492; 94 U. S., 806; 102 U. S., 299; 107 U. S., 355; 108 U. S., 123; 15 Blatchf., 269, 288; 2 Wood, 638; 3 Wood, 213, 214; 27 N. J. Eq., 200; 77 Ill., 184; 21 Minn., 266; 9 Kan., 704; 10 Kan., 581; 12 Kan., 204, 218; 50 Ind., 114; 52 Ind., 599; 66 N. Y., 143; 89 N. Y., 587; 54 Mo., 565; 60 Mo., 54; 67 Mo., 467; 37 Wis., 178; 8 Am. Rep., 110; 111 (48 Mo., 393); 16 Am. Rep., 556 (64 Ill., 252); 23 Am. Rep., 224, 225, 233 (43 Iowa, 48); 29 Am. Rep., 138 (73 N. Y., 238).

PITZER MILLER, *Plff. in Err.*,

v.

LARKIN MCKENZIE ET AL.

(See S. C., 10 Wall., 582-583.)

Writ of error, when defective as to parties—practice.

A writ of error is defective in respect to the parties, which recites that the proceedings are between Pitzer Miller, and Larkin McKenzie and others. This defect is fatal to the jurisdiction of this court, and requires a dismissal of the case.

[No. 13.]

Argued Feb. 17, 1871. Decided Feb. 20, 1871.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

On motion to dismiss.

The facts of the case are sufficiently stated by the court.

The case was elaborately argued upon the merits, on Nov. 25, 1869, and again, Feb. 8, 1871. This motion was made Feb. 15, 1871.

Mr. P. Phillips, for defendants in error.

Mr. T. Wilson, for plaintiff in error.

Mr. Justice Nelson delivered the opinion of the court:

The case is a writ of error to the District Court of the United States for the Northern District of Mississippi.

The suit was brought by Miller in the court below, to recover the value of several bales of cotton. Such proceedings were had that a judgment was rendered for the defendants. Whereupon the plaintiff brought this writ of error.

A motion is now made on the part of the de-

fendants to dismiss the case for want of jurisdiction.

It appears, from an inspection of the record, that the writ of error is defective in respect to the parties. It is therein recited that the proceedings are between *Pitzer Miller and Larkin McKenzie and others*. This defect has been held so many times in this court as fatal to its jurisdiction that it need be but mentioned to require a dismissal of the case.

Motion granted.

THE MAYOR AND CITY COUNCIL OF
BALTIMORE, *Plff. in Err.*,

v.

THE BALTIMORE AND OHIO RAILROAD
COMPANY.

(See S. C., 10 Wall., 543-553.)

Construction of contract—collection of income tax on railroad mortgage.

An agreement between a railroad company and a city, that the company shall pay all expense incidental to the issue of the city bonds does not cover an income tax against the city under the Law of 1862, which is not an expense incidental to the issue of the bonds.

This tax having been exacted under color of law and the company, having notified the city of the demand of the United States and the proceedings taken to enforce it, and having protested against its collection, were justified in paying it.

The city should have tested the legality of the assessment and collection of this tax, by instituting proper proceedings to recover back the money.

It cannot turn round and litigate the legality of the tax with the railroad company.

[No. 78.]

Argued Jan. 24, 1871. Decided Feb. 27, 1871.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

Suit was brought by the plaintiff in error in the Superior Court of Baltimore, to recover a certain balance of interest upon a mortgage, which the defendant in error had deducted and used for the payment to the Government of the United States, of a tax upon the said mortgage. The case before its determination was removed by *certiorari*, to the court below. Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is sufficiently stated by the court.

Messrs. Wm. Henry Norris and Geo. H. Chandler, for plaintiff in error:

The plaintiff in error asks for a reversal of this judgment for the following reasons:

I. Because, had this been a transaction between private parties, the circumstances of the case show that the position of the City in relation to the railroad was not to be more onerous than that of a surety. It will be observed that the form originally intended was that the road should issue bonds and the City guaranty them. But, on account of the greater market value of municipal bonds, this form was changed to a direct issue of bonds by the City, creating no contract between the bond holders and the Railroad Company, and a mortgage by the road to the City to secure the furnishing of the interest in advance to the City on those bonds, and quarterly installments for the creation of a sinking fund for the redemption of the principal of the bonds.

Independently, therefore, of express stipulations, by the nature of the transactions, the Railroad Company was bound to indemnify the City, as if the form of principal and surety had been carried out. By that relation, the situation of a surety can never be more onerous than that of the principal.

Burge, Surety, 5, 6; Chit. Cont., 522; *Mr. Justice Nelson*, in *U. S. v. Allabury*, 4 Wall., 186 (71 U. S., XVIII., 321); 1 Hill. Real Prop., 407; *Pollard v. Herries*, 3 Bos. & P., 341; Chit. Cont., 504; *Holmes v. Weed*, 19 Barb., 128.

The possibility of taxation should have been foreseen by the principal, and it is a part of his obligation to indemnify the surety.

Maltby v. R. R. Co., 52 Pa., 148.

If there is any hardship in the taxation, it is one which the borrower contracted to bear, and is a part of the obligation of his contract.

Dermott v. Jones, 2 Wall., 81 (69 U. S., XVII., 762); *U. S. v. Keebler* (ante, 574).

In this case, the express contract of the parties provided "That any or all expenses incident to the issue of any of the bonds, whether currency or sterling, as aforesaid, shall in like manner be chargeable to, and paid by, the said Railroad Company."

Sec. 1 of Ordinance and Law, last clause, p. 5; *R. R. Co. v. Titus*, 49 Pa., 277.

Congress never intended to give the power to deduct the tax by the debtor, when the debtor had contracted to pay all expenses incidental to the loan. It did not propose to alter contracts, but merely to use the debtor as an agency to collect the tax from the creditor, whom it intended to tax.

Congress made its purposes more distinct by the Act of June 80, 1864, sec. 122, as follows:

"The payment of the amount of said duty so deducted from the interest, etc., shall discharge said company from that amount of the dividend or interest, etc., except where said companies may have contracted otherwise."

13 Stat. at L., 284.

In this case the Railroad Company has contracted otherwise. The engagement set forth in the final clause of the 1st section of the ordinance is no usual covenant in a mortgage indemnifying the mortgagee against taxes incurred whilst the mortgagor is in possession, but is a compact between borrower and lender, by which the borrower stipulates to pay principal and interest, free of all abatements.

Haight v. R. R. Co., 6 Wall., 17 (73 U. S., XVIII., 819).

The tax was not to be deducted in this case, because Congress did not intend double taxation of the same fund.

Though the 81st section of the Act of 1862 directed the railroad companies and other collecting agencies to deduct and withhold from all payments made to any person, persons or party, the duty of three per centum, the generality of these words is to be restrained so as not to impute to Congress an intent to violate the rights which were reserved to the States, both by the character of the Federal Union and the express clauses of the Constitution.

Lane County v. Oregon (ante, 101); *U. S. v. Kirby* (ante, 278); see, also, *Mayor, etc., v. R. R.*, 6 Gill, 298; *Prize Cases*, 2 Black, 668 (67 U. S., XVII., 476).

States are entitled to have property and to

borrow money by the issue of securities, and to invest money free from Federal taxation if this is done for governmental purposes, so as not to interfere with other Federal powers than that to levy and collect taxes.

Weston v. Charleston, 2 Pet., 467; *Banks v. Mayor* (ante, 57); *Bank v. Supervisors* (ante, 60); *Bk. v. Fanno* (ante, 482); *Thompson v. R. R. Co.* (ante, 792); *Bk. v. Commissioners*, 2 Black, 620 (67 U. S., XVII., 451).

The money of a State municipality, raised on a delegated power of taxation, and loaned to a private corporation to advance a governmental purpose, is a debt protected from Federal taxation by the immunities of the State.

Rogers v. Burlington, 3 Wall., 663 (70 U. S., XVIII., 82); *Mayor v. R. R. Co.*, 6 Gill, 296, 297; *S. C.*, 21 Md., 91; *Mayor, etc., v. Groshen*, 30 Md., 444; *Erat Hartford v. Hartford Bridge Co.*, 10 How., 511; *Bk. v. Knoop*, 16 How., 369; *Mayor v. The State*, 15 Md., 462, 464; *State v. R. R.*, 12 Gill & J., 486; *S. C.*, 8 How., 550.

Mr. J. H. B. Latrobe, for defendant in error:

First. Is the case one that falls within the scope of the Act of 1862, known as the Internal Revenue Law?

Second. If it is, and the United States has the right to demand the payment of the tax in question, is the Baltimore and Ohio Railroad Company bound, having paid it, to pay to the City of Baltimore the interest on the \$5,000,000 debt aforesaid, without deducting it?

On the first point the counsel for the plaintiff and the counsel for the defendant in error are both agreed. They hold the tax to be an unlawful exaction.

The real difficulty, as between the plaintiff and the defendant in error, arises under the second point, and becomes important only in the event of the first point being decided in the affirmative.

The solution of the question depends on the language of the contract, which is clear and explicit, defining accurately the rights and obligations of the respective parties.

The obligation of the defendant in error to pay to the City the full amount of interest, without deduction, must turn upon the meaning that the court shall give to the words, "and shall pay all and any expense incidental to the issue of any of the bonds, whether currency or sterling."

The defendant in error insists that the expenses incident to the issue of such bonds were such as related to the preparation of them, and such books and clerk hire as might be required in connection with them.

All the facts in the case go to show that the plaintiff in error is the principal and not the surety in this transaction.

The Baltimore & Ohio Railroad was the first work of the kind conceived, commenced and completed in the United States; and it originated in a desire to preserve a share, at least, of the trade of the country west of the Alleghenies, of which internal improvements centering in other Atlantic and rival cities threatened to deprive it.

An incomplete road, in debt, and requiring the facility of a double track for a part of its length, was to be relieved from its difficulties by the action of its principal stockholder.

The commissioners of finance were to issue certificates of city stock, which were to be sold by the commissioners themselves, at not less than par, and the proceeds paid to the Register of the City. With the funds thus on hand, the Register was to pay to the Baltimore and Ohio Railroad Company the amount that might be required by it, and received by him from the commissioners of finance, reserving ten per cent., to be used as a sinking fund to redeem the principal at maturity.

When, besides issuing its own bonds, the City retained possession of them, and sold them only when required from time to time for the moneys wanted by the Company, it really seems difficult to give to it any other character than that of a principal borrowing money to lend it again, to aid in the promotion of an object in which it was deeply and principally interested.

There is nothing in the facts of the case, as disclosed by the evidence, that justifies the implication that would place the defendant in error in the situation of principal in the transaction, while the plaintiff in error occupies that of surety, so as to subject the former to those liabilities that, it has been urged, attach to the principal in ordinary cases of principal and surety.

Mr. Justice Davis delivered the opinion of the court:

On the first day of July, 1862 (12 Stat. at L., 469) Congress passed an excise law, levying an income tax of three per cent. on all sums of money due for interest by railroad companies, on its bonds or other "evidences of indebtedness," and constituting the company the collector of the tax for the United States. The Commissioner of Internal Revenue insisted that a mortgage given by the Baltimore and Ohio Railroad Company, to secure the payment of the principal and interest of certain bonds issued by the City of Baltimore for its benefit, was an "evidence of indebtedness" within the meaning of the Act, and obliged the Company to pay the income tax thereon, to avoid this distress. This tax the Company deducted from the payments of interest to the City, and the suit is brought to recover the amount withheld.

It is contended, on the part of the City, that if the tax in question be a lawful exaction by the United States, the burden of it must be borne by the Company, and that the obligation of the Company to the City is not changed by reason of the imposition and collection of the tax. Whether this be so or not depends on the nature of the contract between the parties, for the Company was authorized to withhold the tax, unless it had contracted with the City to pay it. 13 Stat. at L., 284.

It appears that the Baltimore and Ohio Railroad Company needed money to complete their road, and that the City of Baltimore, a principal stockholder, and vitally interested in the enterprise, was willing to lend the Company, for this purpose, the sum of \$4,500,000. In order to raise the money, the City issued six per cent. currency bonds for \$5,000,000, payable in 1890. The proceeds of these bonds, less ten per cent. reserved as a sinking fund, were paid over to the Company, and the City took from it a mortgage on all its property, to secure

the payment of the principal and interest of the entire issue of bonds.

It is admitted that the Company paid to the City, regularly as it accrued, the interest on the \$5,000,000 until after the passage of the Internal Revenue Law of 1862; but since then, has withheld the three per cent. income tax which the United States obliged it to pay.

The position taken by the City is, that the Company was bound to pay the full amount of the interest without deduction, because of the following words in the defeasance clause of the mortgage: "And shall pay all and any expense incidental to the issue of any of the bonds." It is, therefore, necessary to construe these words, and there is no difficulty about it, when we consider the subject-matter about which they were employed. The word "expense" may mean one thing in one case and quite a different thing in another. Its meaning in this case cannot be mistaken.

To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationery, advertising and similar matters. These expenses were incidental to the issue of the bonds, and it was right and proper that the Railroad Company—the party to be benefited by the transaction—should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense incidental to the issue of the bonds. At the date of the mortgage (1854) there was no tax of the kind, nor any reasonable expectation of one. If there had been, it is easy to see that appropriate words applicable to the subject would have been used. But the words which were used did not relate to the subject of taxation at all, and it is very certain that the possibility of taxation was not in contemplation of either of the parties to the mortgage.

It is unnecessary to discuss the general rules of law affecting the relations of principal and surety, and to show in what state of case a surety is required to save his principal from loss, because these rules are not applicable to this case. It is always competent for parties capable of entering into a business arrangement to fix the terms of it, and to declare what shall be their respective rights and liabilities under it. If the court can in any case see that this has been done, it is required to give effect to the contract which the parties chose to make for themselves, although, in the absence of a special agreement on the subject, the rule to determine the rights of the parties might be different.

The parties to this suit have made a contract in relation to a matter of interest to both, and have settled what each shall do. To hold one of them responsible for contingencies not provided for, and not even anticipated when the contract was executed, would be to disregard instead of giving effect to the will of the parties.

It is contended, however, by the City, that the securities of a municipality like Baltimore are not taxable by the National Government and, therefore, the tax in question was an unlawful exaction. This presents an important question; but the City is not in a condition to raise it and, under the circumstances, can have no cause of action against the Company for

paying the tax. It is difficult to see in what respect the Company failed to discharge its duty in regard to this subject. It occupied the position of a stakeholder, owing the money either to the City or the United States, and wholly indifferent to which of the parties it should be paid. It notified the City that the United States were enforcing the collection of the tax, and did not pay it until it was obliged to do so to avoid the consequences provided for in the Act in case of refusal, and not then, without a written protest stating distinctly all the grounds of objection claimed by the City to the assessment and collection of the tax. In this condition of things, if the City felt itself aggrieved by the action of the officers administering the internal revenue laws in a matter of interest to it and not to the Company, it should have stepped in, and taken upon itself the burden of testing the legality of the assessment and collection of this tax, by instituting proper proceedings to recover back the money. This

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it was authorized to do by these laws, which not only provide for the manner of collecting the revenue, but also furnish a mode of redress to the party who has suffered injury by their administration. *Phila. v. Collector*, 5 Wall., 781 [73 U. S., XVIII., 616]; *Nichols v. U. S.* [ante, 125]; *Assessor v. Osborne* [ante, 748].

If there were injury at all, the City sustained it and, as it did not avail itself of the privilege to sue, it cannot turn round and litigate the legality of the tax with the Railroad Company. This tax was exacted under color of law, and the Company, having notified the City of the demand of the United States and the proceedings taken to enforce it, and having protested against its collection, were justified in paying it.

And it cannot be required in this state of the case, on its own behalf, to test the correctness of the ruling of the revenue officers.

Judgment of the Circuit Court affirmed.

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5. Claimants are not deprived of the benefits given by the Captured and Abandoned Property Act of Mar. 12, 1863, because of aid and comfort to the rebellion not voluntarily given.

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2. Redress can be had in admiralty for a breach of a contract of affreightment where the port of shipment and the port of destination are in the same State.

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3. The entire admiralty power of the Constitution is lodged in the Federal Courts, and the district courts have "exclusive original cognizance," exclusive of the state courts.

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5. State Legislatures cannot create a maritime lien, nor confer jurisdiction upon a state court to enforce one by a suit or proceeding *in rem*.

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6. Liens for repairs and supplies can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary or believed to be necessary in a foreign port.

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7. Where proof is made of necessity for repairs or supplies, or for funds raised for them by the master, and of credit given to the ship, a presumption of necessity for credit will arise.

Idem, 83

8. Necessity for repairs and supplies is proved where such exigency is shown as would induce a prudent owner, if present, to order them or provide funds for them on the security of the ship.

Idem, 83

9. The ordering, by the master, of supplies and repairs on the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the material-man, or the lender of money who acts in good faith.

Idem, 83

10. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, or of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.

Idem, 83

11. Reasonable repairs in a foreign port, ordered by the owner, is a lien on the vessel which may be enforced in admiralty.

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12. Acceptances for repairs, by insolvent owner, not taken in payment, are not payment.

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13. Owner of cargo has a lien on the vessel for any injury from fault of vessel or master.

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14. The law creates no lien on vessel for performance of contract to transport cargo, until a contract of affreightment is made and cargo is delivered to the master.
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The Portsmouth v. Salt Co., 754
18. A loss from mistake of port and attempt to enter at night instead of remaining on lake until morning, is fault of carrier, and not a danger of lake navigation.
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19. After stranding, it is the master's duty to take all possible care of the cargo.
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20. The owner of cargo has a lien upon the ship for the safe custody, transportation and delivery of cargo.
The Maggie Hammond v. Moreland, 772
21. Maritime law creates reciprocal liens between ship and cargo.
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22. Filing of the libel in the district court here, secures the same lien on ship as if libel were filed in the foreign jurisdiction.
Idem, 772
23. Our admiralty courts have jurisdiction in their discretion over suits between foreigners, if the subject-matter is of a maritime nature.
Idem, 772
24. The master is bound to carry goods in his own ship, unless prevented by the act of God, the public enemy, or the act of the shipper, or some peril excepted in the contract of shipment.
Idem, 772
25. If his ship is disabled, he must tranship the goods and forward them, and charge the goods with any increased freight from hire of another vessel.
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2. It is not error for a court to refuse to give the instructions asked for, even if correct, where those given cover the entire case.
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3. Overruling a motion for new trial cannot be made the subject of review by this court.
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4. Error in state court, in construing state statute, cannot be reviewed in this court.
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5. The remission of penalties under the revenue laws by the Secretary of the Treasury, is the exercise of his discretion in a matter intrusted to him alone, from which there can be no appeal.
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6. The ruling of the court below in granting or denying a motion for new trial, is not reviewable in this court.
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7. Defects of form in a declaration, are not cause for reversing a judgment.
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8. Federal Courts possess the power to permit such imperfections to be amended.
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9. Exceptions to decisions which overrule objections to questions put to a witness, where the answers of the witness are not given, show no error.
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10. Where the complainants own both sides of the litigation, and control them, the case should not be heard.
Wood-paper Co. v. Heft, 378
11. Plaintiff cannot complain of an error in a ruling which was made at his request, and to the prejudice of defendant.
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12. Statement of facts filed several days after issue and service of writ of error, is a nullity.
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13. Mere omission to charge the jury on one point in a case, without any request to the court on the subject, is not error.
Exp. Co. v. Kountze, 457
14. Cases of admiralty and maritime jurisdiction cannot be brought to this court for re-examination in any other mode than by appeal.
The Baltimore v. Rowland, 463
15. In admiralty and prize causes, the facts, as well as the law of the case, are open to revision on the appeal.
Idem, 463
16. Where the only exception in the bill of exceptions is not well taken, the judgment will be affirmed.
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17. When a court sits in place of a jury and finds the facts, this court cannot review that finding.
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18. The instruction—that if plaintiff had himself been a traitor, he could not recover against those who had been instrumental in his arrest, imprisonment and trial for treason against the Confederacy—is erroneous.
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19. The decision of the court below as to enlarging time to take testimony will not be reviewed except in extreme cases.
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20. Where the case was decided upon testimony taken on former trial and not read before this jury, this was error.
Barney v. Schneider, 648
21. Where the jurisdiction of a court has been enlarged, judgments or decrees founded upon the new jurisdiction are liable to the general provisions in respect to writs of error and appeals.
Ex parte Zellner, 665
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22. Where the record shows no exception to rulings on the trial, nor to the report, nor to any ruling of the court in relation to it, there is nothing to be reviewed.
Weed v. Orane, 712
23. Where, in pursuance of a decision of this court, a new judgment is rendered by the court below and it is sought to be reversed, on the ground that an important and controlling fact was misapprehended, held, that there was no misapprehension.
Kenosha v. Campbell, 711
24. Foundation of jurisdiction of this court over judgments of state courts, is the writ of error.
Gleason v. Florida, 730
25. No writ of error to a state court can issue without allowance, either by the proper judge of the state court or by a judge of this court.
Idem, 730
Twitcheil v. Commonwealth, 723
26. A writ of error to a state court is not a matter of right.
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27. When a prayer for instruction is presented, and there is no evidence to support the facts, it assumes it should be denied, and if given is error.
Bank v. Eldred, 763
28. This court has no jurisdiction of appeals from the Supreme Court of the District of Columbia when the amount in controversy is less than \$1,000.
Pierce v. Cox, 786
29. Without an allowance of appeal this court cannot acquire jurisdiction.
Idem, 786
30. The Virginia Act of Feb., 1867, extending the limitation upon appeals, is not in conflict with the Constitution of the State.
Downham v. Alexandria, 929
31. Where the judgment of the district court of a State is final and without appeal, writ of error lies to this court.
Idem, 929
32. Where there was no request for an instruction, it is not error for the court not to give it; particularly if the evidence did not demand it.
Butler v. Maples, 822
33. Allowance of a writ of error to the Supreme Court of a State is indispensable to the jurisdiction of this court, to revise the state judgment.
Ins. Co. v. Van Duzer, 827
34. An error of the court which is favorable to the party objecting, furnishes no ground of complaint.
Wiggins v. Burkham, 854
35. An error in the instructions of the court which could work no injury, is not ground of reversal.
Deery v. Cray, 857

36. A writ of error to a Circuit Court of the United States will not be dismissed because the record contains no bill of exceptions, agreed statement, special verdict or demurrer.

N. O. R. R. v. Morgan, 392

37. If there is no error in any part of the record, the prevailing party in the circuit court is entitled to an affirmance of the judgment.

Idem, 392

38. This court will not reverse a judgment and send the case back for a new trial, if it be certain that the result cannot be changed on a new trial.

Brobst's Lessee v. Roe, 1002

39. Where the constitutional objection taken in a case is too general, it cannot be noticed on a writ of error.

Messenger v. Mason, 1028

40. A judgment of a state court which upholds the validity of a statute of a Territory in contravention of the Constitution, cannot be reviewed in this court.

Idem, 1028

APPEAL AND ERROR, PRACTICE ON.

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1. Proof that papers, used in the court below, have been lost, must be made by affidavit.

The Grapeshot v. Waldstein, 83

2. Prayer for an appeal and order allowing it, constitute a valid appeal. The bond is not essential to it.

Edmonson v. Bloomshire, 91

3. After an appeal is dismissed, a new one may be taken within the time prescribed.

Idem, 91

4. Citation signed by a district judge on a writ of error to a state court is without authority of law, and of no effect.

Palmer v. Donner, 99

5. The lodging of a copy of the writ of error in the clerk's office within ten days is necessary to make the writ a *superedeas*.

R. R. Co. Harris, 100

6. Where the record shows no ground of jurisdiction in this court, over a state judgment, the writ of error must be dismissed.

Davidson v. Starcher, 52

7. A writ of error, without the test required by Act of 1799, is insufficient.

Moulder v. Forrest, 154

8. The writ cannot be amended in this court.

Idem, 154

9. A cause cannot be brought into this court, by agreement of parties.

Washington Co. v. Durant, 164

10. It is no objection to the allowance of a writ of error that the judgment to be reviewed was rendered in a criminal case.

Twitcheil v. Commonwealth, 223

11. Statement of facts by judge, after case is removed to this court by writ of error, treated as a nullity.

Generes v. Bonnemere, 227

12. This court will not dismiss because the record shows no allowance of appeal, when it is shown by affidavit that an appeal was actually allowed.

Chicago v. Bigelow, 257

13. Where an appeal was prayed, and the appeal bond filed and approved, it may be properly inferred that an appeal was allowed.

R. R. Co. v. Bradley, 274

14. During the term, a decree is subject to be rescinded or modified upon motion and, therefore, is not final until the end of the term.

Idem, 274

15. It becomes final, when a motion to rescind has been heard and denied.

Idem, 274

16. Bond of appeal approved and filed within ten days after such denial is in time to justify a *superedeas*.

Idem, 274

17. Where the appeal is regularly taken but there is no bill of exceptions nor anything upon which error can be assigned, the judgment should be affirmed.

James v. Bank, 275

18. An objection cannot be made for the first time in this court.

The Georgia v. U. S., 122

Alvins v. U. S., 84

Exp. Co. v. Kountze, 457

The Eagle v. Fraser, 365

National Bk. v. Ky., 702

Laber v. Cooper, 151

19. The judges of this court being equally divided, the judgment of the Court of Claims affirmed.

Reeside v. U. S., 391

20. Upon a motion to dismiss the appeal, on the ground that the suit is fictitious, where the affidavits leave it doubtful, the court will grant a rule to show cause why the suit should not be dismissed, with leave to both parties to take and file depositions in support of and against the motion.

Am. W. P. Co. v. Heft, 379

21. The fact that no transcript of the record was filed at the next term is fatal to an appeal.

The Lucy v. U. S., 394

22. Where the question of jurisdiction cannot be determined without looking into the merits, the motion to dismiss for want of jurisdiction will be denied, with permission to argue it upon the hearing.

Lynch v. De Bernal, 395

23. Where no exceptions appear in the transcript, except such as appear from the minutes of the clerk, this court cannot take any notice of them.

Young v. Martin, 418

24. Exceptions must distinctly present the ruling of the court and be signed and sealed by the judge, or they cannot be considered.

Idem, 418

25. But no bill of exceptions is necessary where the error alleged is apparent upon the record.

Idem, 418

26. Filing a replication to an answer, is an abandonment of a demurrer to the answer.

Idem, 418

27. A cause which does not come within any of the exceptions to Rule 30, although it involves important interests, will not be advanced on the docket.

R. R. Co. v. Marshall Co., 452

28. Where prayer for allowance of appeal was within the statutory time, ninety days, the case will not be dismissed for the reason that the appeal was not actually allowed within that time.

Latham v. U. S., 771

Latham v. U. S., 452

U. S. v. Vigil, 423

29. Order allowing appeal has relation back to date of prayer for allowance, and will be considered as made on that day.

Idem, 771

30. The objection—that the writ of error was allowed by the Chief Judge of the Court of Appeals of the State of New York, which writ is addressed to the Superior Court of Buffalo, where the record is—untenable, as the judgment was in fact rendered upon the decision of the Court of Appeals.

Aldrich v. Ins. Co., 473

31. Appearance by the defendant in error waives the irregularity, that the citation was not signed by the judge who allowed the writ of error.

Idem, 473

32. The 30 days' notice for re-examination of cases on writs of error, need not be given prior to the first day of the term.

Cox v. U. S., 500

33. This court will not compel the hearing of the cause at the first term unless such notice has been given.

Idem, 500

34. Where writ of error issued within thirty days before the meeting of the court, defendant is at liberty to enter his appearance and proceed to trial.

Idem, 500

35. It is plaintiff's duty to docket the cause or file the record within the first six days of the term; on failure of which, defendant may docket the cause and file the record.

Idem, 500

36. Where the writ of error was dated Dec. 3, 1868, and by mistake was made returnable "on the third Monday of December next" but the error was corrected in the citation, the case will not be dismissed for such defect in the writ of error.

McVeigh v. U. S., 511

37. Bill of exceptions should not contain all the evidence nor entire charge of the court.

Hickman v. Jones, 551

38. Where a case is dismissed for want of jurisdiction on the face of the pleadings, costs not allowed in this court.

Hornthall v. Keary, 560

39. The court is not authorized to make other exceptions than those made by the statutes.

U. S. v. Keebler, 574

40. Where the Court of Claims makes a mistake as to the finding of the facts, this court may remit

- the case back for correction prior to the hearing.
U. S. v. Adams, 584
41. The court will not allow either party to lie by until the cause is decided and the opinion delivered, and then apply for the correction.
Idem, 584
42. A *certiorari* is not the proper method to have the findings of the Court of Claims made complete.
U. S. v. Child, 508
43. The method obtaining a finding of facts by that court is an order of this court.
Idem, 508
44. This court cannot give Court of Claims any directions as to what finding it shall make.
Idem, 508
45. If that court should refuse to find a material fact, the remedy would be a request to find and an exception to a refusal.
Idem, 508
46. A question certified on division of opinion which rests upon a hypothesis, this court will decline to answer.
Pelham v. Rose, 602
47. Act of Mar. 3, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, provides for two kinds of findings in regard to the facts, to wit: general and special.
Norris v. Jackson, 608
48. Whether the finding be general or special, it has the same effect as the verdict of a jury and is conclusive as to the facts so found.
Idem, 608
49. If the verdict be general, only such rulings can be reviewed as are presented by bill of exceptions, or arise on the pleadings.
Idem, 608
50. Bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.
Idem, 608
51. If the parties desire a review of the law of the case, they must either get the court to find a special verdict, raising the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them.
Idem, 608
52. Objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.
Idem, 608
53. An appeal or writ of error should be brought by some person interested in the vessel. It cannot be brought in the name of the steamboat.
The Burns v. Reynolds, 620
54. Motion for new trial may be made in Court of Claims while appeal from its judgment is pending in this court.
U. S. v. Ayres, 625
55. After a case is brought to this court from Court of Claims, if it grant a new trial, the appeal will be dismissed.
Idem, 627
56. Where the court does not order a re-hearing, counsel may submit, without argument, a petition or suggestion of the important points.
Public Schools v. Walker, 650
57. If, upon such petition or suggestion, any judge who concurred in the decision move for a re-hearing, motion will be considered; if not, the rehearing will be denied.
Idem, 650
58. Where statement of facts by the judge is filed nearly three months after judgment, this court will disregard it.
Flanders v. Tweed, 678
Same v. Same, 680
59. Where there is no stipulation waiving jury, nor any finding of the facts, and no question upon the pleadings, the judgment below should be affirmed; but in an important case, it was reversed for a mistrial, and a new trial ordered.
Idem, 680
60. Where the court below was without jurisdiction and improperly gave judgment for the plaintiff, it must be reversed.
Gates v. Osborne, 748
61. Appellants have a right to have appeal dismissed on their own motion.
Idem, 778
62. The appellant cannot move to dismiss the appeal on the ground that no citation was issued, particularly where appearance has waived his neglect.
Pierce v. Cox, 786
63. On a motion for additional security on writ of error, for insolvency of sureties, if plaintiff in error has had no notice of motion, hearing will be postponed that notice may be given.
Wood v. Richards, 831
64. Where writ of error describes the judgment as rendered in favor of a firm, without naming the persons composing the firm, the writ dismissed.
Godbe v. Toole, 831
65. Suit in a state court against a marshal for seizing the goods of one person for the satisfaction of the debt of another, cannot be removed into the Circuit Court of the United States.
McKee v. Rains, 860
66. A suit cannot be so removed where no application was made until after verdict.
Idem, 860
67. Where writ of error was prosecuted in good faith, motion for ten per cent. damages on affirmation will be denied.
Idem, 860
68. Party desiring to change his counsel, a rule nisi granted to such counsel, to show cause why such change should not be made.
Texas v. Peabody, 888
69. Where an appeal was dismissed on motion of appellant's counsel, long acquiescence by silence of appellant will prevent its being re-instated, although he swears that his counsel acted without his knowledge and consent.
Deming v. U. S., 893
70. This court has power to issue a *supersedeas* before the return day of the writ of error where the return has been made.
Slaughter House Cases, 915
71. Writ of error to state court cannot have any greater effect than if the judgment had been rendered in a circuit court.
Idem, 915
72. Neither an injunction nor a decree dissolving one in a circuit court, is reversed or nullified by an appeal or writ of error before the cause is heard in this court.
Idem, 915
73. Where the judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, or it will be dismissed.
Downing v. McCartney, 957
Masterson v. Howard, 953
74. Where one party fails to appear or, if appearing, refuses to join on written notice and due service, the court may on that ground grant an appeal to the party who prayed for it as to his own interest.
Idem, 953
75. When considerable delay in perfecting the appeal is sufficiently accounted for, motion to dismiss will be denied.
U. S. v. Vigil, 954
76. On motion to take further evidence to be used in this court in an admiralty case, some excuse satisfactory to this court should be shown for the failure to examine them in the courts below.
The Mabey v. Atkins, 963
77. There can be no substantial amendment in this court; but if the pleadings or evidence are defective, and the case appear to have merits, the court will reverse the decree and remand the cause, with directions to permit amendments and further proofs.
Idem, 963
78. Where writ of error is prosecuted merely for delay, judgment will be affirmed, with ten per cent. damages.
Campbell v. Wilcox, 973
79. Where no exceptions were taken on the trial, nor any statement of facts by the court, and no question of law arises upon the pleadings or the trial, the judgment will be affirmed.
Coddington v. Richardson, 981
80. Where this court is equally divided in opinion, the case will be remitted to the court below for the purpose of enabling that court to take such action therein as it may be advised.
Hannauer v. Woodruff, 991
81. A writ of error is fatally defective which recites that the proceedings are between Pitser Miller and Larkin McKenzie and others, and must be dismissed.
Müller v. McKenzie, 1043
82. Commission to take testimony, not allowed without good excuse shown for failure to examine the witnesses in the court below.
The Mabey v. Atkins, 963

ARBITRATION AND AWARD.

SEE PRINCIPAL AND AGENT, 6, 7.

1. An agreement, in a submission to arbitration, that the claims be referred to the decision and arbitration of parties designated and an umpire, authorized the arbitrators, in case of disagreement, to appoint an umpire.

Smith v. Morse, 597

2. The agreement carried with it the agreement to abide the award of the arbitrators or, in case of their disagreement, the award of the umpire.

Idem, 597

ASSIGNMENT.

1. The fund, of which an equitable assignment can be made, must be some definite fund in the hands of a person who admits the obligation to pay the assignor, or some liquidated demand, capable of being enforced in a court of justice.

Kendall v. U. S., 85

2. A claim which has none of these characteristics cannot be so assigned as to give the assignor an equitable right to prevent the original parties from compromising or adjusting the claim.

Idem, 85

3. By making a contract to prosecute a demand against the government for a share of the recovery, one does not thereby acquire a claim against the Government as equitable assignee, which would prevent it from settling with the claimants without incurring any liability to him.

Idem, 85

ATTACHMENT.

SEE STATE LAWS AND DECISIONS, 2, 3.
JURISDICTION, 44, 47-49.

ATTORNEY.

SEE CONTRACTS, 8.

1. The Governor of a State may authorize an attorney to bring an action in its name.

Texas v. White, 227

2. Action against a judge cannot be maintained by attorney for a wrongful removal of him from the bar.

Randall v. Brigham, 285

3. It is not necessary that proceedings against attorneys for malpractice or any unprofessional conduct, should be founded upon formal allegations against them.

Idem, 285

4. All that is requisite to their validity is, that when not taken for matters occurring in open court, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense.

Idem, 285

5. The manner in which proceedings shall be conducted is matter of judicial regulation.

Idem, 285

6. An attorney has a lien upon the funds in his hands for the amount of his fees and disbursements in the action.

Texas v. White, 227

7. Where attorney has lien upon funds in his hands for his disbursements and professional fees, this court will deny a motion that he pay the money into court.

Idem, 227

8. This court will, upon application of a party to an action, permit him to change his attorney, allowing the attorney to retain in his hands the money, papers and documents belonging to his client until his claim shall be adjudicated.

Idem, 227

BAIL.

SEE CRIMINAL LAW, 1-5.

BANKS.

SEE TAXES, 15-17, 27-32.

1. Defendant cannot object that an action, by the receiver of a national bank, is not brought by the attorney of the United States, but by his own attorney.

Kennedy v. Gibson, 476

2. The Comptroller of the Currency must decide when it is necessary to institute proceedings against the stockholders of such bank, to enforce their personal liability, and his decision is conclusive.

Idem, 476

3. Liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one.

Idem, 476

4. Where the whole amount of such stock is sought to be recovered, the proceeding must be at law. Where less is required the proceeding may be in equity.

Idem, 476

5. In such case an interlocutory decree may be taken for contribution, and the case may stand over for further action of the court until the full amount of the liability is exhausted.

Idem, 476

6. It is no objection that there are other stockholders beyond the jurisdiction of the court who cannot, for that reason, be made co-defendants.

Idem, 476

7. When the receiver sues in his own name, it is not necessary to make either the creditors or the bank, parties to the suit.

Idem, 476

8. Such suits may be brought by the banking associations in the courts of the United States.

Idem, 476

9. Receivers of such banks may sue in the courts of the United States, without reference to the locality of their personal citizenship.

Idem, 476

BILLS, NOTES AND CHECKS.

SEE BONDS, 18.

USAGE, 1, 2.

1. The protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued.

Pierce v. U. S., 169

2. Purchaser of such paper, purporting to bind the government, must, at his peril, see that the officer executing it had authority to bind the government.

Idem, 169

3. There is no express authority to any officer of the government to draw or accept bills of exchange.

Idem, 169

4. A bill of exchange to bind the government is to be judged by the same rule as other contracts.

Idem, 169

5. The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power.

Idem, 169

6. No department of the government nor any of its officers or agents can accept drafts made on them so as to bind the government.

Idem, 169

7. Purchasers of notes or bonds, past due, take nothing but the actual right and title of the vendors.

Texas v. White, 227

8. Promissory note bearing interest anterior to its date is not, necessarily, usurious nor illegal.

Ewing v. Howard, 293

9. Presumption is that the note was given upon a state of facts which authorized taking interest prior to its date.

Idem, 293

10. Burden to prove the contrary is upon the party who makes the charge.

Idem, 293

11. Defendant cannot present such objection to the note for the first time in this court.

Idem, 293

12. Where bill of exchange is lost among a pile of papers in bank at which it was payable, it is not present in the bank so as to constitute a presentment or demand against the acceptors.

Chicopee Bk. v. Phila. Bk., 427

13. Where the holder thereby loses his remedy against the drawer and indorser, he is entitled to one against the bank through whose negligence the bill was lost.

Idem, 427

14. A telegram from the bank that the bill had not yet been received, is not notice of non-payment.

Idem, 427

15. The loss of the bill by the bank, carries with it presumption of negligence and want of care, and the burden of proof to rebut such presumption is on the bank.

Idem, 427

16. *Bona fide* holder without notice, of negotiable paper indorsed by a firm, is not affected by a restriction in the copartnership agreement.

Mich. Bk. v. Elured, 763

17. Party authorized by the course of business of firm may fill blanks in its negotiable paper.
Mich. Bk. v. Eldred. 762

18. Presumption of law is that an indorsement without date was made at time bill or note was executed, and before the same was negotiated.
Idem. 762

19. Holder of bank check cannot sue the bank for refusing payment unless it was accepted by the bank or charged against the drawer.
Nat. Bk. of Republic v. Millard. 897

20. Certificate of a bank that a check is good, is equivalent to acceptance.
Merch. Bk. v. State Bk. 1008

21. A certified check is not against the policy of the Banking Act, and is a legal and valid investment.
Idem. 1008

22. Cashier of bank has authority to certify checks, even at another place than his banking house.
Idem. 1008

23. Checks certified, do not require an additional stamp.
Idem. 1008

BILL OF ATTAINDER.

SEE CONSTITUTIONAL LAW, 11-13.

BILL OF EXCEPTIONS.

SEE APPEAL AND ERROR, 16-18, 22, 36.

APPEAL AND ERROR, PRACTICE ON, 17-23-25, 37, 39, 50, 52, 79.

EXCEPTIONS, 1, 2.

BILL OF REVIEW.

SEE CONFISCATION ACTS, 14.

1. The matter, on account of which a bill of review is filed, must not only be new but such as the party, by the use of reasonable diligence, could not have known; and if there be any laches or negligence in this respect, that destroys the title to the relief.
Rubber Co. v. Goodyear. 828

2. Leave to file a bill of review rests in the discretion of the court. It is never a matter of right.
Idem. 828

BLOCKADE.

1. A vessel may be in such distress as to justify her in attempting to enter a blockaded port.
U. S. v. The Diana. 165

2. The case, however, must be one of absolute and uncontrollable necessity.
Idem. 165

BONDS.

SEE BILLS, NOTES AND CHECKS, 7.

INTEREST, 1, 2.

MANDAMUS, 1-3, 5, 6.

TAXES, 8, 9, 27, 35.

1. By the Iowa Act of Jan. 19, 1857, irregularities in the Lee Co. Bonds, were cured, and they declared valid.
Lee Co. v. Rogers. 160

2. Where a judgment at law has conclusively established the validity of town bonds, a suit in equity cannot be maintained by the town to compel their surrender.
Belott v. Morgan. 203

3. Where a state statute distinctly affirms that the bonds shall be paid, it is a fatal objection to a bill to compel their surrender.
Idem. 203

4. The designation in a bond, of a place of payment, requires that its holder shall have it at such place when due, to receive payment, and that the obligor shall have the funds there to pay it.
Ward v. Smith. 207

5. If the bond be not lodged there, and obligor is there at its maturity, with the funds to pay it, he is not responsible for future costs of suit or interest.
Idem. 207

6. Where decree of this court requires defendant to restore certain bonds or make good their proceeds, and payment of the bonds has been received by him pending the suit, he will be ordered to pay into court the amount so received by him, for the use of the plaintiff.
Texas v. White. 532

7. Where one got a license as a distiller of coal oil, and gave bond with surety, neither he nor his surety are liable for any breach after the expiration of the license.
U. S. v. Smith. 506

1052

8. Voluntary payment to a creditor of the United States is no defense to suit on an official bond.
U. S. v. Keebler. 574

9. In action upon coupons, bonds need not be given in evidence.
Kenosha v. Lamson. 730

10. Coupons of bonds do not have the effect of extinguishing the interest due on the bonds.
Idem. 735

11. An action on coupons is not barred by lapse of time short of 20 years.
Idem. 735

12. Ratification by Legislature of loan of city's credit of a city, is equivalent to original authority.
Idem. 733

13. Where, at time of loan, and issue of bonds, the decisions of the court of the State favored the validity of the law, a later decision to the contrary cannot be followed.
Idem. 735

14. Where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced.
U. S. v. Hodson. 937

15. A vote of a county, authorizing a subscription by the county to the stock of a railroad corporation and the issue of bonds, does not authorize a subscription to the stock of another corporation.
Marsh v. Fulton Co. 1040

16. That the plaintiff was an innocent purchaser of the bonds, without notice of their invalidity, cannot affect the liability of the county in such case.
Idem. 1040

17. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.
Idem. 1040

18. The protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued.
Idem. 1040

19. The power of ratification of the bonds did not lie with the supervisors. A ratification can only be made when party ratifying possesses power to perform act ratified.
Idem. 1040

20. An agreement between a railroad company and a city, that the company shall pay all and any expense incidental to the issue of the city bonds, does not cover a tax against the city on the bonds under a subsequent law of Congress.
Baltimore v. R. R. Co. 1043

21. This tax having been exacted from the company under color of law, the company, having notified the city of the demand of the United States, was justified in paying it, and recovering it of the city, and cannot be required, on its own behalf, to test the ruling of the revenue officers.
Idem. 1043

BOUNTY.

Under Act of Aug. 6, 1861, a volunteer is entitled to the bounty of \$100, although he had not served two years when discharged.
U. S. v. Hosmer. 663

CALIFORNIA.

SEE LANDS, 15, 16.

LANDS (3, MEXICAN LANDS) 9, 10.

CARRIER.

SEE ADMIRALTY, 2, 5, 6, 21, 22, 24, 26.

1. Stipulation in charter-party to take cargo of merchandise, does not compel the master to take goods which, in his honest judgment, cannot be carried without injury to the rest of the cargo.
Boyd v. Moses. 192

2. Where the charterers induced the master, against his objection, to receive and carry lard in leaking casks, the ship is exempt from liability as between its charterers and owners, for damage therefrom to other portions of the cargo.
Idem. 192

3. Obligation between ship and cargo is mutual and reciprocal, and does not attach until cargo is on board or in custody of the master.
King v. The Lady Franklin. 455

4. Where bill of lading was given by mistake for goods not actually shipped, there can be no lien for non-delivery of the goods.
Idem. 455

5. If shipper of goods voluntarily accepts them at

74, 75, 76, 77 U. S.

place of disaster to the vessel, the master is entitled to freight *pro rata itineris*.

Barrell v. The Mohawk, 406

6. This rule applies in case the ship is disabled by a peril or accident not within the exception in the bill of lading.

Idem, 406

7. Proofs of acceptance of goods at place of disaster should be clear and satisfactory in order to operate as discharge of vessel.

Idem, 406

8. It should appear that acceptance was intended as discharge of vessel and owner from any further responsibility, by which the contract in the bill of lading was rescinded.

Idem, 406

9. The above rules applied to an insurance company to which property damaged had been abandoned, after disaster to the vessel.

Idem, 406

10. The explosion of a steam-boller is not a peril within the exception of dangers of navigation in a bill of lading.

Idem, 406

11. Captain of vessel not responsible for damage to flour from inherent causes from stowing it in hold, without his knowledge or direction.

Mephams v. Bissel, 677

12. Carrier must know condition of his vessel and see that she is seaworthy. Seaworthiness defined.

The Northern Belle v. Robson, 748

13. Carrier is liable for damages to cargo from sinking of barge.

Idem, 748

14. Loss by flood or storm is loss by act of God; and a common carrier is excused when the damage resulted from this cause immediately.

R. R. Co. v. Reeve, 909

15. If, in such case, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.

Idem, 909

16. If the carrier had contracted to start with the goods before he did, and the goods would have escaped injury had he done so, the carrier will not be liable for a loss from such cause.

Idem, 909

17. Motion for *certiorari* will not be granted when it appears that nothing is omitted from the record which is of record in court below.

Chicago v. Bigelow, 257

CHARTER-PARTY.

SEE CARRIER, 1-3

CITIZENSHIP.

SEE CONSTITUTIONAL LAW, 2.

JURISDICTION, 36, 37, 39, 41, 42.

1. Act of Congress of Feb. 10, 1855, confers the privilege of citizenship upon women married to citizens of the United States.

Kelly v. Owen, 283

2. The terms "Who might lawfully be naturalized under the existing laws" only limit the application of the law to free white women.

Idem, 283

COLLECTORS.

Under Act of May 7, 1822, and Aug. 23, 1842, a collector cannot receive extra compensation for the disbursement of public moneys.

U. S. v. Shoemaker, 80

COLLISION.

SEE DAMAGES, 1.

EVIDENCE, 18.

1. Although the law compels the master of a vessel to take a pilot, the vessel is liable for damages for a collision which was the result of his gross mismanagement.

The China v. Walsh, 67

2. In order to recover full indemnity for a collision, it is necessary that the suffering vessel should be without fault.

Lockwood v. The Grace Grider, 113

3. Inevitable accident is where an accident occurs when a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger.

Idem, 113

4. Where there is doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen.

Idem, 113

5. If two sailing ships or steam vessels are meet-

See WALL, 7, 8, 9, 10.

U. S., BOOK 19.

ing end on, or nearly so, so as to involve risk of collision, the helms of both should be put to port, so that each may pass on the port side of the other.

Brown v. Slanson, 157

The Johnson v. McCord, 610

6. Sailing ships are meeting end on when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity.

Brown v. Slanson, 157

7. Where vessels approaching are yet so distant from each other, or where the lines of approach, though parallel, are so far apart as not to involve risk of collision, that rule of navigation has no application.

Idem, 157

8. Where the variation, from opposite directions, or from parallel lines, did not exceed half a point by the compass, it is within the rule.

Idem, 157

9. Mistakes of a vessel committed in moments of peril and excitement, when produced by the mismanagement or the greater fault of those in charge of the colliding vessel, do not relieve the latter from the payment of full damages to the injured vessel.

Idem, 157

The Carroll v. Green, 392

Fincke v. The Fairbanks, 708

10. Mistakes of a vessel, committed in moments of peril and excitement, when produced by the mismanagement or the greater fault of those in charge of the colliding vessel, do not relieve the latter from payment of full damages to the injured vessel.

Idem, 157

The Carroll v. Green, 392

Fincke v. The Fairbanks, 708

11. Claim for damages occasioned by collision of vessels at sea may be enforced in the admiralty by a proceeding *in rem*, except where the vessel is the property of the United States.

The Siren v. U. S., 129

12. Claims against, or liens upon, property of the United States, are incapable of enforcement, except when such property becomes subject to the control of the courts.

Idem, 129

13. Damages for a collision which was caused by a ship in possession of a prize master and crew, may be assessed and paid out of the proceeds of the vessel before distribution to the captors.

Idem, 129

14. Case of collision should be tried according to the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law.

The Eagle v. Fraser, 365

15. Steamship meeting sailing vessel should watch her course and movements with diligence, to avoid collision.

The Carroll v. Green, 392

16. Porting the helm a point, when the light of the sailing vessel was first observed, and then waiting until the collision was imminent before doing anything further, is not sufficient.

Idem, 392

17. Owners of ships and vessels are not liable for injury by collision occasioned without their knowledge, beyond the amount of their interest in such ship or vessel.

The Baltimore v. Rowland, 463

18. Claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention.

Idem, 463

19. Where repairs are practicable, the damages assessed should be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred.

Idem, 463

20. No deduction is to be made for new materials furnished in place of the old.

Idem, 463

21. If the vessel is totally lost, the rule of damages is the market value of the vessel at the time of her destruction.

Idem, 463

22. Allowance for freight is made in such a case, reckoning the gross freight, less the charges which would necessarily have been incurred in earning the same.

Idem, 463

23. Full value of the vessel and cargo cannot be recovered where the vessel may be raised and the cargo saved.

Idem, 463

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24. Damages, which might have been reasonably avoided by the exercise of ordinary skill and diligence, cannot be recovered after the collision.

The Baltimore v. Rowland, 463

25. Just damages for delay and single or double costs may be adjudged at the discretion of the court, but counsel fees cannot be allowed.

Idem, 463

26. If a steamer adopt proper measures of precaution to avoid a collision with a schooner, which would have been effective if the schooner had not changed her course, she is not chargeable for the consequences of the collision.

Bedell v. The Potomac, 511

27. Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins and so long as the means and opportunity to avoid danger remain.

The Johnson v. McCord, 610

28. Where two vessels are in close proximity, neither of them has a right to insist upon any departure from the ordinary rules of navigation.

Idem, 610

29. Steamship approaching a sailing vessel must keep out of the way. The sailing vessel must keep its course.

Pincke v. The Fairbanks, 708

Steamship Co. v. Simmons, 751

30. Omission to exhibit proper light, does not exempt other vessels from consequences of their negligence.

Plaster v. Greening, 741

31. Where both parties are in fault, both must contribute to make good the damage.

The Washington v. Cavan, 787

32. Both vessels can be proceeded against in same libel.

Idem, 787

33. The speed of the steamer should not be higher than was consistent with safety of other vessels in so crowded a thoroughfare.

Steamship v. Simmons, 751

Hancox v. The Syracuse, 783

34. Defense, that a tug injured by collision attempted suddenly, without notice, to sheer across the course of the ferry-boat, not sustained.

The Suffolk County v. Jaynes, 753

35. The libellant need not state with perfect accuracy the point of collision.

Idem, 753

36. In collision cases, the finding of facts by district court, concurred in by circuit court, will be presumed correct.

The Quickslop v. Byrne, 767

37. Canal-boats and barges in tow are under the control of the tug; the latter is liable for collision, unless she can show herself not in fault.

Idem, 767

38. The tug must see that tow is properly constructed. Otherwise she is in fault.

Idem, 767

39. In recovering a detached boat, the tug must see that no other boat in the fleet suffer in consequence.

Idem, 767

40. Duty of steamer in narrow entrance of harbor.

Hannah v. Wolberton, 751

Steamship Co. v. Simmons, 757

41. A tug with tow, is bound to consult their safety as well as her own.

Hancox v. The Syracuse, 783

42. If two ships under steam are crossing, the ship which has the other on her starboard side shall keep out of the way of the other; the latter must keep her course.

The Corrick v. Schuyler, 804

The Columbia v. Bunting, 890

43. Where a steamer made no attempt to slacken her speed when the danger became imminent and, by starboarding, precipitated herself directly upon the libellant's vessel, she is liable for the collision.

The Columbia v. Bunting, 890

44. A vessel should not be made liable for consequences of an accident, by reason of not having a special lookout where the collision could not have been guarded against by a lookout.

Clark v. The Farragut, 946

CONDITIONS.

1. A condition in a deed that a permanent location of an Institute on the land should be made within a year, is a condition subsequent.

Mead v. Ballard, 190

2. If it was done within that time the grantor's right of reverter was gone; if it was not done within

the year, he could refund the consideration money and recover the land.

Idem, 190

3. A resolution of the trustees of the Institute locating the building on the land, with the intention that it should be the permanent location, satisfies the condition, and takes away the right of reversion.

Idem, 190

CONFEDERATE NOTES.

1. Confederate notes must be regarded as a currency, imposed on the community by irresistible force.

Thorington v. Smith, 361

2. Such currency must be considered in courts of law the same as if it has been issued by a foreign government temporarily occupying a part of the territory of the United States.

Idem, 361

CONFEDERATE STATES.

SEE WAR, 2-19.

ACTS OF CONGRESS, 1-6.

1. The rebellion was only an insurrection; there was no rebel government *de facto* so as to give any legal efficacy to its acts.

Hickman v. Betts, 551

2. Certain belligerent rights were conceded to the insurgents in arms, but the Government of the Confederacy was not recognized.

Idem, 551

3. An Act of the Confederate Congress creating a court was void. The court was a nullity and could exercise no rightful jurisdiction; it gave no protection to those who assumed to be its officers.

Idem, 551

4. A statute of the Confederate States, or order of its Postmaster-General cannot have any legal effect making a payment valid.

U. S. v. Keebler, 574

5. An officer of the Government cannot turn over its money or property, to an insurrectionary government, which exercises no force or threat of personal violence.

Idem, 574

6. The Acts of April 29th, 1864, and of March 2d, 1865 extend to losses by Confederate armed forces either by robbery or burning.

Idem, 574

CONFISCATION ACTS.

SEE PRIZE, 1, 2.

1. In a case of unlawful conversion of property, a proceeding by information cannot be sustained, under the Confiscation Acts of 1861 and 1862.

Morris v. U. S., 281

2. Neither of the Acts authorized proceedings, where there was no specific property capable of being seized.

Idem, 281

3. Where the seizure under the Confiscation Acts was made on land, the suit, though in the form of a libel of information, is an action at common law, and the claimants are entitled to trial by jury.

Morris v. U. S., 481

4. All seizures on land must be prosecuted as other common law suits, and can only be removed into this court by writ of error.

Idem, 481

5. Where the fund has been distributed, and the judgment under which it was distributed is reversed, a writ of restitution will be issued to cause the fund to be restored to the registry of the court.

Idem, 481

6. The Act of Congress of March 3, 1863, in regard to prosecutions for acts committed during the rebellion, does not apply to actions of ejectment.

Bigelow v. Forrest, 606

7. It applies only to personal actions for wrongs done under authority or color of authority of the President of the United States, or of some Act of Congress.

Idem, 606

9. Under the Confiscation Act of July 17, 1862, all which could be sold was a right to the property seized, terminating with the life of the person for whose act it had been seized.

Idem, 606

10. The persons described in the 5th section of such Act, who are barred from bringing a suit for the possession or use of such property, are those only whose property the President has caused to be seized.

Idem, 606

11. The heir of one of such persons may after his death recover the lands so forfeited and sold.
Idem, 696
12. Under the Act of 17th July, 1862, entitled "An Act to Suppress Insurrection," etc., it is only as against the United States that the sales, transfers, and conveyances of property liable to seizure are null and void.
Corbett v. Nutt, 976
13. A proceeding under the Confiscation Act of July 17, 1862, is not a proceeding in admiralty.
Ex parte Graham, 981
14. A libel of review of a decree in confiscation is an elongation of the original case, and necessarily of the same nature and jurisdictional character.
Idem, 981

CONGRESS.

1. Congress may abolish a tribunal it created for the adjustment of claims, or commit them to some other authority, and in neither event is a claimant's right thereby violated.
Gordon v. U. S., 35
2. By the Act of February 27, 1865, Congress legalized the bridge as then constructed across the Mississippi River.
Gray v. R. R. Co., 969
3. Congress could legalize the bridge under the power to regulate commerce, and the Act having passed pending a suit to remove the bridge as a nuisance, it gave the rule of decision for the court at the final hearing.
Idem, 969

CONSTITUTIONAL LAW.

SEE APPEAL AND ERROR, 30, 39, 40.

CONTRACTS, 20-22, 27.

COURTS, 2.

STATE LAWS AND DECISIONS, 1-3, 7, 9, 11, 12, 14.

TAXES, 1, 2, 13, 14, 17, 27, 28, 38.

1. The 5th and 6th Amendments of the Constitution of the U. S. do not apply to state governments. They were designed exclusively as restrictions upon federal power.

Twitchell v. Commonwealth, 323

2. A corporation is not a citizen within the meaning of that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Paul v. Va., 357*Ins. Co. v. Otter*, 1029

3. States may exclude a foreign corporation entirely, or they may exact security for the performance of its contracts.

Idem, 357

4. A law of a State requiring insurance companies of other States or countries to file security or take out a license or pay a specific tax or certain fees and percentages, before they can issue policies in the State, is constitutional.

Ducat v. Chicago, 972*Ins. Co. v. Otter*, 1029

5. Such law does not conflict with the provision of the Constitution that Congress shall have power to regulate commerce among the several States.

Idem, 972

6. A State has power to discriminate between her own corporations and those of other States, detestful of transacting business within her jurisdiction.

Idem, 972

7. The State can determine the degree of discrimination subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.

Idem, 972

8. The constitutional provision against taxing imports by the States does not extend to articles brought from another State.

Woodruff v. Parham, 383

9. An ordinance of a city, imposing a tax on sales at auction, of goods sold in original packages, which are products of other States, is constitutional.

Idem, 383

10. A State Act imposing a tax of fifty cents per gallon on all spirituous liquors brought into a State, is constitutional, where the same tax is imposed on liquors manufactured in the State.

Hinson v. Lott, 387

See WALL 7, 8, 9, 10.

11. The term "bill of attainder" in the National Constitution is generic, and embraces both bills of attainder and bills of pains and penalties.

Drehman v. Stille, 508

12. A provision in the Constitution of Missouri, which exempts from suits for acts done by military authority, belongs to neither of those classes of bills.

Idem, 508

13. Such provision is not a law impairing the obligation of contracts, in violation of the Constitution of the United States.

Idem, 508

14. A State Legislature may pass retroactive laws where there is no inhibition in the Constitution of the State, provided they do not impair the obligation of a contract, and are not *ex post facto*.

Idem, 508

15. Where right of plaintiff under the 1st section of the 14th amendment of the U. S. Constitution was not set up, or claimed in the state court, this court has no jurisdiction over the judgment.

Worthy v. Barnett, 565

16. Congress has no power to prohibit trade within the limits of a State.

U. S. v. De Witt, 593

17. The 28th section of the Act of March 2, 1867, is not a valid and constitutional law except so far as it operates within the United States, but without the limits of any State.

Idem, 593

18. A state constitution providing that taxes be uniform in respect to persons and property, does not forbid the Legislature commuting taxes or assessments with individuals or corporate bodies.

Chicago v. Sheldon, 594

19. A contract which is valid at the time, by the laws of the State, cannot be impaired by its Legislature, nor by any decision of its courts.

Idem, 594

20. The 7th Amendment of the Constitution applies to a cause tried by a jury in a state court.

Justices v. U. S., 658

21. The 5th section of the Act of Congress, Mar. 3, 1863, providing for the removal of a judgment in a state court, in a cause tried by a jury, to the Circuit Court of the United States, for a re-trial on the facts and law, is unconstitutional and void.

Idem, 658

22. The courts can only consider vested rights, when those rights are sought to be enforced in opposition to the repeal or modification of the laws on which they were founded.

Frable v. Whitney, 668

23. The Constitution of a State is a law within the meaning of the prohibition of the Constitution of the United States that no State shall pass a law "impairing the obligation of contracts."

R. R. Co. v. McClure, 997

24. Where the State has passed no law in regard to the bonds in question, and the Constitution of the State was in force when the bonds were issued, no question arises as to impairing their obligation under the 25th section of the Judiciary Act.

Idem, 997

25. There is no distinction between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State.

The Daniel Ball v. U. S., 999

26. A decision of a state court which simply holds that certain notes and a mortgage were nullities, on the ground that the Confederate currency, which constituted the consideration, was illegal according to the law of the State, is not repugnant to the Constitution.

Bethell v. Demaree, 1007

27. The business of insurance is not commerce, and a corporation of one State, having an agency by which it conducted that business in another State, is not engaged in commerce between the States.

Ins. Co. v. Otter, 1029

CONSULS.

1. After Algiers became a province of France, there was no provision for the appointment of a consul at that place with a salary.

Mahoney v. U. S., 864

2. Under the Act of August 18th, 1856, consuls to Algiers are entitled to such fees only as they may collect as compensation for their services.

Idem, 864

CONTINENTAL CONGRESS.

1. A claim on loan certificates purporting to be issued by the Continental Congress in 1778 rejected, because the certificates were not properly countersigned, or used for the benefit of the government.

Ward v. U. S., 1033

2. The United States can contest the validity of these certificates notwithstanding the payment of interest for four years, where it was paid by mistake and without authority, and the paper was rejected as soon as attention was called to it.

Idem, 1033

CONTRACTS.

SEE EVIDENCE, 23.

CONSTITUTIONAL LAW, 13, 14, 19, 23.

COURT OF CLAIMS, 2, 3.

LANDS, 20-22.

LIEN, 5, 8.

STATUTE OF FRAUDS, 1, 2.

WAR, 2-4, 7, 8, 12.

1. Written contracts are not necessarily negotiable, because by their terms they inure to the benefit of the bearer.

R. R. Co. v. Howard, 117

2. Express contracts to pay coined dollars can only be satisfied by the payment of coined dollars.

Bronson v. Rodes, 141

Butler v. Horwitz, 149

3. Damages upon such contracts must be assessed in coin, and judgment rendered accordingly.

Idem, 149

4. Effect of the currency laws, on such contracts, considered.

Idem, 149

5. Where one had contracted with the Government to furnish all supplies at certain ports in Arizona, the title to the goods did not pass to the government until delivered in Arizona.

Grant v. U. S., 194

6. Where he was prevented so delivering them, by the public enemy, the loss is his and not that of the United States.

Idem, 194

7. A rescinding of the contract by the Secretary of War is no ground for damages.

Idem, 194

8. An Act of the Legislature of Kentucky releasing the interest of the State in escheated lands does not impair the obligation of the auditor's contract to concede a moiety of the lands to an attorney for their recovery.

Mulligan v. Corbin, 222

9. A contract made by an insurgent state military board, in aid of the rebellion, is void.

Texas v. White, 227

10. Doubtful expressions in a contract should be construed most strongly against the party who uses the language.

Garrison v. U. S., 277

11. An Act of Congress authorizing a contract to be made with plaintiffs for certain government work, does not constitute an acceptance of previous proposals for the same work made by them, where a written contract was afterwards made with them on different terms. The written agreement governs the rights of the parties.

Gilbert v. U. S., 305

12. The written promise of the Secretary of the Interior is not a binding obligation on the Government, where no authority of law existed for the promise.

Stansbury v. U. S., 315

13. Contractor for carrying the mail in Southern States held entitled to one month's pay, in pursuance of his contract, on the Postmaster-General ordering the service to be discontinued in consequence of the civil war.

Reeside v. U. S., 318

14. A contract made by a city, with a company, to furnish gas for the city is not violated by the establishment therein of another gas company, nor by the city taking stock in the latter company.

Memphis v. Dean, 326

15. Where language to express a contract is entirely wanting in the instrument, courts will not imply one.

Canal Co. v. Coal Co., 349

16. Contract construed not to contain a covenant on the part of the coal company that it would transport on the canal all the coal brought over its railroad connecting with the canal.

Idem, 349

17. A contract for the payment of Confederate

notes, made during the late rebellion, between parties residing within the Confederate States, can be enforced in the courts of the United States.

Thorington v. Smith, 361

18. The parties entitled to be paid in Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States.

Idem, 361

19. A State may, in the charter creating a bank, agree to receive the paper of the bank for all taxes due the State.

Furman v. Nichol, 370

20. Such a contract is binding on the State, and within the protection of the Constitution of the United States.

Idem, 370

21. The State had the right at any time to withdraw such guaranty, but it must be done in such manner as not to impair the obligation of its contract with the holders of note of the bank.

Idem, 370

22. The guaranty attached to the paper itself and notes in circulation at the time of the repeal of the Act are not affected by such repeal, and carry with them the pledge of the State to be received in payment of taxes by every bona fide holder.

Idem, 370

23. The Commissary-General may approve of a contract by letter.

Idem, 370

24. Where the contract requires an expenditure by the contractor of a large sum in preparation to perform it, and a continuous readiness, the other party must do whatever is necessary to enable such contractor to comply with the contract.

Idem, 370

25. Although a party to a contract had objections to it yet, having executed it, his mouth is closed against any denial that it superseded all previous arrangements.

Parish v. U. S., 473

26. This court determines for itself the construction of a contract without reference to the previous adjudications of the state courts upon the subject.

U. S. v. Muscatine, 490

U. S. v. Burlington, 495

27. The clause in the charter of a corporation granted by a state Legislature "that the property of the corporation shall be exempt from taxation" is a contract between the State and the corporators, which the State may make and the courts will uphold, and of which the corporation could not be deprived by subsequent state legislation.

Home of Friendless v. Rouse, 495

Washington University v. Rouse, 495

28. Any attempt to tax the property impairs the obligation of the contract, and cannot be allowed.

Home of Friendless v. Rouse, 495

29. A consideration is not necessary in order to uphold the contract.

Idem, 495

30. A covenant in a lease, giving the tenant the right to purchase the leased premises, constitutes a contract of sale, when accepted.

Willard v. Tayloe, 501

31. Where a proposition to sell lands is made before but is not accepted until after the passage of the Act of Congress making notes of the United States a legal tender for private debts, the contract must be construed as if it had been concluded before the passage of the Act.

Idem, 501

32. Agreement to erect a building of certain dimensions is not satisfied by building one of other dimensions, though larger.

Swain v. Seams, 554

33. Acquiescence in change of dimensions of building may be shown by the party being present and not objecting and by his declarations.

Idem, 554

34. A contract of a railroad company to keep a street in repair, does not compel the company to grade or pave the street.

Chicago v. Sheldon, 594

35. Where the language of a contract is of doubtful construction, the interpretation by the parties themselves is entitled to great weight.

Idem, 594

36. The contract of affreightment is governed by the same principles as other special contracts.

The Harriman v. Emerick, 629

37. Where there has been no complete fulfillment on one side and no fault or waiver on the other, no freight-money can be recovered.

Idem, 629

38. If what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant.

Idem.

39. A state statute changing the security for infants' estates does not violate any contract.

Lobrano v. Nelligan.

40. An agreement not to enforce the bond in case the obligee's title failed, is valid.

Winnan v. Bradley.

41. A party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have it construed favorably to himself.

Idem.

42. An agreement not to enforce a bond on the happening of an event, by its happening becomes absolute.

Idem.

43. Where there is doubt as to the proper construction of a contract, the construction put upon it by the parties is entitled to great consideration; but where its meaning is clear, the error of the parties cannot control its effect.

Phila. R. R. Co. v. Trimble.

44. Contracts under seal, where the Statute of Frauds is not involved, may be changed or abrogated by a new parol agreement, express or implied; and a contract within the statute may be taken out of it by the conduct of the parties.

Idem.

45. A reservation (in a deed) of, and an agreement for, all the marble from certain land, that the grantor might want to manufacture, is not a grant of an exclusive right.

Rutland Marble Co. v. Ripley.

46. An insurance agent who has received the company's circular stating his commissions and acted on it for fifteen years, received and adjusted his compensation by it, is estopped to deny that it was the measure of his compensation.

Stagg v. Ins. Co.,

CORPORATIONS.

SEE CONSTITUTIONAL LAW, 2-7, 27.

MANDAMUS, 1, 5.

1. A municipal corporation takes the title to streets in trust.

Railroad Co. v. Schurmeter.

2. It cannot, nor can the State, appropriate the street to the laying of a railroad track.

Idem.

3. Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited.

Railroad Co. v. Howard.

4. Stockholders are precluded from denying the validity of a guaranty made by a corporation by a judgment thereon against the corporation.

Idem.

5. On foreclosure of railroad mortgage, whatever interest remains after the lien of the mortgages is discharged, belongs to the corporation, and becomes a fund in trust for the benefit of its creditors.

Idem.

6. A stockholder of a company cannot file a bill in the United States court, in his own name, against a wrong-doer where the company has, for the same purpose, brought a suit in the state court, which is still pending.

Memphis v. Dean.

7. Where a party deals with a corporation in good faith, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, the corporation is bound by the contract, although such defect or irregularity in fact exist.

Merch. Bank v. State Bank.

8. If the contract can be valid under any circumstances, an innocent party in such case has a right to presume their existence, and the corporation is estopped to deny them.

Idem.

9. Corporations are liable for the acts of their servants while engaged in their employment in the same manner and to the same extent that individuals are liable under like circumstances.

Idem.

10. A corporation created by a State can exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the county and consent of the latter.

Ins. Co. v. Otter.

See WALL. 7, 8, 9, 10.

COUPONS.

SEE BONDS, 19.

COURT OF CLAIMS.

SEE APPEAL AND ERROR, PRACTICE ON, 19, 40, 42-45, 54, 55.

LIEN, 6.

PARTIES, 1.

1. Cases arising under the revenue laws are not within the jurisdiction of the Court of Claims.

Nicholl v. U. S.,

2. Where one had made a contract with the government to deliver to it a certain quantity of oats, and, after a delivery of part, tendered the remainder, he may recover in the Court of Claims for any damage which he has sustained by a refusal to receive them.

Gibbons v. U. S.,

3. The jurisdiction of the Court of Claims is limited to claims founded on contracts, express or implied, with certain unimportant exceptions.

Idem.

4. The Court of Claims has no jurisdiction of demands against the government founded on torts.

Idem.

5. The jurisdiction of Court of Claims under the Act of July 4th, 1864, does not extend to any claim against the United States, growing out of the appropriation of property by the army or navy; it cannot consider such a claim.

Flor v. U. S.,

6. Where a person made himself a party to the proceedings before, and took the benefit of the adjustment of his accounts by, a Board, he cannot claim an additional amount before the Court of Claims.

U. S. v. Adams.

7. The Court of Claims was authorized to render judgment for a specified sum in a claim made under the captured and abandoned property Act.

U. S. v. Anderson.

8. Neither claimant nor his assigns nor any person interested in event of the suit can testify in Court of Claims.

Idem.

9. The Court of Claims has no equitable jurisdiction given it, and cannot inquire into the rights in equity set up by claimant against the United States.

Bonner v. U. S.,

COURTS.

SEE APPEAL AND ERROR, 2, 4, 6, 8, 14, 17-29, 31-33, 40.

CONFEDERATE STATES, 3.

1. On Nebraska being admitted as a State, civil cases of federal character and jurisdiction were transferred from the Territorial courts to the Circuit Court.

Exp. Co v. Kountze.

2. It was within the constitutional authority of the President, as Commander-in-Chief, to establish therein provisional courts in insurgent territory occupied by national forces, for the hearing of all causes under state or United States laws; and to establish the Provisional Court for the State of Louisiana.

The Grapeshot v. Wallerstein.

3. When Congress directed that causes pending in the provisional court, and judgments, orders and decrees rendered by it proper for the jurisdiction of the circuit court, be transferred to that court, a decree in admiralty rendered in the provisional court, became at once, upon transfer, the decree of the circuit court, and an appeal was properly taken from it to this court.

Idem.

CRIMINAL LAW.

SEE STATE LAWS AND DECISIONS, 12.

1. Where a recognizance provided for the personal appearance of defendant at the next term of the court, and at any subsequent term, sureties are not bound for his appearance at a term years later, depending for its designation on a contingent event.

Reese v. U. S.,

2. Stipulation to postpone the trial until after the final disposition of other cases, discharged the sureties.

Idem.

3. Liabilities of sureties on a recognizance are limited to the precise terms of contract.

Idem.

4. The power of arrest by bail can only be exercised within the territory of the United States.

Idem.

5. Consent of government that defendant in a criminal action depart from the United States and remain abroad an indefinite period without the concurrence or knowledge of his sureties, discharges sureties.

Reese v. U. S.,

541

COVENANTS.

SEE LANDS.

DAMAGES.

SEE CARRIER, 2, 13, 14.

CONTRACTS, 3, 7, 13.

EVIDENCE, 23, 28, 30, 31.

PATENT RIGHTS, 1, 2, 12, 23, 24.

1. In cases of tort the allowance of interest as damages rests in the discretion of the jury.

Lincoln v. Claffin,

106

2. The measure of damages on a contract for supplies is the difference between the cost of doing the work and what claimants were to receive for it.

U. S. v. Speed,

449

3. To recover damages for a refusal to receive property, one must show that he had the property on hand and an offer to deliver.

Parish v. U. S.,

473

DECREES AND JUDGMENTS.

SEE COURT OF CLAIMS, 7.

JURISDICTION, 1-3, 8, 15, 18, 27, 31, 34.

LANDS, 35, 36.

1. A decree, directing a sale of trust property and that the proceeds be brought into court, is final.

E. R. Co. v. Bradley,

274

2. A judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditor's bill.

Mattingly v. Nye,

330

3. Reversal of judgment does not affect purchaser at a sale under it, not a party to the suit.

McGoon v. Scales,

545

4. A judgment, recovered in the common pleas in England wholly without jurisdiction of the person can have no validity here.

Bischoff v. Wethered,

329

5. All inferior courts must yield a prompt obedience to the mandate of this court.

Ex parte Howard,

634

6. Judgments at law or decrees in chancery, affecting property, bind only the parties before the court and their privies.

Idem,

634

7. A decree of distribution will not preclude a claimant not embraced in its provisions, having rights similar to those of other claimants who are embraced, from asserting his right to share in the fund.

Idem,

634

8. The circuit court may withhold the distribution of the fund until such claims are determined.

Idem,

634

9. A judgment of dismissal with costs, held, final.

R. R. Co. v. Morgan,

392

10. A court cannot disregard a judgment in another suit given in evidence before it, except for want of jurisdiction in the court which rendered it.

Cooper v. Reynolds,

931

11. A decree in an action in equity, wherein defendant was never brought before the court, was *coram non jussice* and void.

R. R. Co. Trimble,

948

12. A court cannot by the mere force of its decree transfer the title to land lying without its jurisdiction from the party in whom it was vested.

Corbett v. Nutt,

976

13. A decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is final, although it allows a subsequent deduction from the amount therein judged, of any note held by defendant against plaintiff.

Stovall v. Bank,

1036

DEEDS.

SEE CONDITIONS, 1-3.

EVIDENCE, 12, 41-43.

INFANTS, 1-4.

LANDS, 25.

RECORDING LAWS, 1-3.

1. In aid of a certificate of acknowledgment of a deed, reference may be had to the instrument itself, or to any part of it.

Carpenter v. Dexter,

436

1058

2. It is the policy of the law to uphold certificates when substantially correct and not to suffer conveyances to be defeated by technical or unsubstantial objections.

Idem,

426

3. Unless the statute requires evidence of official character to accompany the certificate of acknowledgment, none is necessary.

Idem,

426

4. Where one State recognizes acknowledgments of deeds made in pursuance of the laws of another State, its courts will take judicial cognizance of those laws.

Idem,

426

5. Mutual deeds of release are not necessary in suit for partition in Illinois, to invest the several parties with the title to the parcels respectively allowed to them.

Idem,

426

6. In Illinois, deeds are deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven, according to law.

Idem,

426

7. The party who is to execute and deliver a deed should prepare it.

Willard v. Tayloe,

501

8. A deed made under the authority of a decree, is good without producing the decree.

Hanrick v. Neely,

947

9. Where a deed was delivered in obedience to the decree of the court, proof of the decree is not necessary to support the delivery.

Idem,

947

10. Where a grantee is in possession of a deed, which upon the face of it is regularly executed, and has had it recorded, the presumption is that it was duly delivered.

Idem,

947

11. A decree which determines the principal matter in controversy between the parties is final, although it directs certain accounts to be taken.

Dean v. Nelson,

94

12. In an action to recover land, a *mandamus* from this court to the court below, to enter a judgment in favor of defendant, does not authorize a judgment that defendant hath right to the lands claimed.

Litchfield v. R. R. Co.,

150

13. The judgment entered pursuant to the *mandamus* should have been simply in favor of the defendant upon the issue joined and for the costs.

Idem,

150

DEMURRER.

SEE PLEADING, 1, 2, 5, 13.

STAMP ACT.

DISTRICT COURT.

SEE LANDS, 11.

DIVORCE.

1. Proceeding for a divorce may be instituted where the wife has her domicile; the place of marriage, of the offense, and the domicile of the husband are of no consequence.

Cheever v. Wilson,

604

2. The wife may acquire a domicile separate from her husband whenever it is necessary or proper.

Idem,

604

DOWER.

SEE HUSBAND AND WIFE, 5.

DURESS.

1. Duress, what is.

Brown v. Pierce,

124

2. Contract procured through fear of loss of life, produced by the threats of the other party to the contract, may be avoided for duress.

Idem,

124

DUTIES.

SEE TAXES, 4, 5, 11, 12, 36, 37.

1. A written protest, signed by the party, with the grounds of objection, is a condition precedent to the right to sue, for duties illegally paid, and if omitted, all right of action is gone.

Nicholl v. U. S.,

125

2. Import duties, if they are *ad valorem*, are estimated in the first place on the invoice value without any appraisal.

Kimball v. Goodrich,

934

3. Whenever, in the opinion of the collector, there is ground to suspect that goods have been in-

74, 75, 76, 77 U. S.

voiced below their true value, he is authorized to direct that the goods should be appraised.

Idem, 964

4. Neither the appraisers nor the collector can make any reduction in the invoice or entered value in the assessment of *ad valorem* duties.

Idem, 964

EJECTMENT.

SEE LANDS, 12, 13, 22-24.

1. If, since the commencement of an action of ejectment, the plaintiff has acquired a title to the land, that title can be asserted only in a new action.

Litchfield v. R. R. Co., 150

2. In ejectment, the legal title must prevail and an equitable title is no defense.

Marshall v. Ladd, 153

3. In California a judgment in ejectment has the same conclusiveness as a judgment in any common law action.

Merryman v. Bourne, 683

4. A defeated plaintiff may bring a new action upon an after-acquired title, and the former judgment will be no bar.

Idem, 683

EQUITY.

SEE BONDS, 2, 3, 6.

COURTS OF CLAIMS, 9.

JURISDICTION, 10-12, 42.

LANDLORD AND TENANT, 1-5.

MORTGAGE, 14.

PARTIES, 3-5, 7, 9, 12-15, 19.

PRACTICE, 2, 23, 24, 26-28.

SPECIFIC PERFORMANCE, 1-4.

1. In contests in equity for land held under the U. S., the chancery practice is to compel the defendant, in person, to convey to plaintiff or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose.

Silver v. Ladd, 138

2. A contract by which one was to purchase lands for another, and to receive for his compensation one half of the profits on the sales of the lands, gives him an equitable interest in the lands.

Seymour v. Krenn, 306

3. Such lands having been conveyed to the one for whom they were purchased, he took the title in trust to sell the same, and pay over to the one purchasing, one half the profits.

Idem, 306

4. Such trust is a charge upon and follows the land except upon a *bona fide* sale for value; and upon such sales it follows the proceeds, and equity will enforce it.

Idem, 306

5. The parties are not copartners in respect to the lands to be bought; one is trustee, the other is *cestui que trust*.

Idem, 306

6. His rights continued after the expiration of the time agreed upon for the sale unless he renounced or disclaimed them.

Idem, 306

7. Where the conduct of defendants has not been such as to commend them to the favor of a court of equity, every doubt and difficulty should be resolved against them.

Rubber Co. v. Goodyear, 566

8. A cross-bill is for a discovery to aid a defense to the original suit, or for complete relief to all the parties as to matters charged in the original bill.

Idem, 537

9. When the bill was not auxiliary to the original suit nor in continuation of it, the case was not proper for substituted service.

Idem, 537

10. Equity protects parol gift of land, if accompanied by possession, and donee has made valuable improvements as a condition of the gift.

Neale v. Neale, 590

11. Equity has jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery.

Jones v. Bolles, 734

12. Where the agreement is perpetual, and the only effectual relief against it is its annulment, this can only be decreed by a court of equity.

Idem, 734

13. Where a bill prays for such other and further relief as to the court shall seem just and proper, any relief can be granted under such general prayer, as is agreeable to the case made by the bill.

Texas v. Hardenberg, 839

14. In an action to compel the surrender of bonds,

See WALL. 7, 8, 9, 10.

it is no objection that other securities were substituted for the bonds before the service of process.

Idem, 839

15. Such substitution transferred the equities of the complainant to the substituted securities.

Idem, 839

16. That one party to the executory contract, partly executed, has violated his engagements, is no reason for a decree by a court of equity, that the contract shall be annulled.

Marble Co. v. Ritley, 955

17. Nor is it any reason for rescinding the contract, that it has become more burdensome in its operation upon the complainants, than was anticipated.

Idem, 955

ESTOPPEL.

SEE LANDS, 18, 19, 22, 25.

1. Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct induced the other party to change his position, so that he will be peculiarly prejudiced.

Swain v. Seamens, 554

EVIDENCE.

SEE BILLS, NOTES AND CHECKS, 9-11, 14, 15, 18.

DECREES AND JUDGMENTS, 2, 4, 10.

INFANTS, 2-4.

LANDS, 2, 6-9, 11-13, 22, 24, 25.

OFFICES, 2.

WITNESS, 1, 2.

1. Where fraud in the sale of property is in issue evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible.

Lincoln v. Clafin, 106

2. If two were engaged in the furtherance of a common design to defraud the plaintiffs, the declarations of each relating to the transaction are evidence against the other.

Idem, 106

3. Evidence held insufficient to establish a trust.

Finley v. Iselt, 273

4. Evidence can be received to prove that a promise, made in one of the insurgent States, and expressed to be for the payment of dollars, was in fact made for the payment of Confederate notes.

Thorington v. Smith, 361

5. Proof that the machines made and used by the defendants were substantially like those of complainants, was sufficient proof of infringement if not rebutted.

Bennett v. Fowler, 431

6. Evidence is inadmissible which presents an immaterial issue not involved in the pleadings.

Blanchard v. Putnam, 433

7. Testimony showing that defendant's machine was in public use anterior to the invention described in the plaintiff's patent is not admissible in patent cases under the general issue, unless defendant give notice as required in the 15th section of the Patent Act.

Idem, 433

8. The *onus probandi*, is on defendant to show that the required notice was given, and if he fails to do so he cannot introduce any evidence to controvert the novelty of the patent.

Idem, 433

9. Letters patent afford *prima facie* presumption that the patentee was the original and first inventor of the improvement.

Idem, 433

10. Declarations of one to whom a person is sent for information, are not admissible in evidence against the sender, unless the person was sent on the business in regard to which the admission was made.

Murphy v. Killinger, 470

11. Such declarations of the third person which detail a party's statement in his own favor as to a contract, are not admissible in his behalf, but are mere hearsay.

Idem, 470

12. Parol evidence to vary contracts in writing, in the absence of fraud, is no more received in a court of equity than in a court of law.

Willard v. Tayloe, 501

13. The declarations of the master of a vessel in a case of collision are evidence against the owner.

Bedell v. The Potomac, 511

14. Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence.

Ins. Co. v. Moseley, 437

15. The declarations of the party himself are evidence to prove his condition, ill, pains and symptoms, whether arising from sickness, or an injury by accident or violence. *Ins. Co. v. Mosley*, 437
16. Declarations of a party as to the cause of his injury, as that he had fallen down stairs, made immediately after the occurrence, are admissible as part of the *res gestæ* to show such cause. *Idem*, 437
17. In so far as a bill of lading is a contract, it cannot be explained by parol. *King v. The Lady Franklin*, 455
18. But so far as it is a receipt, it may be explained by parol in a suit between the original parties to it. *Idem*, 455
19. Circumstantial evidence of fraud, is often of more force than direct testimony. *Kempner v. Churchill*, 461
20. Mere inadequacy of consideration, unless extremely gross, does not *per se* prove fraud. *Idem*, 461
21. What circumstantial evidence and declarations held sufficient to prove fraud. *Idem*, 461
22. The originals of papers filed with Secretary of the Treasury need not be produced in any trial, but certified copies of them may be used in evidence with the same effect as the originals. *Barney v. Schneider*, 648
23. Other copies cannot be used, upon giving notice to produce. *Idem*, 648
24. The government is not bound to furnish the originals or certified copies unless upon demand at the proper office, and tender of the lawful fees. *Idem*, 648
25. Evidence of loss of material where the other party refuses to carry out the contract is proper, on the question of damages. *Chicago v. Greer*, 769
26. Admission by an authorized agent of a city, who participated in making contract, is evidence to prove the contract. *Idem*, 769
27. An expert may give evidence of mode of testing the strength of a leather fire hose. *Idem*, 769
28. Defendant cannot prove rates in a contract for hose with another party, and bids offered when other contract was made. *Idem*, 769
29. Evidence which cannot prejudice a party, is not ground for reversal. *Idem*, 769
30. Copy of a letter to opposite party cannot be given in evidence, without notice to produce original. *Idem*, 769
31. Evidence that the contract article could not be used by the defendant, is not admissible if he had contracted for it. *Idem*, 769
32. Evidence of how the article contracted to be furnished, compared with a similar article made by another person, is inadmissible. *Idem*, 769
33. Where the advertisement for proposals, and the proposals are clear and are accepted, they contain the contract. *Idem*, 769
34. Day-books and ledger, the entries in which are testified to be correct by the persons who made them, are proper evidence. *Ins. Co. v. Weide*, 810
35. A memorandum from lost papers shown to be correct, is evidence of their contents. *Idem*, 810
36. Certified transcript of adjustment of marshal's accounts is sufficient evidence to recover upon against him, although marshal had no notice of adjustment nor of balance against him. *Watkins v. U. S.*, 820
37. Evidence of claims for credit cannot be given in suits between the United States and individuals unless such claims were duly presented to the accounting officers of the Treasury and disallowed. *Idem*, 820
38. It is presumed that a treasury agent in granting a permit, acted rightly, until the contrary is established. *Butler v. Maples*, 822
39. There are no degrees of secondary evidence, and books are of no higher order than the testimony of a witness. *Idem*, 822

40. Where a will was proved in Virginia, agreeably to the laws of that State, it is as available in proof in Illinois, according to the laws of that State, as if probated there. *Long v. Patton*, 881
41. In the absence of any proof as to an erasure in a deed, the presumption is that it was made before the execution of the deed. *Little v. Herndon*, 878
42. A deed executed and acknowledged in another State, in conformity with the laws of that State, may be given in evidence. *Little v. Herndon*, 878
43. Lines in a deed may be established by parol evidence, and by long standing division fence recognized by the adjoining owners. *Deery v. Cray*, 887
44. An allegation in an answer, entirely impertinent to the bill, cannot be used as evidence for defendant, even though plaintiff neglected to file a replication. *Gunnell v. Bird*, 913
45. The record of a suit is not evidence against one who is not a party to it. *Tappan v. Beardsley*, 974
46. Depositions in chancery can only be read when the bill shows that the cause was against the same parties, or those claiming in privity with them. *Idem*, 974

EXCEPTIONS.

1. A bill of exceptions should only contain the rulings of the court upon matters of law, and so much of the testimony as may be necessary to explain the bearing of the rulings upon the issues involved. *Lincoln v. Claffin*, 106
2. Where a charge embraces several distinct propositions, a general exception cannot avail if any one of them is correct. *Idem*, 106

EXECUTORS AND ADMINISTRATORS.

SEE JURISDICTION, 9, 12.
LIMITATIONS, 3.
PATENTS, 26.
PAYMENT.

1. One executor may maintain a suit although three are appointed by the will, if two have not qualified. *Rubber Co. v. Goodyear*, 566
2. His authority to sue in his representative character must be questioned by plea or answer. *Idem*, 566
3. Judgment against administrator is not evidence against heir. *Ingle v. Jones*, 621
4. Duties of an administrators are confined to the personal estate. *Idem*, 621
5. A power given by will to an executor, never passes by devolution to an administrator unless it was the intention of the testator that he should become the donee of the power, in place of the executor appointed by the will. *Idem*, 621
6. Amount of the liabilities to be paid out of the proceeds of real estate in proceedings to sell the same by administrators need not be ascertained before the decree of sale is made. *Idem*, 621
7. In the absence of special statute no suit can be maintained by an administrator, except within the State from which he derives his authority. *Noonan v. Bradley*, 757
8. To prosecute a suit in another State he must obtain a grant of administration therein. *Idem*, 757

EX POST FACTO LAWS.

SEE STATE LAWS AND DECISIONS, 12.

FORECLOSURE.

SEE MORTGAGE, 4, 7, 8.
PARTIES, 3, 4, 5.

FORMER ADJUDICATION.

1. Until a final judgment or decree is rendered in a suit, the proceedings therein are not a bar to a subsequent action. *Aurora v. West*, 48

2. Where the parties are the same, the legal effect of a former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title, and depends upon the same questions.

Idem. 42

3. Judgment on demurrer is final, if the merits are involved, and is conclusive between the same parties upon the same matter directly in question in a subsequent action.

Idem. 42

4. A decree of dismissal on the merits constitutes a bar to another action for same cause between the same parties.

Durant v. Essex Co. 154

5. A judgment rendered by a divided court is as conclusive upon the parties as if rendered upon the concurrence of all the judges.

Idem. 154

7. An acceptance of an award of less than the amount of a claim against the Government, made by a Board of Commissioners, is a bar to a further claim.

U. S. v. Adams. 249

FRAUD.

SEE EVIDENCE, 19-21.

1. Where directors procured a mortgage to be foreclosed on a railroad for a much larger sum than was actually due by fraudulent combination with the purchaser, the latter must be held liable to creditors, as trustee, for the value of the property he purchased on the sale of the road, after deducting the amount due him at the day of sale.

Drury v. Cross. 40

2. Where a party aided the execution of a fraud, and shared its proceeds, he is chargeable with all its consequences.

Lincoln v. Claffin. 106

3. A bill, to set aside a deed of land for fraud and inadequate consideration, which sets up a lien in favor of the vendor of the complainant, but in which such vendor is not made a party, shows no ground for relief.

Dean v. Harvey. 365

4. Allegations of fraud founded wholly upon the fact that the land was sold for Confederate notes, without any averment that the complainant was induced to take these notes by fraudulent misrepresentations, affords no ground of relief in equity.

Idem. 365

GENERAL AVERAGE.

SEE INSURANCE, MARINE, 1-8.

GOVERNMENT.

1. *De facto* government, is when the usurping government expels the regular authorities from their customary seats and functions and establishes itself in their place.

Thurington v. Smith. 361

2. Obligations assumed by a *de facto* government *de jure* when restored.

Idem. 361

3. Government is not liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents.

Gibbons v. U. S. 453

HABEAS CORPUS.

SEE CONSTITUTIONAL LAW, 21.

1. In cases where the circuit court has caused a prisoner to be brought before it and, after inquiring into the cause of detention, remanded him, this court may, by writ of *habeas corpus*, revise the decision of the circuit court and, if it be unwarranted by law, release the prisoner.

Ex parte Yerger. 332

2. This court has power, under such circumstances to issue a writ of *habeas corpus* to a military commission to produce a prisoner held on the charge of murder.

Idem. 332

HUSBAND AND WIFE.

SEE DIVORCE, 1, 2.

1. Deeds of separation through a trustee for separate maintenance of the wife are legal, and equity will enforce them as to a separation immediately to occur or that has taken place.

Walker v. Walker. 814

2. The agreement that the wife should enjoy her

separate estate during life, although she should subsequently become reconciled to her husband and cohabited with him, is valid.

Idem. 814

3. A husband may be trustee for wife, and can be compelled to account in the same manner as a stranger.

Idem. 814

4. The income secured to her was not suspended by her returning to live with her husband, on his solicitation; nor had he any right to retain it by way of set-off against the expense of her living.

Idem. 814

5. The wife, by accepting provisions in her husband's will in satisfaction of dower, did not waive her right under the trust deed.

Idem. 814

IMPORTS.

Goods imported from a foreign country, must be entered at the custom-house of the port where the vessels arrives with intent to unlade the cargo.

Waring v. The Mayor. 342

INDIANS.

1. Under the Act of May 26, 1860, which forbade the sale of the lands of the Kansas Indians, except by consent of the Secretary of the Interior, an individual Indian could not sell his land without such consent, and a sale by him without such consent was void.

Stevens v. Smith. 933

2. A Joint Resolution of Congress removing such restriction on alienation, passed subsequently to such a sale, cannot give validity to it.

Idem. 933

INFANTS.

SEE CONTRACTS, 39.

STATE LAWS AND DECISIONS, 16-18.

1. Infant's deed is not void; it passes the title.

Irvine v. Irvine. 800

2. Confirmation of infant's deed after he becomes of age, may be by an act less solemn than is the act of avoiding a deed.

Idem. 800

3. If, after becoming of age, he receives from his grantee a lease of part of the land, it is evidence of confirmation.

Idem. 800

4. Affirmance is a question for the jury, and not for the court, if there is any evidence tending to show it.

Idem. 800

INFORMER.

1. Under the Act of August 6, 1861, an informer possesses no such interest in the property seized as will prevent the Attorney-General from dismissing the suit.

Confiscation Cases. 196

3. The informer is not a party to the suit, nor is he entitled as such, to be heard, in any stage of the proceedings.

Idem. 196

INJUNCTION.

SEE LANDLORD AND TENANT, 5.

PARTNERSHIP, 3.

1. Bill for injunction to restrain Register and Receiver of Land Office from receiving and acting upon applications to preempt land, not entertained.

Litchfield v. Richards. 681

2. A state court cannot, by an injunction, prevent the execution of process of United States Court to give effect to its judgment.

Davenport v. Lord. 704

3. A state court cannot, by injunction, prevent the circuit court from enforcing its judgment by *mandamus* to compel the levy of a tax to pay it.

Washington Co. v. U. S. 732

4. It is immaterial whether the injunction of the state court was before or after the judgment in the circuit court or before or after the institution of the suit.

Idem. 732

INSURANCE.

SEE CARRIER, 3, 10.

1. FIRE INSURANCE.

2. MARINE INSURANCE.

1. FIRE INSURANCE.

1. Where an explosion produced or set in opera-

tion the fire which burned the plaintiff's cotton, although it was carried to the cotton by first burning another building, the loss is not included in the exception in the policy that the insurers will not be liable for a loss which happened by means of an explosion.

Ins. Co. v. Tweed, 65

2. The accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse cannot be considered a new cause.

Idem, 65

3. A condition in a policy of insurance that an action cannot be maintained upon the policy, unless commenced within twelve months after the loss, is valid.

Riddlebarger v. Hartford Ins. Co., 25

4. The condition is not fulfilled by a previous action, commenced within that period, which was dismissed.

Idem, 25

5. The statute of a State which allows a party who suffers a nonsuit in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in such case.

Idem, 25

6. When a condition of a policy of insurance is: that if the property insured should be sold or conveyed, the risk assumed should cease, it ceases when the assured sells, unless the company be notified of the sale.

Bates v. Equitable Ins. Co., 382

7. If, however, the company consent to it, the policy may continue for the benefit of the purchaser.

Idem, 382

2. MARINE INSURANCE.

1. General average is a contribution by all parties according to their interests to make good the loss by one to save the residue from, or for extraordinary expenses incurred by one, for the benefit of all.

Star of Hope v. Anman, 638

2. Sacrifices, where there is no peril, present no claim for contribution.

Idem, 638

3. The master must determine whether the danger is so great as to render a sacrifice of a portion indispensable for the common safety of the remainder.

Idem, 638

4. A loss occasioned by a voluntary stranding of the vessel, is a proper subject of general average, if the stranding resulted in saving the cargo.

Idem, 638

5. Where the stranding was the result of a choice of perils, it was a voluntary act.

Idem, 638

6. The valuation of the ship in the policy of insurance, is evidence of her value for general average.

Idem, 638

7. Repairs necessary for the ship to proceed on her voyage, are the subject of general average.

Idem, 638

8. The master may sell a part of the cargo to make the repairs, and such sacrifices are the subject of general average.

Idem, 638

9. An offered abandonment may be accepted, even when the assured has no right to abandon.

Ins. Co. v. Copelin, 739

10. If the underwriter take vessel to repair, he must do it as expeditiously as possible.

Idem, 739

11. If he delay repairing, beyond a reasonable time, it is an acceptance of offer to abandon.

Idem, 739

12. The underwriter's liability is not varied by a clause in policy, "that the acts of the assurers in recovering, saving and preserving the property insured in case of disaster shall not be considered an acceptance of an abandonment."

Idem, 739

INTEREST.

1. Interest should be allowed on coupons from the time they are due to the date of the judgment.

Aurora City v. West, 42

2. Bonds drew interest, pending the civil war, when the principal debtor resided within the lines of the Union forces, and the bonds were the repayable, although the creditor was within the Confederate lines.

Ward v. Smith, 207

3. The rule, that interest is not recoverable on debts between alien enemies, can only apply when the money is to be paid to the belligerent directly.

Idem, 207

INTERNAL REVENUE.

SEE COURT OF CLAIMS, 1.

JURISDICTION, 37, 41.

1. Internal revenue taxes illegally assessed and paid under protest, may be recovered back in an action of *assumpsit* against the collector.

Gales v. Osborne, 745

2. A distiller's bond conditioned that he should faithfully conform to all the provisions of the Internal Revenue Act of June 30, 1864, required him to keep an account in writing of the number of gallons sold, or removed for sale and consumption.

U. S. v. Hudson, 937

3. Revenue statutes are to be construed liberally, to carry out the purposes of their enactment.

Idem, 937

4. The bond is not prohibited by the statute, nor contrary to public policy, and was founded upon a sufficient consideration.

Idem, 937

JUDGES.

1. Judges of limited and inferior authority are not liable to a civil action, for any judicial act within their jurisdiction.

Randall v. Brigham, 385

2. Judges of superior or general authority are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, when done maliciously or corruptly.

Idem, 385

JUDGMENTS.

SEE DECREES AND JUDGMENTS, *passim*.

JURISDICTION.

SEE ADMIRALTY, 1-5, 22, 23.

CONSTITUTIONAL LAW, 14-16.

COURT OF CLAIMS, 1, 3, 4-7, 9.

COURTS, 1-3.

HABEAS CORPUS, 1, 2.

1. This court has no jurisdiction to review a judgment of a state court in an action to recover damages from explosion of a steamboat boiler.

Davidson v. Starcher, 59

2. Where, under a New York Act, the banking associations of that State were entitled to re-imbursement by state bonds for taxes illegally collected by the State from them, and the New York Court of Appeals denied them the relief, this court has jurisdiction to review that decision.

People v. Hoffman, 57

3. A decree of the Provisional Court of Louisiana, which was transferred by statute into the circuit court, may be appealed to this court.

The Grapesheet v. Wallerstein, 83

4. This court can exercise, in prize causes, appellate jurisdiction only.

The Altiota v. U. S., 84

5. This court has no jurisdiction of a case on appeal unless the transcript be filed during the term next succeeding the allowance of the appeal.

Edmonson v. Bloomshire, 91

6. One court has no jurisdiction to disbar an attorney for a contempt committed before another court.

Ex parte Bradley, 214

7. A court has no power to punish an attorney for contempt, without notice or opportunity of defense.

Idem, 214

8. In reviewing a state judgment involving construction of an Act of Congress, the only question of which this court has jurisdiction, is whether the plaintiff in error has been deprived of any right contrary to such Act.

Austin v. Boston, 334

9. Circuit court has jurisdiction of a bill against an administrator and his sureties, on his official bond, to obtain a share of the estate.

Payne v. Hook, 200

10. The equity jurisdiction conferred on the Federal Courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different States of the Union.

Idem, 200

11. The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction.

Idem, 200

12. A court of chancery has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. 260

Idem.

13. This court has no jurisdiction of a certificate of division of opinion, as to whether a motion to quash an indictment ought to be granted. 263

U. S. v. Rosenburgh.

14. The Act of March, 1868, takes away the jurisdiction of this court given by the Act of February, 1867, in cases of *habeas corpus*. 264

Ex parte McCarda.

15. No judgment can be rendered in a suit after the repeal of the Act under which it was brought and prosecuted. 264

Idem.

16. This court in such case has no longer jurisdiction of the appeal. 264

Idem.

17. Where there was only a blank form of a certificate to the transcript filed, without a seal or signature of the clerk, this court has no jurisdiction of the case. 280

Blitz v. Brown.

18. Where the record shows that the state court must, in rendering judgment, have passed upon several essential questions, only one of which is a ground of jurisdiction in this court, this court has no jurisdiction. 317

Gibson v. Chouteau.

19. Neither the opinion of the state court nor the argument of counsel can be resorted to, to show that a question of federal cognizance was decided by the state court. 317

Idem.

20. The Act of March 27, 1868, does not take away nor affect the appellate jurisdiction of this court under the Constitution and Acts of Congress prior to 1867. 332

Ex parte Yerger.

21. District courts have jurisdiction of all civil causes of admiralty jurisdiction upon the lakes, and waters connecting them. 365

The Eagle v. Fraser.

22. That a portion of them lie within the limits of another sovereignty is no objection to the exercise of this jurisdiction. 365

Idem.

23. When a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789. 370

Furman v. Nichol.

24. The particular provision of the Constitution which the plaintiffs in error say has been violated, need not be contained in the pleading. 370

Idem.

25. It is sufficient to confer jurisdiction, that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did. 370

Idem.

26. The Circuit Court for the Southern District of Florida has appellate jurisdiction of decrees in admiralty. 394

The Lucy v. U. S.

27. From a decree of the district court of such district no appeal can be taken to this court, but only to such circuit court. 394

Idem.

28. No consent of counsel can give appellate jurisdiction to courts of United States. 394

Idem.

29. The question of want of jurisdiction of Land Commissioners may be revised in this court. 320

Magwire v. Tyler.

30. This court has jurisdiction to determine the question as to whether the circuit court has jurisdiction of the case. 452

Baltimore & O. R. R. Co. v. Marshall Co.

31. It is no objection to a writ of error under the 25th section of the Judiciary Act, that a state judgment was rendered on a voluntary submission without suit under the Code of Procedure of the State. 473

Aldrich v. Aetna Ins. Co.

32. Where the question decided was, whether a mortgage of a vessel duly recorded under an Act of Congress, gave a better lien upon it than a subsequent state attachment, the case is within this section. 473

Idem.

33. This court decides all questions relating to the subject of the process of the United States courts. 490

U. S. v. Muscatine.

34. If a court had jurisdiction to render the judgment, no error in proceedings will render it See WALL, 7, 8, 9, 10.

void, nor can such errors be considered when the judgment is collaterally questioned. 545

McGorm v. Seales.

35. Where parties appeared and contested a suit, they cannot deny the jurisdiction. 545

Idem.

36. Where citizenship of parties is the foundation of jurisdiction in the Federal Courts, it must be distinctly alleged. 545

Hornhall v. Keary.

Gates v. Osborne.

37. Where both parties reside in the same State, circuit courts have no original cognizance of any case under the internal revenue laws. 748

Idem.

38. This court cannot acquire jurisdiction of a cause in circuit court by a transfer to this court by consent. 663

U. S. v. The Nonseuch.

39. Every suitor bringing an action in a court of the U. S. must aver facts, giving to the court jurisdiction. 736

Bushnell v. Kennedy.

40. Valid objection cannot be taken by defendant, to jurisdiction of a suit removed to the circuit court by him under the 12th section of the Judiciary Act. 736

Idem.

41. Where the parties to an action to recover illegally assessed internal revenue taxes are citizens of the same State, the action must be brought in the state court, but the defendant may remove the cause into the circuit court for trial. 748

Gates v. Osborne.

42. Circuit Courts of the United States have jurisdiction over executors and administrators, and will enforce the same rules against them that the local courts administer. 814

Walker v. Walker.

43. The decision which recognizes title confirmed by the Act of Congress, and only determines to whom the confirmation was made, gives no jurisdiction to this court. 827

Carpenter v. Williams.

44. When a proceeding is merely incidental to the principal suit, as a rule to show cause against a surety, the circuit court has jurisdiction, although the parties to the proceeding are citizens of the same State. 858

Reilly v. Golding.

45. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party. 931

Cooper v. Reynold's Lessee.

46. Jurisdiction of the res is obtained by a seizure under process of the court. 931

Idem.

47. In attachment cases, the levy of the writ of attachment on the property is the one requisite essential to jurisdiction. 931

Idem.

48. Though the affidavit preliminary to issuing the writ may be defective, that does not deprive the court of jurisdiction acquired by levy of the writ. 931

Idem.

49. When the writ has been issued, the property seized, condemned and sold, the court had jurisdiction, and the proceedings must be held valid when introduced in another action, although there is a want of a sufficient publication of notice. 931

Idem.

50. To sustain the jurisdiction of the court, as to parties, it must appear by the bill of what States the respective parties are citizens. 935

Jones v. Andrews.

51. The Act of February 28, 1839, by implication, confers jurisdiction over non-residents of the district where the suit is brought, if they voluntarily appear therein. 935

Idem.

52. The court has jurisdiction of a cross-bill or bill of review, or a bill for injunction against a judgment at law in the same court, irrespective of the residence of the parties. 935

Idem.

53. A State may bring a suit, against a citizen of another State, but not against one of its own. 998

Pa. v. Quicksilver Co.

54. An averment that a corporation is a "body politic in the law of and doing business in the State of California," is insufficient to establish as a jurisdictional fact that it is a California corporation. 998

Idem.

55. This court is authorized "To issue writs of prohibition to the district courts only when proceeding as courts of admiralty" and, consequently, cannot issue such a writ in a confiscation proceeding. 981

Ex parte Graham.

JURY.**SEE CONSTITUTIONAL LAW.****QUESTIONS OF LAW AND FACT.**

Where the instructions given to the jury are sufficient to present the whole controversy in clear terms, it is no cause for the reversal of a judgment, to show that prayers for instruction not given by the court, were correct in the abstract.

St. Louis Pub. Schools v. Risley, 850

LANDLORD AND TENANT.**SEE LANDS, 21.**

1. Where recovery was had in ejectment for the non-payment of the rents reserved in a lease, courts may stay the proceedings on payment of the rent due, with interest and costs.

Sheets v. Seiden, 166

2. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere.

Idem, 166

3. Where the lease of surplus waters provided but one remedy for a failure of water, which was an abatement of the rent in proportion to the deficiency, claims for offset, repairs, recoupment and damages will not be considered.

Idem, 166

4. A reduction of the rents will not be decreed by a court of equity, after judgment at law for the rents.

Idem, 166

5. Before an action can be brought to restrain ejectment for non-payment of rent, complainant must tender the amount of rent due after deducting such amounts as the lease stipulates.

Idem, 166

6. A tenant of property who bought it at a judicial sale, for a trifle, in the absence of his landlord, by unfair practices which prevented persons from bidding, may be compelled, in equity, to reconvey to his landlord.

Cocks v. Izard, 275

7. A tenant may attorn to the party holding a valid title, to avoid litigation.

Merryman v. Bourne, 683

LANDS.**SEE EQUITY, 1-6, 10.****INDIANS, 1, 2.****PREEMPTION LAWS, 1, 2.****RAILROADS, 1-6.****TAXES, 13, 19, 21-23, 26, 40.****TRUSTS, 2, 3.****1. GENERALLY.****2. MEXICAN LANDS.****1. GENERALLY.**

1. An unmarried female, incapable of labor, may take lands under the Donation Act.

Silver v. Ladd, 138

2. A person residing in a house which is bisected by the line dividing two quarter sections, will be held to reside on either of them.

Idem, 138

3. The Act of 1831, relinquished the title remaining in the U. S. to the lots and lands reserved for schools by Act of 1812, and it relinquished title to nothing else.

St. Louis Public Schools v. Walker, 576

4. No land rightfully claimed by a private individual was reserved by the Act of 1812.

Idem, 576

5. Congress, by the Act of 1832, intended to remove the restriction of the Act of 1824 upon asserting individual claims.

Idem, 576

6. The survey of Surveyor-General, and his certificate that a lot was reserved for public schools by the Act of 1812, is not conclusive.

Idem, 576

7. A claimant of the right to purchase lands at the minimum price, whose Mexican title has been rejected, unless he alleges and proves that the lands contain no mines, does not bring his case within the Act of Congress.

Cox v. U. S., 579

8. He must also show that his purchase of the donee of the tract was made in good faith and for a valuable consideration.

Idem, 579

9. He should also prove that he continued in the

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actual possession of the land, and that it was free from any adverse private right or title.

Idem, 579

10. Applications to be allowed to purchase the land embraced in such rejected claim should be made to the Commissioner, and not to the Secretary of the Interior.

Idem, 579

11. The District Court may open a California land case to hear newly discovered evidence.

U. S. v. Rocha, 612

12. Where the claimants and their ancestors have been in uninterrupted possession and occupation nearly half a century, under a *pueblo* grant confirmed by a provisional grant from the Mexican Governor, the claim sustained.

Idem, 612

13. In an action for obstructing a wharf, possession of the defendant under color and with claim of title, is sufficient to put the plaintiff upon proof of a better title.

Linthicum v. Ray, 657

14. A grant of the right of using a wharf built, refers only to the structure then erected, when the right was not attached as an incident to any estate.

Idem, 567

15. Before the conquest of California, July 7, 1846, the *pueblo* or Village of San Francisco under the laws of the country, was entitled to the territory within certain prescribed limits, known as *pueblo* lands.

Merryman v. Bourne, 683

16. After the conquest, the lands continued to be the public property of the municipality, as before the war.

Idem, 683

17. The Act of Congress of July 1st, 1864, was a confirmation of the Woodworth title, and took effect by relation, as of the time when the Act of the State Legislature of 11th March, 1863, was passed.

Idem, 683

18. Settlement on public lands of the United States, no matter how long continued, confers no right against the government.

Frable v. Whitney, 668

19. The land continues subject to the disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the purchase money.

Idem, 668

20. If a contract for sale of lands be silent as to possession by the vendee, he is not entitled to it.

Burnell v. Caldwell, 712

21. If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee, and the relation of landlord and tenant does not exist.

Idem, 712

22. In such case the vendee and his assignee are estopped from disputing the title of the vendor.

Idem, 712

23. On default in payment of any installment of purchase money, the possession becomes tortious, and the vendor may at once bring ejectment.

Idem, 712

24. It is not necessary under laws of Georgia to give notice to quit before bringing ejectment.

Idem, 712

25. When one makes a deed of land, covenanting therein that he is the owner, a subsequently acquired title inures to the benefit of his grantor.

Irvine v. Irvine, 809

26. A patent of government land is not a new title. It is a confirmation of a right had before the patent.

Idem, 809

27. A person "having charge" of the estate of the owners, who were laboring under disability by reason of their coverture, may make the redemption of their lands under the Act of June 7, 1862.

Corbett v. Nutt, 976

28. The additional oath imposed by the Act of 1865 is required only of owners seeking in person to redeem.

Idem, 976

2. MEXICAN LANDS.

1. Claim to Mexican grant rejected because the archive papers fail to make out the title, and the papers produced by the claimant are not genuine.

Roland v. U. S., 184

2. Where a Mexican grant is a grant by quantity, the claimant is entitled to the amount specified, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors.

Alveto v. U. S., 305

3. If it is also a grant of a certain place by name, and the boundaries are not given, its extent and

74, 75, 76, 77 U. S.

limit must be shown by the settlement and possession of the grantees.

Idem, 305

4. Where there is doubt upon the evidence as to the correctness of a survey this court will not interfere with the decision of the district court.

Idem, 305

5. Where claimant's grant contains no sufficient boundaries, it creates no right of private property in any particular land until a survey and location.

Maguire v. Tyler, 320

6. A court has no authority to ascertain and establish the boundaries of land.

Idem, 320

7. The Secretary of the Interior has power to set aside a survey.

Idem, 320

8. The Board of Commissioners' adjudication upon a Mexican claim for lands cannot be collaterally assailed on the ground of insufficient evidence.

Lynch v. De Bernal, 714

9. The provision of 15th section of the Act of March 3d, 1851, that such final decrees shall be conclusive between the United States and claimants only, and shall not effect the interests of third persons, does not change the operation of the general rule.

Idem, 714

10. The final decree confirming land to the City of San Francisco excepted parcels of land which had been lawfully granted to private parties.

Idem, 714

11. Grants of the public domain of Mexico were of three kinds: 1, grants by specific boundaries; 2, grants by quantity; and 3, grants of places by name.

Hornaby v. U. S., 900

12. Under grants of the first kind, the grantee had a vested interest in the quantity of land mentioned; the general gift became a particular gift when the survey was made.

Idem, 900

13. That no map accompanied the petition is not a controlling objection.

Idem, 900

14. Where the grant recites that the necessary steps had been taken and inquiries made, something more than mere surmises are necessary to show that the recital is false.

Idem, 900

15. The clause subjecting the grant to the approval of the Departmental Assembly did not prevent the title from passing to the grantees upon the execution of the instrument; until such approval the estate granted was subject to be defeated.

Idem, 900

16. It was the duty of the Governor, and not of the grantee, to submit to the Assembly grants issued by him.

Idem, 900

17. The court cannot pronounce the lands forfeited for any acts or omissions by the Mexican authorities since the 7th of July, 1848, when those authorities were displaced.

Idem, 900

18. Mere neglect to comply with the condition to obtain juridical possession did not of itself work a forfeiture under the Mexican law.

Idem, 900

LAND GRANTS.

SEE RAILROADS, 1-6.

LEGAL TENDER ACTS.

SEE CONSTITUTIONAL LAW, 23.

CONTRACTS, 2-4, 17, 18, 61.

TAXES, 6, 7.

1. Upon a bond and mortgage payable in gold coin of the U. S. the plaintiff is entitled to recover in lawful money to be calculated according to the market rate of premiums for gold.

Dutton v. Palatret, 165

2. A bond and mortgage, for the payment of a certain sum in gold and silver coin, cannot be discharged by a tender of United States notes equal in nominal amount to the sum due thereon.

Bromson v. Kimpton, 433

3. When, at the time a contract is made, the currency, then legal tender, consisted only of gold and silver coin, payment of the contract price must be made in gold and silver coin only, notwithstanding the subsequent Act of Congress making the United States note a legal tender for debts.

Ward v. Taylor, 501

See WALL, 7, 8, 9, 10.

4. Congress has no power to make notes, issued under its authority, a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin.

Hepburn v. Griswold, 513

McGlynn v. Magraw, 531

5. The Act of February 25th, 1862, so far as it makes United States notes a legal tender in payment of debts contracted prior to its passage, is unconstitutional.

Idem, 513

6. Making notes a legal tender is not an appropriate means for the execution of the power to declare and carry on war, or any express power vested in Congress.

Idem, 513

7. Making bills of credit a legal tender is not consistent with the spirit of and is prohibited by the Constitution.

Idem, 513

LIEN.

SEE ADMIRALTY, 5, 6-11, 13, 14, 20, 22.

ATTORNEY, 6, 7.

CARRIER, 4.

COLLISION, 11, 12.

MARITIME LAW, 2, 10.

MORTGAGES, 1-3, 5.

TAXES, 22-26.

1. The lien of a judgment constitutes no property in the land.

Pierce v. Brown, 134

2. The lien of a judgment does not in equity attach to defendant's legal title to the exclusion of a prior equitable title in a third person.

Idem, 134

3. The Court of Chancery will protect the equitable rights of third persons against the legal lien.

Idem, 134

4. A maritime lien does not arise in a contract for materials and supplies furnished to a vessel in her home port; and in respect to such contracts it is competent for the State to create liens not amounting to a regulation of commerce.

The Belfast v. Bon, 266

5. Contracts for ship-building are held not to be maritime contracts, and fall within the same category.

Idem, 266

6. An agreement to advance money to prosecute a claim against the government, and that advances be first paid out of sums realized, creates no lien upon a judgment recovered in the Court of Claims.

Guntton v. Nock, 717

7. An agreement, that the corporation was to have a lien upon the drafts drawn for the proceeds of locks and keys manufactured and delivered, does not create a lien on such judgment where all the drafts have been paid and no claim exists except for breach of the contract.

Idem, 717

8. Complainants can have no lien by virtue of a contract which they never fulfilled.

Idem, 717

LIMITATIONS.

SEE LANDS, 12.

STATE LAWS AND DECISIONS, 1.

1. Where there is no disclaimer, the Statute of Limitations has no application to an express trust.

Seymour v. Freer, 306

2. A claim for land held not barred by the Statute of Limitations where the suit was commenced in less than five months after the official survey was made.

Maguire v. Tyler, 320

3. Defense of Statute of Limitations interposed by administrator cannot avail those who represent the real estate, in an action to subject the real estate to the payment of a debt.

Inglet v. Jones, 621

4. An action upon coupons is not barred by the lapse of six years, nor by any lapse of time short of twenty years.

Kenosha v. Lamson, 725

5. When a Statute of Limitation has begun to run, a disability to sue (subsequently intervening) does not stop its running.

Braun v. Saurwein, 895

6. But the running of a Statute of Limitation may be suspended by causes not mentioned in the Statute itself.

Idem, 895

7. Under the Act of July 13, 1866, the interval between the appeal and its decision is the entire period during which a party was disabled to sue by the Act.

Idem, 895

MAILS.

1. The arrest of a mail carrier by bench-warrants, upon an indictment for murder, is not an obstruction of the mail.

U. S. v. Kirby,

278

MANDAMUS.

Taxes, 9, 10.

1. Where a *mandamus* commanded a municipal corporation to levy a tax on its property sufficient to pay a judgment against it, and collect the tax and pay the judgment, a return to the writ that it did levy a tax, for that purpose and others, is insufficient.

U. S. v. Iowa City,

79

2. *Mandamus*, when the proper remedy.

Ex parte Bradley,

214

3. The writ of *mandamus* is the appropriate remedy to enforce the levying of a tax by a municipal corporation, to pay a judgment against it.

U. S. v. Muscatine,

490

4. The writ of *mandamus* cannot issue to an executive officer where the act is one of discretion, and only in cases where the act is ministerial, and relative or without other adequate remedy.

Cox v. McGarrahan,

500

5. Upon a motion for *mandamus* to compel a city to pay a judgment, the city cannot set up that the bonds for which the judgment was rendered were illegally issued.

Davenport v. Lord,

704

6. It is no objection to a *mandamus* that it was issued without an order being entered for it, when the order was actually made, and a note of it entered, and the court subsequently allowed it to be entered *nunc pro tunc*.

Poweshiek Co. v. U. S.,

813

7. The court below may allow the return of the Marshal to be amended by inserting that it was exhibited at the time of service.

Idem,

813

MARITIME LAW.

SEE ADMIRALTY, *passim*.

COLLISION, *passim*.

INSURANCE, (Marine) *passim*.

SALVAGE, *passim*.

1. The Statute of New York, of Apr. 2, 1857, compels the master of a vessel to take a pilot.

The China v. Walsh,

67

2. Where repairs or supplies in a foreign port or a port of another State are necessary to make the vessel seaworthy or to enable her to prosecute her voyage, the master is authorized to procure them on the credit of the vessel or that of her owners.

Hazlehurst v. The Luhi,

906

3. Reasonable diligence must be exercised by the merchant or lender to ascertain that the repairs and supplies were necessary.

Idem,

906

4. Proof of failure to institute inquiries is no defense to such a claim, even if the master had funds, unless that fact was known to the libellant or such facts and circumstances were known to him as were sufficient to put him on inquiry.

Idem,

906

5. When the repairs and supplies are ordered by the master, the necessity for credit will be presumed.

Idem,

906

6. A lien on a vessel for repairs or supplies does not depend upon possession or registry.

Pendergast v. The Kalamazoo,

941

Pendergast v. The Custer,

944

7. For repairs made on and supplies furnished to a foreign ship, the party has a lien on the ship for security, and he may maintain a suit *in rem* in the admiralty to enforce his right.

Idem,

941

8. Ports of States other than those where the vessel belongs are for that purpose considered as foreign ports.

Idem,

941

9. The repairer or furnisher must prove affirmatively that the ship needed such repairs and supplies.

Idem,

941

10. The owner can order repairs and supplies on the credit of the vessel.

Idem,

941

MARRIED WOMEN.

SEE CITIZENS, 1-3.

DIVORCE, 1, 2.

HUSBAND AND WIFE, 1-5.

MARRIAGE SETTLEMENTS.

SEE HUSBAND AND WIFE, 1-5.

1. The Statute of 18 Eliz., ch. 6, does not affect a settlement by a husband for his family as to subsequent creditors, unless fraud was intended when it was made.

Maittingly v. Nye,

380

2. Such settlements, though voluntary, are founded upon a meritorious consideration, and will be upheld and enforced in equity against the husband.

Idem,

380

3. Under a marriage settlement vesting the title in a trustee in trust to permit the wife to receive rents and profits of lands for her sole use, the real estate became the separate property of the wife, and she had the same power to anticipate and encumber the rents as if she has been a *feme sole*.

Cheever v. Wilson,

694

MORTGAGE.

SEE LEGAL TENDER ACTS, 1, 2.

1. The home port is the one at which mortgages of vessels are to be recorded under the Act of July 29, 1850.

White's Bank v. Smith,

211

2. Mortgage of a vessel recorded under said Act has preference over a mortgage subsequently recorded under said Act, although the first mortgage was not refiled at the end of a year in pursuance of a state Act.

Idem,

211

3. Congress can pass a recording Act for mortgages.

Idem,

211

4. A decree of strict foreclosure which does not find the amount due and gives no time for the redemption of the estate, cannot be sustained.

Clark v. Reyburn,

354

5. The recording of a mortgage of a vessel in the collector's office under the Act of Congress makes the mortgage valid as against subsequent purchasers or mortgagees irrespective of any state law on the subject.

Aldrich v. Ins. Co.,

473

6. An instrument conveying real and personal property, which is intended as security for the payment of a note, is a mortgage.

Dean v. Nelson,

94

7. Foreclosure of a mortgage, as against defendants within the Confederate lines, is void.

Idem,

94

8. They will be allowed to redeem on condition of the payment of principal and interest in full.

Idem,

94

9. A mortgage, as between the parties to it or their privies, is a grant which transmits the legal title to the mortgagee and leaves the mortgagor only a right to redeem.

Brobst's Lessee v. Roe,

1002

10. The mortgagee, after breach of the condition, may enter or maintain ejectment for the land. And having entered he cannot be dispossessed by the mortgagor so long as the mortgage continues in force.

Idem,

1002

11. Where one has a right to enter only in virtue of the mortgage of which he was assignee, it is a legal presumption that his entry was in right of it, and under color of his title, and that he acquired possession to the extent of the mortgage deed.

Idem,

1002

12. An irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee has.

Idem,

1002

13. A mortgagor, after his mortgagee has been in possession twenty years, cannot redeem; it is presumed that he has released his equity.

Idem,

1002

14. The only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee, having entered for condition broken, refuses to relinquish possession of the mortgaged premises, is by bill in equity.

Idem,

1002

MUNICIPAL BONDS.

SEE BONDS, 1-6, 10-12, 15-21.

NATIONAL BANKS.

SEE BILLS, NOTES AND CHECKS, 12-15.

TAXES, 15-17, 27-32.

NEGLIGENCE.

SEE COLLISION, *passim*.

NOTICE.

All courts take notice without pleading, of the Constitution of the United States, and the public laws of the State where they are exercising their functions.

Furman v. Nichol,

370

NUISANCE.

A municipal corporation cannot by its mere declaration that a structure is a nuisance, subject it to removal.

Yates v. Milwaukee,

984

OFFICERS.

1. An officer is not subject to the control of the courts in the exercise of the discretion which the law reposes in him as a part of his official functions.

Gaines v. Thompson,

63

2. In an action by the United States against its officer, it is error to admit evidence of claims for credits which have not been presented to the proper accounting officers and been disallowed by them.

U. S. v. Gilmore,

232

3. The Act of August 23d, 1842, declaring that no officer of the government, drawing a fixed salary, shall receive additional compensation for any service, embraced clerks in the departments.

Stansbury v. U. S.,

315

4. Constructive allowances of pay to officers of the army are not entitled to favor.

United States v. Gilmore,

396

5. The Act of June 20, 1864, did not have the effect of increasing the emoluments of officers.

Idem,

396

6. The Act of March 3, 1865, as to pay for an officer's servant, has no retrospective operation.

Idem,

396

7. Assistant quartermaster at Key West has no power to bind the United States to a lease, although his action was approved by the military commander at that station.

Flier v. U. S.,

549

8. Unauthorized acts of officers cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States.

Idem,

549

9. The return of the Marshal to a writ that he has "arrested the property within mentioned" signifies that he has actually taken the property into his custody and under his control.

Peigham v. Rose,

602

10. The judiciary cannot interfere, either by mandamus or injunction, with executive officers in matters involving judgment or discretion.

Litchfield v. Richards,

681

11. An officer honorably discharged from volunteer service, who resumed his duty and rank in the regular army, is not entitled to the three months' pay provided by 4th section of Act Mar. 3, 1865.

U. S. v. Merrill,

664

PARDONS.

1. The President's Proclamation of pardon to insurgents was fully warranted by the Act of July 17, 1862.

U. S. v. Padelford,

738

2. This pardon included restoration of all rights of property except as to slaves and as against the intervening rights of third persons.

Idem,

738

3. By complying with the conditions of the President's Proclamation, one was purged of offense against the United States, and his property was not liable to seizure and confiscation.

Idem,

738

4. After the pardon, no offense connected with the rebellion can be imputed to him.

Idem,

738

5. The proof of pardon is a complete substitute for proof that he gave no aid or comfort to the rebellion.

Idem,

738

PARTIES.

SEE APPEAL AND ERROR, PRACTICE ON, 53,
BANKS, 1-2, 6-7, 8-9.
EQUITY, 8.

1. One who is not a party to a contract, either originally or by substitution, cannot maintain a claim before the Court of Claims for compensation under it.

Kellogg v. U. S.,

81

2. Boards of Supervisors can be sued in the Circuit Court of the United States by citizens of other States.

Mercer County v. Coules,

86

3. Neither stockholders nor bond holders are necessary parties to a foreclosure of a railroad mortgage.

Railroad Co. v. Howard,

117

4. The sureties of the administrator are proper parties to a suit, on his official bond, to recover a share of the estate.

Payne v. Hook,

260

5. It is no objection to such a bill that there are other distributees besides the complainants.

Idem,

260

6. The personal representative of a deceased party may maintain a suit for his interest in the proceeds of lands sold, and it is not necessary that his heirs at law should be parties.

Seymour v. Freer,

306

7. Where there is a misjoinder of parties in a bill, the bill should be dismissed as to those improperly joined.

Idem,

306

8. A party who has not appealed from a decree approving a survey cannot raise any objection to its correctness here.

Alvao v. U. S.,

305

9. Beneficiaries under a subsequent trust deed should be made parties to a foreclosure of a mortgage.

Clark v. Reyburn,

354

10. When a party claims in the Federal Courts, through an assignment of a chose in action, he must show affirmatively that the action might have been sustained by the assignor if the assignment had not been made.

Bradley v. Hunt,

467

11. The owners of partial interests in contracts for land, acquired subsequently to their execution, are not necessary parties to bills for their enforcement.

Willard v. Tayloe,

501

12. Where a company is directly interested, though no relief is prayed against it, but rather in its favor, it is proper that it should be made a party complainant or defendant.

James v. Bolles,

734

13. Where the bill states that the appellee purchased a large number of shares and paid therefor, this is an allegation of an interest, sufficient to sustain a bill by him.

Idem,

734

14. In an action by an heir to avoid a judicial sale to the receiver of the estate, the complainant in decree of sale and the other heirs are indispensable parties.

Hovey v. Wilson,

762

15. A decree rendered without their presence, reversed, although objection was not taken in the court below.

Idem,

762

16. Only parties to the appeal can be heard in the appellate court.

The Mabey v. Atkins,

963

PARTNERSHIP.

1. In stating partnership accounts, the partner who has had entire charge of the business is to be debited with the whole capital as well as with the proceeds of sales realized by him.

Gunnell v. Bird,

913

2. If part of the capital consisted of stock, which had been used in the business, or disposed of and the proceeds charged against him, he should be credited with such stock, as a disbursement, to the amount at which it was originally charged against him.

Idem,

913

3. A court of equity will interfere by injunction to restrain one partner from violating the rights of his copartner.

Rutland Marble Co. v. Ripley,

955

PATENTS FOR LANDS.

SEE LANDS, 26.

PATENT RIGHTS.

EVIDENCE, 7-9.

QUESTIONS OF LAW AND FACT, 1.

1. The assignment of an undivided half of letters patent, subsequent to an infringement, but before the commencement of the suit, is no bar to patentee's recovery of damages for such infringement.

Moore v. Marsh,

37

2. The assignment of a patent does not carry with

it a transfer of the right to damages for an infringement committed before such assignment.

Idem, 37

3. A patent for a discovery of a new substance by means of chemical combinations of known materials, should state the component parts of the new manufacture.

Tyler v. Boston, 93

4. The term "equivalent" when used with regard to the chemical action of such fluids as can be discovered only by experiment, means equally good.

Idem, 93

5. Whoever first perfects a machine and is the real inventor, is entitled to the patent for it.

Agawam Co. v. Jordan, 177

Whitely v. Swayne, 199

6. Suggestions from an employé not amounting to a new method or arrangement, are not sufficient to deprive the employer of the exclusive property in the perfected improvement.

Agawam Co. v. Jordan, 177

7. That the invention had been on sale and in public use, is not a good defense, unless it was on sale and in public use more than two years before the application therefor was filed.

Idem, 177

8. Forbearance to apply for a patent until the party has perfected his invention, is not abandonment.

Idem, 177

9. Objection, that proviso in the Act of Congress authorizing a re-issue of letters patent is not recited in the re-issued letters patent, held unavailable.

Idem, 177

10. Defense that the respondent's machinery was in use before the patent was granted, is no defense to the charge of infringement of an extended patent.

Idem, 177

11. Evasive answers in patent cases afford strong presumptive evidence against the respondents.

Idem, 177

12. Damages cannot be recovered for an infringement of a re-issued patent, before its re-issue.

Idem, 177

13. Dinsmore's patent was prior to that of Steadman for improvements in harvesters.

Whitely v. Swayne, 199

14. Decision of the court below, that the improvements for which a patent was granted were not original, affirmed.

Jacobs v. Baker, 200

15. Patentee may surrender, and file an amended specification of a patent, when the patent issued is inoperative, or invalid, by reason of a defective or insufficient description or specification.

Morey v. Lockwood, 339

16. The change of a patent, which is one of form and not of substance, constitutes no defense to a bill for an infringement.

Idem, 339

17. Discretion is given to the head of the Patent Office to determine when a given invention or improvement shall be embraced in one, two or more patents.

Bennett v. Fowler, 431

18. Where defendant's machine infringes plaintiff's machine, it is no answer to prove that the defendant is the owner of another patent, and that his machine is constructed in accordance with it.

Blanchard v. Putnam, 433

19. The claim of Charles Goodyear, that he was the original and first inventor of the patents for manufacturing rubber, is impregnable.

Proc. Rubber Co. v. Goodyear, 566

20. A patent should be construed in a liberal spirit, to sustain the just claims of the inventor.

Idem, 566

21. It is the right of the patentee and his representatives to enlarge or restrict the claim, so as to give it validity and secure the invention.

Idem, 566

22. Courts cannot go behind the action of the commissioner in extending a patent and inquire into alleged frauds by which the extension was procured.

Idem, 566

23. Profits, in violation of the rights of the complainant, are the difference between cost and yield.

Idem, 566

24. In taking account in an action for violation of a patent, the master was not limited to the date of the decree, but may extend the account down to the time of the hearing before him.

Idem, 566

25. A patent surrendered by an executor, and re-

issued to him in the same character, vested the legal title in him exclusively.

Idem, 566

26. In an action for infringement of patent, notice by defendant of the particular town or city in which a millstone is used, is sufficiently precise.

Wes v. Allen, 784

27. Where the extension of a patent has expired before the bill to set it aside was filed, nothing remains which can be the subject of a suit.

U. S. v. Goodyear, 786

28. A second claim in letters patent which is an indispensable part of the machine, cannot be considered a design merely, so as to render the patent void.

Clark v. Bousfield, 863

29. Where plaintiff's machine for which a patent had been granted had been anticipated in every part of its construction except the designs on the roller, which roller was old, he was not entitled to recover.

Stimpson v. Woodman, 866

30. The engraving of the figure upon a roller, or the use of the old figured roller, required no invention.

Idem, 866

31. Simple mechanical skill is not patentable.

Idem, 866

32. An assignment of all the patentee's title and interest in the inventions secured to him by two patents, and which should be secured to him for alterations and improvements, is an assignment of all patents relating thereto, whensoever issued.

P. W. & B. R. Co. v. Trimble, 848

PAYMENT.

SEE BONDS, 4-6, 8, 10.

LEGAL TENDER ACTS, 1-5.

PRINCIPAL AND AGENT, 1-3, 6.

TENDER.

A payment at his residence, by a foreign debtor, to an administrator appointed at the domicile of the intestate, is good as against an ancillary administrator appointed at debtor's residence.

Wilkins v. Ellett, 586

PILOTS.

SEE MARITIME LAW, 1.

COLLISION, 1.

PLEADINGS.

SEE JURISDICTION, 36, 49.

PATENT RIGHTS, 11, 18.

1. On demurrer the court will give judgment against the party whose pleading was first defective in substance.

Aurora v. West, 43

2. A demurrer to a pleading admits all such matters of fact as are sufficiently pleaded.

Idem, 43

3. A statement by defendant in his answer, that he has no knowledge that the fact is asserted in the complaint, without any answer as to his belief concerning it, is not an admission of the fact.

Pierce v. Brown, 134

4. An evasive and insufficient answer is not helped by the omission of the complainant to file the general replication.

Idem, 134

5. A bill to recover a share of an estate is not multifarious, although it seeks to open the settlement with the Probate Court as fraudulent, and to cancel the receipt from the complainant to the administrator.

Payne v. Hook, 369

6. When a demurrer is put into the answer, and the declaration is sufficient, judgment will be for defendant.

D. & H. Canal Co. v. Pa. Co., 349

7. An averment, that the plaintiffs were a firm carrying on business in Omaha, is equivalent to saying they had their domicile there.

U. S. Exp. Co. v. Kountze, 457

8. An averment, that the defendant is a foreign corporation formed under and created by the laws of the State of New York, means that the defendant is a citizen of the State of New York.

Idem, 457

9. A court of equity has power to amend the pleadings, after cause has been heard and before decree passed.

Neale v. Neale, 596

10. The rule, that a plea to the merits admits the representative character of the plaintiff and

74, 75, 76, 77 U. S.

his right to sue, is only applicable where no other plea than one of that kind is interposed.

Noonan v. Bradley, 757

11. A plea which puts in issue the representative character of the plaintiff is a good plea in bar to the action.

Idem, 757

12. Pleading over to a declaration adjudged good without reservation, is a waiver of demurrer.

Watkins v. U. S., 820

13. An averment in the declaration that the defendants made their promissory notes, would imply that the instruments were at the time in the form and condition required by law.

Campbell v. Wilcox, 973

14. The filing of a plea to the merits after a demurrer was overruled, operates as a waiver of the demurrer.

Idem, 973

PRACTICE.

SEE APPEAL AND ERROR, PRACTICE ON, *Passim*, EXCEPTIONS, 1, 2.

1. It is too late on the day of trial to move that the suit be dismissed for want of a party.

Burbank v. Bigelow, 51

2. Defendant cannot go to trial before a jury on the facts of a case, and then raise the question for the first time in this court that the action is one of equitable cognizance.

Idem, 51

3. The distinction between law and equity prevails in the modes of proceeding in the Federal Courts sitting in Louisiana.

Ins. Co. v. Tweed, 65

4. The opinion of the court below, is not a finding of the facts.

Idem, 65

5. Objection to deposition first made in this court, comes too late.

The Georgia v. U. S., 122

6. Where there is a division of opinion between a district and circuit judge as to allowance of a writ of *habeas corpus*, a writ of prohibition against proceeding further under the writ, withheld, until after a decision upon the division of opinion.

Ex parte Virginia, 153

7. This court will not order the record of a cause to be brought before it, to correct an error therein after it has been sent to the court below.

Le More v. U. S., 201

8. After having correctly submitted the case to the jury, the court is not bound to answer a catchism of questions.

Mills v. Smith, 346

9. Court cannot, on a motion strike out an answer which constitutes a good defense.

Mandelbaum v. The People, 479

10. A court has power during the same term to set aside a judgment rendered on confession.

Basel v. U. S., 548

11. Where a judgment by confession on an indictment was set aside, the indictment remained, and the recognizance to appear and answer to it, was valid.

Idem, 548

12. Where an issue was not made by the pleadings, it was too late for the defendants to raise the point before the master.

Prov. Rubber Co. v. Goodyear, 566

13. Service upon the Secretary of the Interior, will not support a judgment against his successor. The judgment against him was without opportunity to be heard.

Cox v. McGarrahan, 500

14. No proceeding to compel either the Commissioner of the General Land Office or the Secretary of the Interior, to issue a patent, can be sustained while the patent is required to be signed by the President and countersigned by the Recorder.

Idem, 500

15. A state law prescribing rules of practice, has no efficacy *proprio vigore* in the courts of the United States, unless adopted in the proper manner.

Davenport v. U. S., 704

16. A writ directed to the mayor and aldermen of a city is properly directed in a suit against the city.

Idem, 704

17. A plea or notice, should apprise the opposite party of what he may expect to meet under it.

Wine v. Alite, 784

18. On an order of restitution of this court, all distributees must refund what they have received.

Ex parte Morris, 799

See WALL. 7, 8, 9, 10. U. S., BOOK 19.

19. If a third person received any part of the fund, the rights of the petitioners followed the money into his hands, and he is liable for it.

Idem, 799

20. The court has no authority to order the United States to refund.

Idem, 799

21. An assignee in bankruptcy may be substituted for the bankrupt as appellant in this court.

Herdon v. Howard, 809

22. Whether a new complaint should be filed on removal of cause from a state court, is a question of practice for which error will lie.

Ins. Co. v. Weide, 810

23. An exception to a master's report will not be allowed when, by long acquiescence, it should be treated as having been settled.

Walker v. Beal, 814

24. After an amended bill was filed without leave of the court below after the cause was at issue it was irregular to hear the case without any order on the subject.

The W. A. & G. R. R. Co. v. Washington, 894

25. Omission to file replications to answers, is an irregularity.

Idem, 894

26. Parties defendants are as necessary to cross-bills as to original bills, and their appearance in both cases is enforced by process in the same manner.

Idem, 894

27. A cross-bill which was a nullity should be stricken from the files.

Idem, 894

28. The court, upon such a cross-bill, cannot decree against the complainants the opposite of the relief which they sought by their bills.

Idem, 894

29. A motion, on the foot of the decree, for additional relief, not within the scope or tenor of the decree, will be denied.

Texas v. White, 971

PREEMPTION LAWS.

1. Where husband of plaintiff entered on public land without right, and possession continued without right, permission of the Register to prove up the possession and improvements and to make the entry under the preemption laws, and issuing of patent, was in violation of law and void.

Riley v. Welles, 648

2. The Acts of Sep. 4, 1841, May 29, 1830, and Jan. 23, 1832, relate only to preemptive rights conferred upon actual settlers.

Irvine v. Irvine, 800

PRINCIPAL AND AGENT.

SEE WAR, 17.

1. When an obligation is lodged with a bank for collection, the bank becomes the agent of the payee or obligee to receive payment.

Ward v. Smith, 207

2. A collecting agent can receive for the debt of his principal only legal tender or money which passes at par.

Idem, 207

3. A bank is not agent of payee for collection of bonds not deposited with it, although payable there.

Idem, 207

4. If a principal, with knowledge of the facts, ratify a contract with reference to his property made by another, he is bound by the contract.

Drakely v. Gregg, 409

5. No new or additional consideration is required to support the ratification.

Idem, 409

6. Principals adopt and ratify agent's acts by accepting a settlement by him and bringing an action upon a covenant in a submission to arbitration signed by him.

Smith v. Morse, 597

7. An agent need not be made a party to an action on the submission.

Idem, 597

8. The distinction between general and special agencies.

Buller v. Maples, 822

9. Authority to buy cotton in a county and vicinity, generally, although guarded by secret instructions, was a general agency.

Idem, 822

10. An authority to buy "on the best possible terms, not paying an average of more than thirty cents per pound," authorized him to pay, in some cases, above thirty cents.

Idem, 822

67 1069

11. Where an agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal who has received a letter informing him what has been done.

Field v. Farrington, 923

12. By leaving the agent's letter unanswered, the principal does not relieve the agent from the consequences of subsequent neglect, or want of good faith.

Idem, 923

13. Where factors have made large advances on account of the consignment, the principal cannot control their right to sell at such a time as they judge to be best, but are liable for loss from unreasonable delay to sell.

Idem, 923

PRINCIPAL AND SURETY.

SEE CRIMINAL LAW, 1, 2, 3.

1. Any change in the contract made by the principal without assent, discharges sureties, though it be of advantage to the sureties; so held of criminal recognition.

Reese v. U. S., 541

2. Sureties in a bond are bound to the full extent to which their principal is bound, and cannot collaterally attack a decree against the principal.

Stovall v. Banks, 1036

PROCESS.

SEE JURISDICTION.

PRIZE.

1. A capture of a steamer and her cargo of cotton within the State of North Carolina, on the Roanoke River, and about one hundred thirty miles above its mouth, made by a naval force detached from two steamers, is an inland capture, though made upon a river which empties into the sea.

The Cotton Plant v. U. S., 983

2. Property thus captured cannot be regarded as maritime prize, and subject to condemnation as such.

Idem, 983

PURCHASE.

SEE SALES, 1, 2.

1. It is necessary that a purchaser of land should have actual notice of a previous deed or of some fact which would satisfy a prudent man that there has been a transfer of the land to constitute him a purchaser in bad faith.

Mills v. Smith, 346

2. If either the purchaser or his grantor was a purchaser in good faith, then the purchaser is protected as against the previous deed.

Idem, 346

QUESTIONS OF LAW AND FACT.

SEE INFANTS, 4.

1. Whether one patented compound is the same as another, is a question of fact for the jury.

Tyler v. Boston, 93

2. Where the evidence tended to show ratification by principal of agent's acts, the question of ratification is one for the jury.

Drakeley v. Gregg, 409

3. Where the record of a foreign court is denied the issue is to be tried by a jury.

Basset v. U. S., 548

4. Where there is some evidence on a question of fact, it is error for the court to take the question from the jury.

Hickman v. Betts, 551

5. Where there is any discrepancy in the testimony, the court must submit the matter to which it relates to the jury.

Barney v. Schneider, 648

6. Priority of invention is a question of fact for the jury, not a question of law for the court.

Bischoff v. Wethered, 829

7. What is reasonable time, where the facts are clear, is always a question exclusively for the court.

Wiggins v. Burkhman, 884

8. Where the proofs are conflicting, the question is a mixed one of law and fact.

Idem, 884

9. Whether a long delay by factors in making sale of goods consigned to them, was in the exercise of a sound discretion, good faith, and reasonable diligence, was a question for the jury.

Field v. Farrington, 923

RAILROADS.

SEE CORPORATIONS, 2, 5.
TAXES, 38.

1. Railway companies may guarantee the payment of such bonds as they have lawfully received from cities and counties.

Railroad Co. v. Howard, 117

2. The reservations annexed to the Act of May 15, 1856, granting lands to the State of Iowa, in aid of railroads, embraced lands granted by the Act of Sept. 23, 1850, known as the swamp land grant.

R. R. Co. v. Fremont County, 583

R. R. Co. v. Mills County, 585

3. Until the line of the railroad was fixed, the title to any particular section on the line did not vest in the company under the grant, but was subject to the confirming Act of 1857.

Idem, 583

4. The grants of lands in aid of railroads left the precise lands granted to be determined by the location of the roads.

Hannibal R. R. Co. v. Smith, 599

5. Under the Act of June 10th, 1852, granting lands to Missouri for railroad purposes, swamp and overflowed land, as described in the Act of Sep. 20, 1850, was reserved.

Idem, 599

6. Verbal testimony that tracts are swamp and overflowed is competent to show that fact and exclude them from the grant for railroads.

Idem, 599

7. A city cannot grant the right to construct a railway in one of its streets, for private gain.

People's R. R. v. Memphis R. R. Co., 844

8. Where a charter of a railroad company was on the condition that it should secure the consent of the city before it could exercise its franchise, the road can not be built without such consent.

Idem, 844

9. When such consent was never obtained, a charter to a new company giving authority to construct such railway, is not a law impairing the obligation of a contract.

Idem, 844

RECEIVER.

The court may appoint a receiver of lands held in trust and their proceeds, and decree the execution of a contract by him.

Seymour v. Freer, 306

RECOGNIZANCE.

SEE CRIMINAL LAW, 1-4.

REGISTRY LAWS.

1. The object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens.

Patterson v. De La Ronde, 415

2. Actual knowledge by a purchaser of an existing mortgage or a title, is equivalent to a notice resulting from a registry.

Idem, 415

3. Where a grantee in a deed assumes to pay a mortgage, he cannot avoid payment on the ground that the mortgage had lost its priority because the registry laws are not complied with.

Idem, 415

RIPARIAN RIGHTS.

1. The title to lands bordering on navigable streams stops at the stream, and all such streams remain public highways.

Railroad Co. v. Schurmeter, 74

2. Such riparian proprietors have the right to construct suitable landings and wharves, for the convenience of commerce and navigation.

Idem, 74

3. Calls for a river, in conveyances, do not give or create riparian rights.

St. Louis Public Schools v. Risley, 859

4. The eastern boundary of the City of St. Louis extended to the middle of the channel of the Mississippi River.

Idem, 859

5. Where a street or passageway was permanently established, for public use, between the river and a block of land, when the town was laid out the owners of that block were not riparian proprietors of the land between it and the river.

Idem, 859

6. A riparian proprietor whose land is bounded by a navigable river has the right of access to the navigable part of the river, and the right to make a landing, wharf or pier for his own use, or for the use of the public.

Yates v. Milwaukee, 984

7. This riparian right is property, of which the owner can be deprived only if necessary that it be taken for the public good upon due compensation.

Idem, 984

8. A city cannot, by creating a merely artificial and imaginary dock line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it.

Idem, 984

SALES.

SEE PURCHASER, 1, 2.

1. In sales of personal property, in the absence of express warranty, where the buyer has opportunity to inspect the commodity, and the seller is guilty of no fraud, the maxim of *caveat emptor* applies.

Barnard v. Kellogg, 987

2. This rule does not apply in the case of a sale by sample.

Idem, 987

SALVAGE.

1. A corporation can maintain a salvage suit.

The Camanche v. Wrecking Co., 997

2. Owners of ships may claim salvage compensation when such services are rendered by their vessels.

Idem, 997

3. The owners of the ship are allowed one third of the amount awarded as salvage compensation and sometimes much more in a case of peculiar danger.

Idem, 997

4. Salvage suits may be instituted in the name of the ship or of the owners,

Idem, 997

5. An agreement for a fixed sum is no defense to a claim for salvage unless it is set up in the answer with an averment of tender or payment.

Idem, 997

6. Nothing short of a contract to pay a given sum at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious claim for salvage.

Idem, 997

7. Court will not reverse decrees as to the amount of salvage unless upon some clear mistake or gross over allowance of the court below.

Idem, 997

8. Salvage suits may be promoted in the name of the master, or of the owners and master, or by part of the salvors.

The Blackwall v. S. W. & T. Co., 870

9. The owners of a tug, which assisted in extinguishing a fire on a ship, and all who contributed to saving the property are entitled to salvage.

Idem, 870

10. Corporations, as the owners of vessels, whether sail vessels or steamers, may promote a salvage suit.

Idem, 870

11. Where the libelants were not the sole salvors, and the sum decreed is for the whole service, this decree will be reversed on that ground.

Idem, 870

12. Personal property of the United States on board the vessel is subject to a lien for salvage services rendered in saving the property.

U. S. v. Douglass, 875

13. Such a lien cannot be enforced by a suit against the United States.

Idem, 875

14. Such lien for salvage can be enforced in a proceeding which does not need a process against the United States nor require that the property shall be taken out of its possession.

Idem, 875

15. A possession of the United States which protects the goods from the process of the court must be an actual possession.

Idem, 875

16. Where goods were delivered to the master of the vessel to be delivered to an agent of the United States, the possession of the master is not the possession of the United States.

Idem, 875

See WALL. 7, 8, 9, 10.

SECESSION.

Texas, by its secession from the Union did not cease to be a State, nor her citizens to be citizens of the Union.

Texas v. White, 227

SECRETARY OF WAR.

1. The Secretary of war, if he becomes satisfied that contracts are being fraudulently executed within a military district, in disregard of the rights of the Government, may issue an order to suspend their payment.

United States v. Adams, 249

2. He may appoint a Board of Commissioners to speedily hear and decide upon the claims.

Idem, 249

3. The Secretary of War, through the Commissary-General, may authorize a contract for supplies to be made with a resort to advertisement for proposals.

United States v. Speed, 449

SPANISH CLAIMS.

SEE TREATIES, 4-6.

SPECIFIC PERFORMANCE.

1. Specific performance of a renewal of a contract cannot be compelled without a demand and refusal; nor where the contractor has an option to renew, or pay a specific sum of money.

Smith v. Wash. Gas Light Co., 187

2. Specific execution of a contract is not a matter of right, but rests in the discretion of the court.

Willard v. Tayloe, 501

3. Such discretion is not an arbitrary or capricious one, but controlled by the settled principles of equity.

Idem, 501

4. A party may apply for a specific performance, and submit the amount to be paid by him to the judgment of the court.

Idem, 501

5. Mere increase in value of land since the contract of sale is no objection to specific performance.

Idem, 501

6. Specific performance of a parol agreement to give an intended daughter-in-law a lot of land if she will erect a dwelling-house on it, which has been done, will be decreed.

Neale v. Neale, 590

7. A decree for a specific performance will not be made in favor of a party who has himself been in default.

Rutland Marble Co. v. Ripley, 955

8. A personal contract to deliver marble will not be enforced by decree of specific performance.

Idem, 955

9. When a contract is incapable of being enforced against one party that party is equally incapable of enforcing it specifically against the other.

Idem, 955

10. Specific performance will not be decreed where the party who asks for it has an adequate remedy provided by the reservation in his deed, and by the contract itself,

Idem, 955

STAMP ACT.

A fraudulent omission to stamp a promissory note cannot be taken advantage of on demurrer.

Campbell v. Wilcox, 973

STATES.

SEE SECESSION.

STATE LAWS AND DECISIONS.

SEE BONDS, 1, 2, 13.

CONSTITUTIONAL LAW, 3-7, 10, 14.

TAXES, 6, 7.

1. No State statute limitation of suabillity can defeat a jurisdiction given by the Constitution.

Mercer Co. v. Cowles, 86

2. Attachment proceedings in Illinois have the same effect on property there situate, in an action in a Court of New York, as they had in Illinois.

Green v. Van Buskirk, 109

3. The title acquired under the attachment laws of a State, and which is valid there, is to be held valid in every other State.

Idem, 109

4. The dominion of a State over personal property situate there and over its transfer, is complete.

Idem, 109

5. If a State, by a public Act of its Legislature, imposes restrictions upon the alienation of its property, every person who takes a transfer of such property must be held affected by notice of them.
Texas v. White, 227
6. An Act of an insurgent State Legislature intended to aid rebellion, can be given no effect by this court.
Idem, 227
7. Construction of a state constitution by state courts is conclusive upon this court.
Randall v. Brigham, 235
8. Where the settled decisions of a State in relation to a state statute, local in its character, have become rules of property, this court will follow such adjudications.
U. S. v. Muscatine, 490
9. A State can pass laws to subject the lands of a corporation, whose charter had expired, to debts owing to her citizens.
McGoon v. Scates, 545
10. State decision as to amendment of execution under its laws controls this court.
Idem, 545
11. The ruling of state court that a state law does not violate the state constitution, is conclusive upon this court.
Gut v. Minn., 573
12. A state law changing the place of trial to another county in the same district, or to a different district from that in which offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the offense or the indictment.
Idem, 573
13. The courts of the United States take a judicial notice of the laws and judicial decisions of the several States.
Cheever v. Wilson, 604
14. The Constitution and laws of the United States give an Indiana decree the same effect elsewhere which it has in Indiana.
Idem, 604
15. The finding of the residence of the plaintiff, by the decree, is sufficient until overcome by adverse testimony.
Idem, 604
16. The Legislature possesses the power to determine by law the manner in which the estates of infants shall be preserved, and to say what kind of security shall be given by those who are intrusted with their management.
Lobran v. Nelligan, 694
17. It has the power of altering the law on the subject, whenever in its judgment the interest of the minors or the public good requires that it should be done.
Idem, 694
18. There is no right of complaint, if the Legislature, in varying the nature and extent of the security, takes care that the property is preserved.
Idem, 694

STATUTE OF FRAUDS.

1. A written contract within the Statute of Frauds cannot be varied by subsequent agreement of the parties, unless it is in writing.
Swain v. Seamens, 554
2. Performance of an agreement, void by the Statute of Frauds, and acceptance of such performance is an answer to the statute.
Idem, 554

SURETIES.

SEE INSURANCE, 5.

1. There is no repugnancy between the two Acts of Feb. 28, 1839, in regard to the transfer of causes to another circuit, and of March 3, 1863, as to a circuit being held by a judge of another circuit.
Lee Co. v. U. S., 162
2. Courts do not favor repeals by implication, and never sanction them if the two Acts can stand together.
Furman v. Nichol, 370

SURETY.

SEE PRINCIPAL AND SURETY, 1, 2.

TAXES.

SEE BONDS, 2.

CONSTITUTIONAL LAWS, 4, 8-10, 18. CONTRACTS, 19-22, 27-29. MANDAMUS, 1-3.

1. United States bond and certificates of indebted-

- ness, also its notes issued under the Acts of 1862 and 1863, are exempt from state taxation.
People v. Hoffman, 57
People v. Supervisors, 60
2. Pennsylvania law taxing money owing by solvent debtors by bond or otherwise, is not operative upon coupons of bonds upon a railroad company lying partly without the State.
R. R. Co. v. Jackson, 83
3. By the Act of June 30, 1864, it was not the intent of Congress to impose an income tax on non-resident aliens.
Idem, 83
4. The 9th section of the Internal Revenue Act of July 13, 1868, requires that the difference between coined money and legal tender currency shall be added to the return of a person's income when made in coined money, and that he shall pay the tax or duty upon the amount thus increased.
Pacific Ins. Co. v. Soule, 95
5. Such tax is not a direct tax, but a duty or excise.
Idem, 95
6. Where the courts of a State have held that the statutes of the State required the collection of taxes in gold and silver coin, this court is bound by such decision.
Lane County v. Oregon, 101
7. The clause in the Act of Feb. 25, 1862, making United States notes a legal tender for debts has no reference to taxes imposed by state authority.
Idem, 101
8. A Marshal may be appointed as a commissioner to levy a tax in satisfaction of a judgment upon the taxable property of a county.
Lee Co. v. U. S., 162
9. A mandamus may be issued to compel a town clerk to levy a tax to pay a judgment against the town, where there is a statute authorizing him to levy such tax.
U. S. v. Gates, 202
10. A bill in equity will lie to compel a city and town to levy a tax to pay a judgment which they are bound to pay in proportion to their taxable property.
Morgan v. Beloit, 205
11. Sales by the importer are exempt from state taxation.
Waring v. Mobile, 342
12. Merchandise in the original packages, when once sold by the importer, is taxable as other property.
Idem, 342
13. Direct taxes are taxes on land and appurtenances, and taxes on polls, or capitation taxes.
Veazie Bank v. Fenn, 452
14. The power to tax without apportionment extends to all other objects, taxes on which must be laid and collected by the rule of uniformity.
Idem, 452
15. A tax on bank circulation is not a direct tax, nor a tax on the franchise of a bank.
Idem, 452
16. If a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced unconstitutional.
Idem, 452
17. The Act of Congress of July 13, 1868, imposing a tax on the circulation of state banks, is constitutional.
Idem, 452
18. Judgment of the court below dismissing a bill affirmed by equal division in a case where the town officers had resigned to avoid levying a tax to pay a judgment on town bonds, and the action was brought against leading citizens of the town, to recover the amount of the judgment.
Morgan v. Beloit, 503
19. Land of the United States is not subject to state taxation.
McGoon v. Scates, 545
20. The Commissioners, under Act of June 7, 1861, could not sell for taxes, after tender of amount due.
Bennett v. Hunter, 673
21. The first clause of 4th section did not *proprio vigore*, work a transfer to the United States of the land declared to be forfeited.
Idem, 673
22. The assessment of the tax created a lien on the land, which might be discharged by payment.
Idem, 672
23. The title was forfeited by non-payment of the tax and, upon public sale, became vested in the U. S. or in any other purchaser.
Idem, 672
24. The right to pay the tax was not limited to sixty days after the fixing of its amount.
Idem, 672

25. Right to make this payment belonged to the owner or his agent, until the sale.
Idem, 672
26. A sale after payment of tax, did not vest the title in the purchaser.
Idem, 672
27. Capital of a bank invested in government securities cannot be taxed.
First Nat. Bank v. Kentucky, 701
28. The shareholders may be taxed by the States on their shares although all the capital of bank be invested in federal securities.
Idem, 701
29. The revenue law of Kentucky, imposing a tax on bank-stock, is a tax on the shares of the stock-holders.
Idem, 701
30. Conditions imposed on power of States to tax banks refer to banks of circulation,
Lionberger v. Rouse, 721
31. National banks may be required to pay tax assessed on shares instead of individual shareholders.
Idem, 721
32. Congress, by the second limitation in the proviso to the 41st section of the National Banking Act, requires each State to tax shares in national banks like shares of banks of issue of its own creation.
Idem, 721
33. A railroad constructed by U. S. for its use is not exempt from taxation under state authority in the absence of legislation by Congress to that effect.
Thomson v. Union Pacific Railroad, 792
34. A state corporation cannot hold its property exempt from state taxation.
Idem, 792
35. Supervisors of a county cannot be excused for neglecting to execute a *mandamus* from the Circuit Court of U. S. to levy a tax to pay a judgment because enjoined by a state court.
Poweshiek Co. v. U. S., 813
36. The rule by which the increased value of ready-made clothing is to be ascertained for the purpose of taxation, under the Act of June 30, 1864, is by comparison between the market value of the materials with the market value of the manufactured goods.
Bryan v. U. S., 859
37. The increased value means the value augmented since the original payment of the duties.
Idem, 859
38. Special license tax imposed by a city for the privilege of selling beer, is not obnoxious to the Constitution.
Downham v. Alexandria, 929
39. The Illinois Act of Feb. 31, 1861, does not dispense with the necessity of producing the judgment and precept as the foundation of a sale for taxes, and of the validity of the deed.
Little v. Herndon, 878
40. Courts should give to statutes authorizing redemption from tax sales a construction favorable to owners.
Corbett v. Nutt, 976
41. Under the Act of March 3, 1865, the validity of the redemption from taxes does not depend upon repayment to the purchaser.
Idem, 976
- TENDER.**
- Bank-notes not current at their par value nor redeemable on presentation are not a good tender as payment.
Ward v. Smith, 207
- TIME.**
1. The time during which the war lasted is not to be counted in reckoning the time allowed for an appeal from an Alabama court.
Freeborn v. The Protector, 812
2. The Act of March 2, 1867, is not repugnant to this rule.
Idem, 812
- TREATIES.**
1. As respects rights of government under a treaty, it is binding from date of signature.
Jecker v. Magee, 571
2. So far as it affects individual rights, it is not concluded until exchange of ratifications.
Idem, 571
3. Making ratification of the treaty relate back to signing, thereby divesting a title already vested, not sanctioned.
Idem, 687
4. An assurance that a claim should be paid could not be given by any minister of the United States, except upon the condition that it should become a treaty stipulation.
Meade v. U. S., 687
5. An award made by the Spanish Government long after the treaty was signed, was not included in its provisions for settlement.
Idem, 687
6. Decision of the Commissioners appointed by the United States to adjudicate Spanish claims dismissing a claim, is final.
Idem, 687
- TRIAL.**
- SEE CONSTITUTIONAL LAW, 20.
- TRIAL BY JURY.**
1. This court has no right to order a new trial because the jury has erred in their verdict on the facts.
Mills v. Smith, 346
2. The enabling Act of 1845 gives to either party the right of trial by jury.
The Eagle v. The Fraser, 365
- TRUSTEE.**
- SEE FRAUD, 1.
- A trustee should be allowed no compensation, when he literally did nothing towards executing his trust, but was guilty of the grossest abuses concerning it.
Walker v. Walker, 814
- TRUSTS.**
- SEE EQUITY, 2-6.
- EVIDENCE, 3.
- HUSBAND AND WIFE, 1-5.
- MARRIAGE SETTLEMENT, 3.
1. Where the trustee is unable longer to administer the trust, the chancellor will substitute another trustee.
Girard v. Philadelphia, 53
2. In Wisconsin, passive trusts are abolished and the deed or instrument creating such a trust takes effect as a conveyance of the legal title directly to the *cestui que trust*. The trustee acquires no estate or interest.
McGoon v. Seales, 545
3. Land held under a passive trust is liable to judicial sale for the debts of the *cestui que trust*.
Idem, 545
- USAGE.**
1. The use of bills of exchange by the officers of government in cases authorized by law, cannot establish a usage in cases not so authorized.
Pierce v. U. S., 169
2. Usage is not a sufficient authority for the acceptance of drafts by the Secretary of War.
Idem, 169
3. Where the common law does not, on the admitted facts, imply a warranty of the good quality of wool, no custom in the sale of this article can be admitted to imply one.
Barnard v. Kellogg, 987
4. Such contract cannot be altered by proof of usage.
Stagg v. Ins. Co., 1038
Barnard v. Kellogg, 987
- WAR.**
- SEE CONFISCATION ACTS, 1-14.
- CONTRACTS, 9, 13, 17, 18.
- INTEREST, 2, 3.
- STATE LAWS AND DECISIONS, 6.
- TIME, 1, 2.
1. Purchase of a ship of war from an enemy in a neutral port is invalid. Although the vessel had been dismantled, such vessel may afterwards be captured as prize of war.
The Georgia v. U. S., 122
2. Contract made by British Consul at New Orleans during the late civil war, to cause cotton to be "protected" and transported from places within the insurgent lines to New Orleans, is void.
Hall v. Coppell, 244
3. Consular certificates, that the cotton which they respectively covered was the property of a British subject, were nullities.
Idem, 244
4. Consent of the defendant to waive the objection is tainted with the vice of the original contract and void for the same reasons.
Idem, 244

5. The order of Sep. 1, 1861, to General Butler to raise, arm and equip six thousand men, only required him to bring the costs thereof within that of like troops raised for the service.

Garrison v. U. S., 277

6. Unlicensed business intercourse with an enemy during a time of war is not permitted.

McKee v. U. S., 329

7. A purchase of cotton (made by a citizen of New Orleans) of the agent of the Treasury Department of the Confederate States within the Confederate lines, was illegal.

Idem, 329

8. Such purchase is not protected by a permission given by the commanding officer of the Gulf Department to pass through the U. S. lines into Upper Louisiana and bring away any property that he might purchase there.

Idem, 329

9. Nor would a treasury license to trade generally within the insurgent territory authorize a purchase from an important official of the Confederate States.

Idem, 329

10. Such property was liable to seizure at the place of purchase and to condemnation.

Idem, 329

11. Rights and obligations of a belligerent were conceded to the Confederate Government very soon after the war began.

Thorington v. Smith, 361

12. A contract with a treasury agent to deliver to him cotton from within the lines of the Confederate forces, and the license for the enterprise given by the military commander, were illegal.

U. S. v. Lane, 445

13. The vessel and cargo were properly seized for being engaged in illegal trading with the army.

Idem, 445

14. The 20th day of August, 1866, is the time when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.

U. S. v. Anderson, 615

15. Business intercourse between the citizens of States at war is unlawful, without express declaration of the sovereign.

U. S. v. Grosmayer, 627

1074

16. During the civil war, all trade with the enemy had to be conducted according to regulations of Secretary of the Treasury.

Idem, 627

17. There is no power to appoint an agent in the hostile territory after hostilities have actually commenced.

Idem, 627

18. A transaction between enemies originally unlawful cannot be made better by ratification.

Idem, 627

19. The rebellion was closed, in all cases where private rights are affected by the time of its termination, on the 2d of August, 1866.

McKee v. Rains, 369

WHARVES.

SEE LANDS, 12, 14.

WILLS.

SEE EXECUTORS AND ADMINISTRATORS, 5.

1. The estate of Stephen Girard, at the time of his death, was, by his will, vested in the City of Philadelphia on valid legal trusts, which it was fully competent to execute.

Girard v. Philadelphia, 53

2. The change in the name of the city, the enlargement of its area, the increase in the number of its corporators, or the amendment of its charter cannot effect its title or right to hold the property devised by such will, nor its authority to execute the trusts of the will.

Idem, 53

WITNESS.

SEE COURT OF CLAIMS, 8.

1. The Act of July 2, 1864, admitting parties as witnesses applies to trials in which the United States are a party.

Green v. U. S., 306

2. In such actions the parties may be witnesses.

Idem, 306

WRIT OF ERROR.

SEE APPEAL AND ERROR, *passim*.

74, 75, 76, 77 U. S.



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